TEXAS REGISTER

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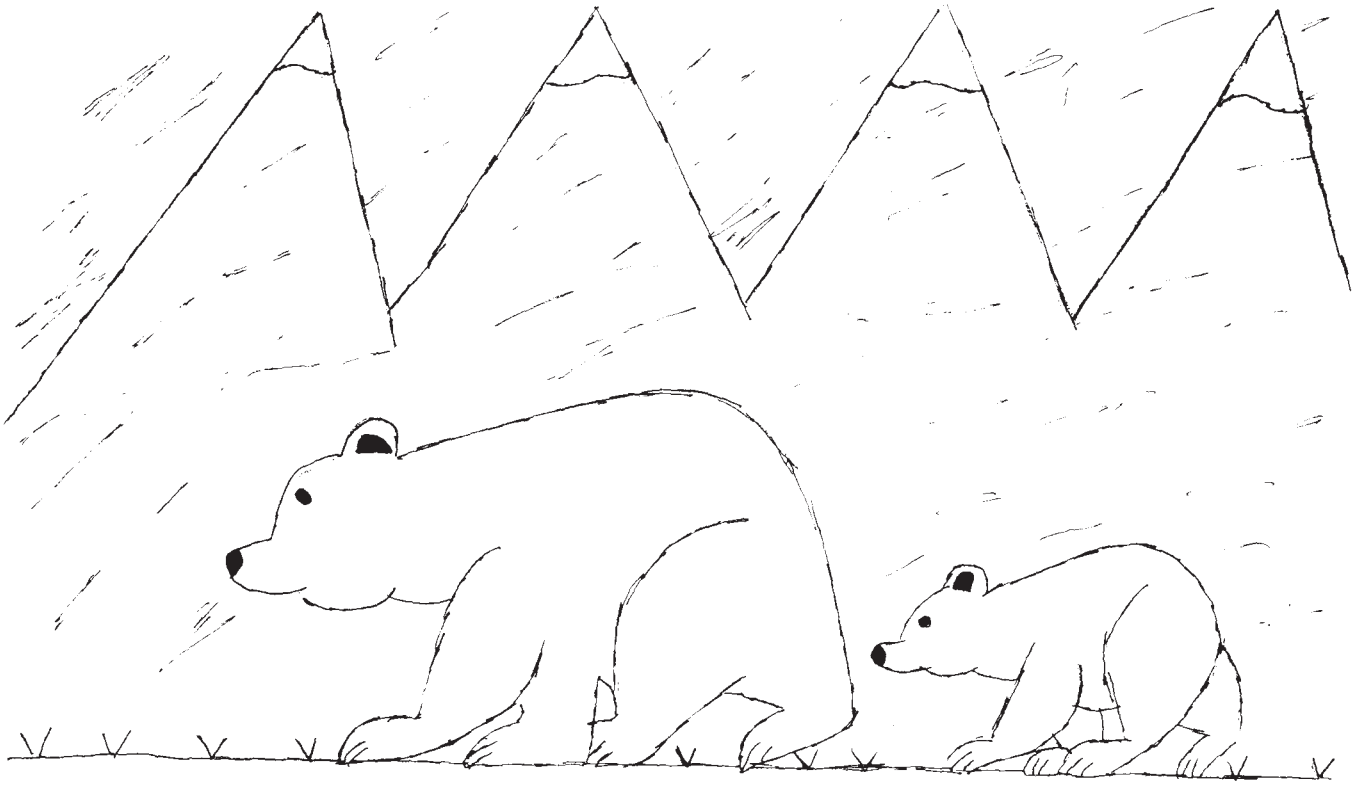

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East Bernard Junior High

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OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Office of the Attorney General

Open Records Requests

Parties interested in submitting a brief to the Attorney General concerning this ORQ are asked to please submit the brief no later than December 27, 1999.

ORQ-35. NOTICE: Withdrawn request for a formal decision. The following request for a decision has been withdrawn by Denton County, the requesting governmental body. Therefore, no formal open records decision will be rendered on the following issue: Re: Whether daily requests that seek all of a governmental body's incoming and outgoing mail for each day are valid requests under the Public Information Act and related questions. (ID# 127533-99)

ORQ-42. Requestor: No requestor. Pursuant to section 552.011 of the Texas Government Code, in order to maintain uniformity in the application, operation and interpretation of the Public Information Act, this office will prepare and publish a formal decision on the following issue. Re: Construction of the law enforcement exception of the Public Information Act, section 552.108 of the Government Code, as amended by the 75th Legislature; the factors that a governmental body must establish to show that section 552.108(a)(1) or (a) (2) applies; and related questions. (ID# 131599)

ORQ-44. Requestor: No requestor. Pursuant to section 552.011 of the Texas Government Code, in order to maintain uniformity in the application, operation and interpretation of the Public Information Act, this office will prepare and publish a formal decision on the following issue. Re: Whether a private company hired by an appraisal district to create and maintain mineral appraisal rolls for the district is subject to the Public Information Act, including its costs provisions; whether parties by contractual agreement may limit the effectiveness and scope of the Act on the private party. (ID# 131601-99)

ORQ-45. Requestor: No requestor. Pursuant to section 552.011 of the Texas Government Code, in order to maintain uniformity in the application, operation and interpretation of the Public Information Act, this office will prepare and publish a formal decision on the following issue. Re: Does the requirement imposed by section 552.221 (a) of the Government Code, that the governmental body "promptly" release information deemed to be public, mean that the body must release the information as close to immediately as possible under the circumstances, or does "promptly" mean simply no later than ten business days after the receipt of the request for that information? (ID# 131602-99)

ORQ-46. Requestor: No requestor. Pursuant to section 552.011 of the Texas Government Code, in order to maintain uniformity in the application, operation and interpretation of the Public Information Act, this office will prepare and publish a formal decision on the following issue. Re: Upon receipt of a request for public information, when may or must a governmental body ask for a decision from the attorney general? Does the Public Information Act allow a governmental body to ask for an attorney general decision when the governmental body has determined that the requested information is not subject to one of the Act's exceptions? (ID# 131603-99)

TRD-9908047
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: November 24, 1999

♦ ♦ ♦

Parties interested in submitting a brief to the Attorney General concerning this ORQ are asked to please submit the brief no later than December 24, 1999.

ORQ-40. Requestor: No requestor. Pursuant to section 552.011 of the Texas Government Code, in order to maintain uniformity in the application, operation and interpretation of the Public Information Act, this office will prepare and publish a formal decision on the

following issue. Re: Re-evaluation of Open Records Decision No. 574 (1990) regarding the scope of the attorney-client privilege under section 552.107 (1) of the Government Code; whether section 552.101 of the Government Code also encompasses the attorney-client privilege; whether the attorney-client privilege is mandatory and compelling for purposes of the Public Information Act; and related questions. (ID# 131387-99)

TRD-9907993
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: November 22, 1999

♦ ♦ ♦

Opinions

Opinion #JC-0144. The Honorable Florence Shapiro Chair, Committee on State Affairs Texas State Senate P.O. Box 12068 Austin, Texas 78711 Re: Interpretation of section 143.073, Local Government Code. (RQ-0006-JC)

Summary.. Any workers' compensation benefit to which a municipal police officer injured in the line of duty may be entitled under chapter 504 of the Labor Code is offset by the provision of section 143.073(a) of the Local Government Code which entitles him to full pay during his incapacity, continuing if necessary for a full year.

Opinion #JC-0145. The Honorable Bob Turner Chair, Committee on Public Safety Texas House of Representatives P.O. Box 2910 Austin, Texas 78768-2910 Re: Authority of a municipality to regulate or prohibit street vendors. (RQ-0070-JC)

Summary. A Type A general-law city may not prohibit the occupation or business of street vending, but it may, in general, prohibit or reasonably regulate by ordinance the sale of merchandise on its city streets, sidewalks, and other public places. It may also require by ordinance that a vendor obtain a permit as a condition to selling merchandise in the city and charge a reasonable fee. The city may regulate but not prohibit street vendors from going on private residences to sell their goods. If the state has authorized or licensed a particular occupation or activity that is the subject of street vending, a city might be precluded from requiring a permit as a condition of engaging in that activity within the city. Issuance of a sales tax permit to a vendor, however, is not such state authorization or license as to preclude the city from requiring a city permit. An ordinance regulating street vending may not, broadly speaking, unreasonably discriminate against persons subject to the ordinance, infringe on personal fundamental rights, or interfere with interstate commerce.

Opinion #JC-0146. The Honorable Bob Hunter Chair, Committee on State, Federal and International Relations Texas House of Representatives P. O. Box 2910 Austin, Texas 78768-2910 Re: Whether the legislature is authorized to appropriate money to a state agency to transfer to a private, out-of-state endowment, and whether a state university may transfer appropriated funds to a private, out-of-state endowment. (RQ-0082-JC)

Summary. The legislature may not appropriate funds to a state agency to transfer to a private endowment unless the legislature (i) determines that the expenditure serves a public purpose and (ii) requires the agency to place sufficient contractual controls on the transaction to ensure that the public purpose is carried out. See Tex. Const. art. III, 51, 52. The authority of the state agency to transfer the funds and enter into a contract providing the requisite controls must be supported by substantive law. See id. 35, 44. Southwest Texas State University lacks statutory authority to transfer appropriated state funds to the National Geographic Society for a Texas Fund for Geography Education to benefit elementary and secondary geography education in the state or to enter into a contract with the National Geographic Society regarding such a transaction.

Opinion #JC-0147. The Honorable Homero Ramirez Webb County Attorney P.O. Box 420268 Laredo, Texas 78042-0268 Re: Effective date of salary increases for county officers and employees. (RQ-0050-JC)

Summary. When a county budget is not approved by the commissioners court until after the beginning of the fiscal year, salary increases for county and precinct officers and employees do not go into effect until the budget is approved.

TRD-9908028
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: November 23, 1999

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Request for Opinions

RQ-0140. Requested by: Mr. Frank Di Tucci Executive Officer Polygraph Examiners Board 5805 North Lamar Boulevard Austin, Texas 78752 Re: Authority of the Polygraph Examiners Board to conduct on-site inspections (Request No. 0140-JC) Briefs requested by December 18, l999

RQ-0141. Requested by: The Honorable Yolanda de Leon Cameron County District Attorney 974 East Harrison Street Brownsville, Texas 78520 Re: Whether a member of a commissioners court may practice law in county or justice court (Request No. 0141-JC) Briefs requested by December 18, l999

RQ-0142. Requested by: Mr. Jim Nelson Commissioner of Education Texas Education Agency 1701 North Congress Austin, Texas 78701-1494 Re: Whether payments in settlement of litigation are "severance payments" under section 11.201, of the Education Code, and related questions (Request No. 0142-JC) Briefs requested by December 19, l999

RQ-0143. Requested by: The Honorable Jill Cornelius Matagorda County Attorney 1700 Seventh Street, Room 305 Bay City, Texas 77414-5034 Re: Whether the Port of Bay City Authority may release and/or convey easements to adjoining landowners, and related questions (Request No. 0143-JC) Briefs requested by December 18, l999

RQ-0144. Requested by: The Honorable Tim Curry Tarrant County Criminal District Attorney 401 Belknap Street Fort Worth, Texas 76196-0201 Re: Authority of a commissioners court over a sheriff's budget (Request No. 0144-JC) Briefs requested by December 19, l999

RQ-0145. Requested by: The Honorable Michael A. Sheppard 24th Judicial District Attorney, DeWitt County 307 North Gonzales Cuero, Texas 77954 Re: Whether the secret recording of a suspect's conversation while seated in a police car violates article 16.02 of the Penal Code (Request No. 0145-JC) Briefs requested by December 19, l999

TRD-9908029
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: November 24, 1999

EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 19. EDUCATION

Part 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

Chapter 5. PROGRAM DEVELOPMENT

Subchapter A. GENERAL PROVISIONS

19 TAC §5.12

The Texas Higher Education Coordinating Board adopts an emergency new rule §5.12 concerning General Provisions (Expert Witnesses).

The new rule is to be adopted on an emergency basis pursuant to §2001.034 of the Texas Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. The rule is being proposed for emergency action to implement the provisions of House Bill 746 which requires the Coordinating Board to report annually to the governor and the presiding officer of the House and Senate on any faculty members or professional staff at public institutions of higher education who serve as expert witnesses in lawsuits in which the state is a party. The rule will provide guidelines to higher education institutions for reporting on employees who serve as expert witness under the conditions specified in the legislation.

The new rule is adopted on an emergency basis under Texas Education Code, §61.0815.

§5.12. Expert Witnesses.

(a) Purpose. Pursuant to Texas Education Code, §61.0815, this subchapter sets out guidelines for reporting by higher education institutions to the Coordinating Board on certain employees who serve as consulting or testifying expert witness under the conditions specified in the law and in this subchapter.

(b) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consulting or testifying expert witness–any non-fact witness whose name must be disclosed during litigation as required by the Texas Rules of Civil Procedure.

(2) Institution of higher education–any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in Texas Education Code, §61.003.

(3) Faculty or professional staff of an institution of higher education–a non-classified, full-time employee who is a member of the faculty or staff and whose duties include teaching, research, administration or performing professional services, including professional library services.

(4) Fiscal year–the State of Texas' fiscal year, August 31 through September 1.

(5) Non-classified–an employee whose position is not controlled by the institution's classified personnel system or a person employed in a similar position if the institution does not have a classified personnel system.

(c) Reporting. No later than September 30 of each year, the president of an institution of higher education shall file a written report with the Coordinating Board regarding members of the faculty or professional staff who received compensation for serving as consulting or testifying expert witnesses during the prior fiscal year in lawsuits in which the state is a party.

(1) Each report shall contain:

(A) the number of hours spent by faculty or professional staff members serving as consulting or testifying expert witnesses during the prior fiscal year;

(B) the names, cause numbers and county where filed of the cases in which that service was rendered; and

(C) the outcome of the case, including the amount of:

(i) any judgment entered against the state;

(ii) any prejudgment or postjudgment interest awarded against the state; and

(iii) any attorney's fees of another party ordered to be paid by the state.

(2) The information regarding the number of hours spent by faculty or staff serving as consulting or testifying expert witnesses shall be reported to the Coordinating Board in the aggregate without identifying specific individuals.

(3) In the event an institution cannot provide the information specified in paragraph (1)(C) of this subsection, the Texas Attorney General's Office shall provide the information to the Coordinating Board.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907757
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board

Effective date: November 15, 1999
Expiration date: March 14, 2000
For further information, please call: (512) 483-6162

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TITLE 25. HEALTH SERVICES

Part 1. TEXAS DEPARTMENT OF HEALTH

Chapter 34. WAIVER PROGRAM FOR MEDICALLY DEPENDENT CHILDREN

25 TAC §34.31

The Texas Department of Health (department) adopts on an emergency basis new §34.31, concerning the deinstitutionalization of children from nursing facilities which have terminated operations. The new section is necessary in order to ensure that eligible children have adequate care and housing once their facility ceases to operate and there are no other appropriate resources of care available for their utilization.

The section is adopted on an emergency basis due to an imminent peril to public health and safety. It also acts as a response to a reasonably unforeseeable situation. The rule will allow the department to provide adequate and appropriate care for eligible children. In particular, this section will aid in the placement of eligible children who reside in Truman Smith, a facility in Gladewater, Texas. Because of the possibility of the imminent closure of Truman Smith, it is imperative to address the serious and imminent threat to the safety and health of the children as soon as possible. Many of these children are medically fragile and dependent upon medical technology in order to live. All of these children require skilled care. There is no other long-term care facility of this size in Texas that is equipped to serve all of these children. Very few long term care facilities specialize in the care of children who are medically fragile. The rule is also necessary as it responds to a reasonably unforeseeable situation, the possibility that Truman Smith will cease operations. The new section will allow the department to move eligible children from institutions to home and community settings if the parents make that choice. The new section provides an alternative to care in another nursing facility. The new section is proposed for temporary adoption for a period not to exceed 180 days from date of filing.

The new section is adopted on an emergency basis under §1915(c) of the Social Security Act, which grants the department a waiver to provide home and community-based services to medically dependent children; the Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and the Government Code, §2001.034, which provides the board with the authority to adopt rules on an emergency basis.

The new section affects the Social Security Act, §1915(c); Health and Safety Code, §12.001; and the Government Code, §2001.034.

§34.31. Deinstitutionalization Due to Closure of Facility.

(a) An individual who resided in a Texas nursing facility on November 1, 1999, and continued to reside there until they were scheduled to be discharged from the facility due to its closure may apply for services to support the individual's deinstitutionalization if the individual:

(1) has been determined to be Medicaid eligible; and

(2) has met all of the criteria in subsection (b) of §34.3 of this title (relating to Participant Eligibility Criteria).

(b) The names of qualified individuals applying for nursing facility deinstitutionalization under the Medically Dependent Children Program (MDCP) shall be maintained on a waiting list separate from that for other MDCP registrants.

(c) An individual applying for nursing facility deinstitutionalization under MDCP shall become eligible for waiver services under this subsection if:

(1) a vacancy designated for qualified individuals under this subsection exists within the waiver; and

(2) the individual's Texas Index for Level of Effort (TILE) funding is available to be allocated for home and community-based services.

Filed with the Office of the Secretary of State,on November 22, 1999.

TRD-9907953
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: November 22, 1999
Expiration date: March 21, 2000
For further information, please call: (512) 458-7236

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

Part 4. OFFICE OF THE SECRETARY OF STATE

Chapter 91. TEXAS REGISTER

The Office of the Secretary of State, Texas Register proposes to amend §§91.23, 91.61, and 91.65, concerning Texas Register filing procedures and proposes to repeal and replace §91.77, concerning how to file graphic material electronically. The purpose of the amendments and new section is to establish guidelines on how to submit graphic and tabular material in electronic format. This process will allow the Texas Register to include graphics in the *Texas Administrative Code* and in the electronic *Texas Register* in a timely manner.

Dan Procter, director, Texas Register has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections. It should be noted that some agencies may prefer to buy scanning equipment to be able to create their graphic material. This is not required by the Texas Register. The Texas Register staff will be willing to assist an agency within reason.

Mr. Procter also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the public will be able to view graphic material on the Internet in a timely manner.

Comments on the proposals may be submitted in writing to Dan Procter at dprocter@sos.state.tx.us or P.O. Box 13824, Austin, Texas 78711 within 30 days of publication in the *Texas Register*.

Subchapter A. ADMINISTRATIVE

1 TAC §91.23

The amendment is proposed under the Government Code, Chapter 2002, Subchapter B, §2002.017, which provides the Secretary of State with the authority to promulgate rules consistent with the code.

The proposal affects Government Code, Chapter 2002, Subchapter B, §2002.011.

§91.23. Structure; Terminology.

(a)-(d) (No change.)

(e) When you adopt new and amended rules submit the entire text. Do not use the "No change" designation, with the exception of graphic labels as described in §91.77(l) of the title (relating to Graphics). Submit adopted repealed rules with only the section number and title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907923
Jeff Eubank
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-5561

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Subchapter B. FILING PROCEDURES

1 TAC §§91.61, 91.65, 91.77

The amendments and new section are proposed under the Government Code, Chapter 2002, Subchapter B, §2002.017, which provides the Secretary of State with the authority to promulgate rules consistent with the code.

The proposal affects Government Code, Chapter 2002, Subchapter B, §2002.011.

§91.61. Electronic Procedures for Filing Rules and Miscellaneous Documents.

(a)-(g) (No change.)

(h) Label graphic material and submit as specified in §91.77 of this title (relating to Graphics [~~Material~~]) [~~and deliver it to the Texas Register by the deadline. Do not fax graphic material~~].

(i) (No change.)

§91.65. Procedures for Filing Rules.

(a) (No change.)

(b) Adopted rules. The APA states that a rule takes effect 20 days after the date on which it is filed in the Office of the Secretary of State unless a later date is required by statute, specified in the rule, or required by federal mandate. When adopting rules, comply with the following procedures.

(1)-(4) (No change.)

(5) Do not use the "No change" designation in adopted rule submissions, with the exception of graphic labels as described in §91.77(l) of the title (relating to Graphics). If you submit the final version of adopted rules with any level designation as "No change", we will reject the submission.

§91.77. Graphics.

(a) Graphic material accompanying a rule appears in the Tables and Graphics section of the *Texas Register* and as part of our on-line publications.

(b) Submit graphics in electronic format using one of the following methods.

(1) File transfer protocol (FTP). Submit graphic documents via FTP in binary mode. For the FTP address, login and password, contact us.

(2) E-mail. Attach graphic files to an e-mail, separate from rule or miscellaneous submissions. More than one graphic file may be attached to an e-mail, but each file must contain only one graphic. The subject line should be the name of the graphic file or files.

(3) 3-1/2 inch diskettes. Submit a diskette containing graphics separately from rule or miscellaneous text files. A diskette may contain more than one graphic file, but each file should contain only one graphic. Label the diskette with the graphic file names and agency name.

(c) Name rule graphics according to the following formula: aa_bbbb_cccc-1."file extension." In this scheme, aa represents the title number, bbbb represents the chapter number, cccc represents the rule number, and 1 indicates that this is the first graphic file submitted for this rule filing. Example: 01_0091_0001-3.htm indicates this is the third file submitted for Title 1, Chapter 91, rule 1 (1 TAC §91.1) and it is an html file. Files containing graphic material for miscellaneous documents will be named in accordance to the following: "date of submission"_"Texas Register agency code"-1."file extension." Example: 1019_004-1.pdf indicates it is the first file submitted on October 19, 1999 from the Secretary of State and it is an Adobe Acrobat file.

(d) We accept the following types of graphic files:

(1) Word documents (.doc extension);

(2) Word Perfect documents (.wpd extension);

(3) Hypertext Markup Language (.htm or .html extension);

(4) image files with the extension .jpg or .gif; and

(5) Adobe Acrobat files (.pdf extension).

(e) If you cannot create electronic graphic files or have files in an electronic format other than those listed in subsection (d)(1)-(5) of this section, contact us for assistance.

(f) Indicate on the submission form the graphic file name and whether the file was submitted by FTP, e-mail, or diskette. For rule graphics, mark whether or not the graphic is new or amended.

(g) Include in each electronic graphic file a label comprised of the word "Figure," the TAC citation, and the level of the rule that references the graphic. Example: "Figure: 34 TAC §3.334(a)(1)" will appear at the top of the printed or on-line version of the graphic. The rule text must reference the same label at the appropriate level. Label a table or graphic within a preamble with the word "Figure," TAC citation, and the word "preamble." Example: "Figure: 34 TAC Chapter 3 - Preamble."

(h) Do not refer to the Tables and Graphics section of the *Texas Register* in rule text. Place graphic labels at the end of the appropriate subdivision and not within the text of the subdivision. The graphic label should not be the only text in a subdivision.

(i) When proposing a new graphic, submit it in its entirety. When proposing to amend a rule graphic, send only the portion that is being changed. Example: If only two pages of a ten-page graphic are changed, submit only the two changed pages.

(j) When adopting new or amended rules, submit a complete version of any graphics that were published as part of the proposed rulemaking. Example: If only two pages of a ten-page graphic are changed, submit all ten pages.

(k) If the body of a graphic is not being amended, but it is moving within a rule, resubmit it with its new label in both the proposed and adopted rule filings.

(l) If a graphic attached to an amended subdivision is not changed or deleted, mark it as "No change." Example: "Figure: 34 TAC §3.334(a)(1) (No change.)" If a subdivision with a graphic was marked "No change" in the proposed rulemaking, submit the complete text of the adopted rule with its graphic label designated "No change." Since we require adopted rules to be submitted with full text, graphic lines labeled "No change" are the only portions of final rules that you do not submit.

(m) When proposing to delete a graphic from a rule, bracket the figure label within the rule text. Example: [Figure: 34 TAC §3.334(a)(1)]. Do not submit the deleted graphic with the filing.

(n) Explain in the preamble changes made to amended graphic material. Do not use the <etb>, [ ], <*>, or *n codes in graphic material. Do not use the "tab" function to create tables and equations in Word or Word Perfect because the tab formatting will be lost in the conversion to html.

(o) Submit graphics on the same day as the text file that includes the graphic label.

(p) If we are unable to access a graphic file, if the file does not match the submission form or if the file does not convert to web ready, we will contact the liaison promptly. If time permits us to process the graphic without delaying production of the issue, we will ask the liaison to resubmit the file. If there is not sufficient time, we will reject the submission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907924
Jeff Eubank

Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-5561

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1 TAC §91.77

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Government Code, Chapter 2002, Subchapter B, §2002.017, which provides the Secretary of State with the authority to promulgate rules consistent with the code.

The proposal affects Government Code, Chapter 2002, Subchapter B, §2002.011.

§91.77. Graphic Material.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907925
Jeff Eubank
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-5561

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Part XV. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

Chapter 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

1 TAC §351.3

The Texas Health and Human Services Commission submits an amendment to §351.3, concerning the purpose, task, and duration of advisory committees. Section 62.057, Health and Safety Code, establishes regional advisory committees to advise the Health and Human Services Commission on the implementation and operation of the children's health insurance program (CHIP). This amendment sets out the regional advisory committees' purpose, tasks, and how the committees will report to the Health and Human Services Commission pursuant to Chapter 2110, Government Code. Section 62.057(f) exempts the regional advisory committees from §2110.008, Government Code, which requires the agency to set an abolition date by rule and for the automatic abolition of advisory committees.

Don Green, Chief Financial Officer, has determined that for each year in the first five years that the amendment is in effect, there will be no net fiscal implications to state or local governments as a result of administering the amendment.

Mr. Green has also determined that for each year in the first five years that the amendment is in effect, the public benefit anticipated as a result of administering the amendment will be a more effective implementation and operation of CHIP, as well as public and industry participation and input into CHIP. There will be no costs to small businesses. There may be some costs to persons complying with the section as proposed, as travel to and from the regional advisory committee meetings will not be reimbursed by the State, as no appropriations were made for that purpose. There will be no impact on local employment.

Comments may be submitted by mail to Elizabeth Stanford, Children's Health Insurance Program, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247, or by e-mail to elizabeth.stanford@hhsc.state.tx.us, (512) 424-6568. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under the Texas Health and Safety Code, Chapter 62, §62.051(d), which authorizes the Health and Human Services Commission to adopt rules necessary to carry out the Health and Human Services Commission's duties under Chapter 62.

The amendment implements Health and Safety Code, §62.057.

§351.3. Purpose, Task, and Duration of Advisory Committees.

(a)-(i) (No change.)

(j) Children's Health Insurance Program Regional Advisory Committees

(1) The Children's Health Insurance Program (CHIP) regional advisory committees provide recommendations to HHSC on the implementation and operation of CHIP pursuant to section 62.057, Health and Safety Code.

(2) The CHIP regional advisory committees meet at least quarterly to review and discuss CHIP implementation and operation in their region.

(3) The CHIP regional advisory committees report to HHSC regularly through HHSC staff assigned to the committees.

(4) The CHIP regional advisory committees have no automatic abolition date, nor is HHSC required to create one pursuant to section 62.057(f).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907932
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 424-6576

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TITLE 4 AGRICULTURE

Part 1. TEXAS DEPARTMENT OF AGRICULTURE

Chapter 3. BOLL WEEVIL ERADICATION PROGRAM

Subchapter F. GENERAL PROCEDURES [~~MISCELLANEOUS PROVISIONS~~]

4 TAC §§3.201-3.203

The Texas Department of Agriculture (the Department) proposes new §§3.201-3.203, concerning administrative rules for the boll weevil eradication program.

The new sections provide procedures and requirements for approval by the Commissioner of Agriculture of documents and activities required to be submitted and/or reported to the Commissioner under the Texas Agriculture Code, Chapter 74, subchapter D. In addition, the new sections provide requirements and procedures for implementation of a cost-share program established by the 76th Legislature, 1999.

Matt Brockman, Special Assistant for Producer Relations, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Brockman also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to formalize and make more efficient the approval and reporting requirements of the Texas Agriculture Code, Chapter 74, subchapter D, thereby strengthening the supervisory rule of the department in the implementation of the boll weevil eradication program, and to assure the financial support for boll weevil eradication programs in Texas through the use of cost-share funds. There is no anticipated economic effect on micro-businesses or small businesses and/or to persons who are required to comply with the new sections as proposed.

Comments on the proposal may be submitted to Matt Brockman, Special Assistant for Producer Relations, Texas Department of Agriculture, P. O. Box 12847, and Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code (the Code), §74.120, which provides the Texas Department of Agriculture (department) with the authority to adopt rules for implementation of the Code, Chapter 74, subchapter D, and the Code, §74.152, which authorize the department to adopt rules to implement a cost-sharing program as part of the program to eradicate the boll weevil and pink bollworm under Chapter 74, subchapter D.

The code that will be affected by the proposal is the Texas Agriculture Code, Chapter 74, subchapters D and E.

§3.201. Approval by the Commissioner of Agriculture.

The Texas Boll Weevil Eradication Foundation (foundation) is required to obtain approval from the commissioner of agriculture as follows.

(1) Approval must be obtained from the commissioner for the borrowing of money to fund operations of the foundation.

(A) An approval request for the borrowing of money must first be approved by the board in open meeting.

(B) Once approved by the board, the request for approval to borrow money must be submitted to the commissioner at least 30 days before the date of the actual borrowing transaction and include:

(i) name and address of lender;

(ii) amount to be borrowed;

(iii) copy of terms of agreement for borrowing and supporting documentation;

(iv) a statement of justification for choosing the lender including other options considered; and

(v) any other information requested by the commissioner.

(2) The commissioner must approve the foundation's policy for the procurement of goods and/or services.

(A) A general policy must be approved by the commissioner initially and reviewed annually thereafter.

(B) The general procurement policy of the foundation shall include:

(i) a requirement in regards to purchases of goods or services:

(I) that all agreements over the amount of $10,000 entered into for the providing of goods and/or services of aerial applicators, purchases of chemicals and purchases of vehicles or other heavy equipment be approved by the commissioner; and

(II) that the requirement does not include agreements for routine or day-to day operating expenditures such as office supplies, payroll or utilities.

(ii) provisions for obtaining of competitive bids; and

(iii) a requirement that a short statement of justification of the need for the goods or services being purchased be provided for each purchase.

(3) The commissioner must review and approve the foundation's operating budget, and no funds may be used to fund programs not approved by the commissioner. The budget must:

(A) be approved on an annual basis to correspond with the foundation's fiscal year;

(B) be submitted at least 30 days prior to be the end of the foundation's fiscal year;

(C) be approved by the foundation board in an open meeting prior to submission to the commissioner.;

(D) include the following:

(i) a breakdown of expenses to show the budget as projected by zone;

(ii) total projected budget including expenses for goods and services to be approved by the commissioner; and

(iii) a description of programs to be implemented using budgeted; and

(E) Budget revisions are permitted within the approved budget line items. Prior approval from the commissioner is required on all cumulative transfers, for the fiscal year covered by the proposed budget, of funds among budget line items when the amount transferred exceeds 5% of the total annual budget.

(4) The commissioner must approve the use of a bank depository prior to the deposit of funds by the foundation.

(5) The commissioner must approve cooperative agreements entered into by the foundation for carrying out the purposes of approved eradication activities:

(A) with other states;

(B) with individuals, or a group of persons involved in similar programs to carry out the purposes of Chapter 74, subchapter D; and

(C) with other governmental entities.

§3.202. Reporting Requirements.

(a) The foundation shall provide the department with a copy of its annual audit within 30 days of the audit's completion. Included with the audit shall be any accompanying letters to management from the auditor.

(b) The foundation shall file with the department an annual report within 45 days of the end of its fiscal year. The annual report shall include:

(1) itemization of income/expenditures;

(2) statement of eradication activities carried out in the year covered by the report, by zone;

(3) information regarding the name and quantity of pesticides used in the program by zone; and

(4) copies of any resolutions adopted by the board regarding the eradication program.

§3.203. Cost-sharing Program.

(a) Statement of Purpose and Authority. In accordance with the Texas Agriculture Code, Chapter 74, subchapter E, the department is authorized to contract with the entity named under §74.1011 to carry out boll weevil eradication to obtain boll weevil eradication services for the state of Texas as part of a cost-sharing program. The Texas Boll Weevil Eradication Foundation, Inc. (the foundation) has been designated as that entity. This section sets forth requirements and procedures for the implementation of the cost-sharing program.

(b) Zone eligibility.

(1) The department may spend money under the cost-sharing program only in a boll weevil eradication zone in which:

(A) a boll weevil eradication project authorized under the Code, Chapter 74, subchapter D is active; or

(B) boll weevil eradication has been declared complete by the United States Department of Agriculture or its designee.

(2) A zone meets the requirement set forth in subparagraph (1)(A) of this section if a referendum of cotton growers has been held in the zone in accordance with the Code, Chapter 4, subchapter D, and both the establishment of an eradication program and a maximum assessment have been approved by growers for that zone.

(c) Request for funding.

(1) The foundation may request funding under this section by submission to the department of a proposal to provide boll weevil eradication services which meets the requirements specified by the department.

(2) A proposal to provide boll weevil eradication services shall include:

(A) a statement that the foundation meets eligibility requirements;

(B) a statement verifying that the foundation will comply with the Uniform Grant Management Standards promulgated by the Governor's Office of Budget and Planning, under the Texas Government Code, Chapter 783 (UGMS);

(C) verification that funds provided will be used for boll weevil eradication services in eligible zones; and

(D) the specific amount of funding requested and how will be used, broken down by zone, period of time covered, specific category of expenditure, and nature of activity.

(3) Additional information may be requested, if needed.

(d) Disbursement of funds.

(1) Disbursement of funds will be made after review and acceptance of the foundation's proposal by the department and execution of a written contract for services between the department and the foundation.

(2) Disbursement shall be made only in accordance with the contract.

(3) Disbursement of funds may be made in a lump sum or installments , as set forth in the contract.

(e) Reporting/Accounting Requirements.

(1) After funds have been disbursed the foundation shall provide a written report of expenditures on a quarterly basis according to the State of Texas fiscal year, or more often, as requested by the department.

(2) Quarterly reports shall be submitted to the department within 30 days after the end of each quarter.

(3) The foundation shall establish an accounting system which identifies source of funds for programs, with separate accounting, in a manner that will enable the department and others to audit funds and verify source of funds and how they are used, for:

(A) grower assessments;

(B) state funds; and

(C) federal funds,

(4) The foundation shall comply with all state requirements regarding use of state funds.

(5) The department may suspend disbursement of funds to the foundation, if:

(A) the department determines, or has reason to believe, that appropriated funds are not being used for purposes stated in the contract or the foundation is not complying with the terms of the contract, including reporting requirements, or these rules;

(B) the department determines, or has reason to believe, that the use of the appropriated funds by the foundation is not consistent with state law; and/or

(C) the department determines or has reason to believe that the foundation's use of the appropriated funds is not in the best interest of the state, cotton growers, or the eradication program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907966
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4075

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Chapter 18. ORGANIC STANDARDS AND CERTIFICATION

The Texas Department of Agriculture (the department) proposes amendments to §§18.1-18.17, concerning certification of organic food and fiber and the repeal of §18.18, concerning expiration of Chapter 18. The department also proposes new §18.18, concerning standards for processing of organic fibers other than cotton, new §18.19 concerning standards for the production of organic livestock, livestock fiber, and livestock products and new §18.25, concerning expiration of Chapter 18. The proposed amendments, repeal and new §18.18 are proposed to update language for consistency, clarify requirements, simplify the procedures governing the department's Organic Certification Program and to incorporate the new organic livestock standards proposed as new §18.19 into the existing standards.

The General Appropriations Act, Article IX, §9-10.13 (formerly section 167), 76th Legislature, 1999 and the Texas Government Code, §2001.039, as enacted by the 76th Legislature, 1999, require that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001. Such reviews shall include, at a minimum, an assessment by the agency as to whether or not the reason for adopting or readopting the rule continues to exist. The department has conducted a preliminary review of the rules in Chapter 18 and has determined that the justification for their adoption continues to exist. As part of that review, the department is proposing to repeal §18.18 and replace that section with existing §18.17(d), regarding processing of organically produced fibers into textile products, and renumber existing §18.18 as new §18.25 to better organize the sections. In addition, the following amendments and new sections are proposed.

Proposed amendments to §18.1 define terms used in the new livestock section, delete unnecessary terms and update or amend other terms for clarity and consistency. Proposed §18.2(a)(4) provides for a change in ownership of an organic farm during the growing season. Proposed amendments to §18.5 add livestock fees and clarify that fees are additive and nonrefundable. Section 18.11(b)(3) establishes a maximum tolerance level for contaminants in certified products. In §18.13(d)(3) a longer pre-harvest interval is specified for use of manure on food crops. As noted previously, old §18.17(d) is reorganized as new proposed §18.18 to separate standards unique to cotton from standards applicable to all fibers. Proposed new §18.18 outlines general principles for organic fiber processing, adds additional processing terms, removes references to materials that will be covered by the TDA Materials List, and simplifies the organization of the section. Proposed new §18.19 establishes standards for production of livestock, livestock fiber, and livestock products and sets certification fees for that program. Proposed new §18.25 provides for the expiration of Chapter 18.

Leslie McKinnon, coordinator for organic certification, has determined that for the first five-year period the amended, repealed and new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended, repealed and new sections. The cost of any additional inspection activities and administrative workload for state program and field staff in implementing the new organic livestock program will be recovered through collection of additional fees from applicants for certification under that program. Other program fees have not been changed.

Ms. McKinnon also has determined that for each year of the first five years the amended, repealed and new sections are in effect the public benefit anticipated as a result of enforcing the sections, as proposed, will be the expansion of the market for Texas organic agriculture products. The effect on large and small businesses is to provide access to new niche markets. The anticipated economic cost to small businesses and persons who are required to comply with new §18.19, concerning organic certification of livestock, livestock fiber and livestock production is limited to reasonable fees collected for certification services. The amount of fees will depend on the type of livestock production and the size, based on land acres, of the organic operation, as proposed in amended §18.5 of the proposal.

Comments on the proposal may be submitted to Leslie McKinnon, Coordinator for Organic Certification, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711, and must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

4 TAC §§18.1-18.19, 18.25

The amended and new sections are proposed under the Texas Agriculture Code (the Code), §18.002, which provides the department with the authority to adopt rules necessary for the enforcement and administration of Chapter 18, subchapter A, concerning Organic Standards and Certification; and the Code, §18.006, which provides the department with the authority to set and charge fees for certification as an organic producer, distributor, retailer, or processor, in amounts that enable the department to recover its costs in administering the organic certification program.

The code sections which will be affected by the proposal are the Texas Agriculture Code, Chapter 18, and the Texas Agriculture Code, §12.002.

§18.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

[~~(1) ASCS–United States Department of Agriculture, Agriculture Stabilization and Conservation Service.~~]

(1) [~~(2)~~] Agricultural product–Any agricultural commodity or product, whether raw or processed, including any commodity or product derived from livestock that is marketed in the United States [~~for human consumption or livestock consumption~~].

(2) Aquaculture Stock–Fish, shellfish, or other aquatic animals produced for meat, eggs or other products.

(3)-(6) (No change.)

(7) Breeder stock–Animals used for reproduction, to produce organic progeny.

(8) [~~(7)~~] Certified organic farm–A farm, or portion of a farm, or site where agricultural products or livestock are produced, that is certified by the Texas Department of Agriculture (the department) or an organic certifying agent, as utilizing a system of organic farming as described by these rules.

(9) [~~(8)~~] Code–The Texas Agriculture [~~Agricultural~~] Code.

(10) [~~(9)~~] Commingled–[~~Inseparably~~] Mixed [~~mixed~~] or interspersed with other food or fiber [~~and not distinguishable from it~~].

(11) [~~(10)~~] Contaminated–As applied to organic food or fiber, unfit for use because of the presence of [~~illegal quantities of~~] toxic, synthetic, or other prohibited substances, or [~~;~~] as applied to irrigation water or soil, unfit for use because of presence in the resulting crop [~~of illegal quantities~~] of toxic, synthetic, or other prohibited substances , in excess of tolerances established in this chapter.

(12) [~~(11)~~] Cover crop–A crop planted primarily to prevent soil erosion, recover nutrients from the subsoil, increase water infiltration, and increase the levels of nitrogen and organic matter in the soil.

(13) Dairy stock-An animal or animals raised for milk or milk products.

(14) [~~(12)~~] Department or TDA–The Texas Department of Agriculture.

(15) [~~(13)~~] Distributor–A person who is engaged in the business of selling food or fiber for resale, including, but not limited to, a wholesaler, broker, packer, repacker, shipper, or agent.

(16) [~~(14)~~] Farm–All agricultural land that is leased, owned, or otherwise held by and under the management of a certified producer or applicant for certification.

(17) [~~(15)~~] Farm plan–All documents relevant to the previous three years', current, and future management of an organic farm, including, but not limited to, written plans to rotate crops, build humus, and stabilize soil nutrients.

(18) Fiber stock-An animal or animals raised for fiber production, such as wool or mohair.

(19) [~~(16)~~] Field–A clearly demarcated, contiguous tract of agricultural land leased, owned, or otherwise held by and under the management of a certified producer or applicant for certification.

(20) FSA–United States Department of Agriculture Farm Service Agency which includes the Agricultural Stabilization and Conservation Service (ASCS), Natural Resource Conservation Service (NRCS) and Farmers Home Administration (FMHA).

(21) [~~(17)~~] Green manure crop–A cover crop or other crop planted primarily to be plowed under to increase soil tilth and fertility.

[~~(18) Guano–Partially decomposed excrements of birds, bats, seals, or other animals.~~]

(22) [~~(19)~~] Handle–To sell, process or package agricultural products.

(23) [~~(20)~~] Hazard Analysis Critical Control Point or HACCP–A system designed to eliminate the potential of contamination and commingling of food and/or fiber products during handling and processing.

[~~(21) Illegal quantities–Amounts that are not lawful under federal or state statutes or regulations.~~]

(24) [~~(22)~~] Ingredient information panel–An ingredient statement which shall appear on the principle [~~primary~~] display panel or [~~on the~~] information panel [~~and shall~~] listing [~~list~~] the ingredients contained in the productin descending order of predominance. [~~The ingredient statement shall be in letters and numbers at least 1/16 inch in height and shall be located before or after the name and address of the manufacturer, packer or distributor.~~]

[~~(23) Julian date–A calendar date expressed by a decimal number, three consecutive digits of which indicate the day of the year in a series from 001 (January 1) to 365 (December 31 of a non-leap year) or 366 (December 31 of a leap year).~~]

(25) [~~(24)~~] Livestock–Cattle, sheep, goats, swine, poultry, [~~or~~] equine animals used for food or fiber, fish ,or other aquatic animals used for food, or wild or domesticated game[~~, or other nonplant life~~].

(26) Livestock production unit–A production system that includes animals and all related inputs and production practices, such as feed sources and feed storage, stock sources, water quality, shelter, land, disease-control methods, living conditions, stress management practices, and control of all associated processing and handling facilities, as applicable.

(27) [~~(25)~~] Logo–The copyrighted "Texas Department of Agriculture Certified Organically Produced" and "Texas Department of Agriculture Transitional-Organic Certification Pending" logotypes.

(28) [~~(26)~~] Low ecological profile–As applied to a soil-, crop-, or pest management practice, a practice that has a low degree of or no adverse effects on human health or the environment.

(29) [~~(27)~~] Manuring–The application to soil of the excreta of agricultural animals, including stable litter and paunch wastes, to increase tilth and fertility.

(30) [~~(28)~~] Material use records [~~report~~]–[~~A report of~~] Records [~~records~~] required by the department or an organic certifying agent regarding the use of materials listed as allowed or allowed with restrictions, which have been used for production, processing, or handling of certified food or fiber.

(31) [~~(29)~~] National list–A list of substances categorized as allowed or prohibited for organic crop or livestock production inputs, processing ingredients and aids, and handling materials as provided under the Organic Foods Production Act of 1990.

(32) [~~(30)~~] Organic certifying agent–An [~~A private~~] organic certification organization, or a person registered [~~accredited~~] under this chapter.

(33) [~~(31)~~] Organic farming–A system of ecological soil management that relies on building humus levels through crop rotations, recycling organic wastes, and applying balanced mineral amendments and that uses, when necessary, mechanical, botanical, or biological controls with minimum adverse effects on health and the environment.

(34) [~~(32)~~] Organic fiber–Fiber that is produced under a system of organic farming and that is processed, packaged, transported and stored so as to maintain segregation and prevention of contamination from other fiber and from synthetic pesticides, prohibited defoliants and/or desiccants.

(35) [~~(33)~~] Organic food–Food for human or livestock consumption that is produced under a system of organic farming and

that is processed, packaged, transported and stored so as to retain maximum nutritional value without the use of artificial preservatives, coloring or other additives, ionizing radiation, or prohibited materials.

(36) [~~(34)~~] Organic Foods Production Act of 1990 or OFPA–The national organic standards, 7 United States Code §6501, *et seq.*, under the authority of the United States Department of Agriculture.

(37) [~~(35)~~] Organically produced–An agricultural product that is produced, handled, or processed in accordance with these rules.

(38) [~~(36)~~] Participant–A producer, processor, retail store or distributor location certified to use the "Texas Department of Agriculture Certified Organically Produced" logo and/or the "Texas Department of Agriculture Transitional-Organic Certification Pending" logo.

(39) Pasture–land that is managed in a sustainable manner to provide forage for grazing livestock.

(40) [~~(37)~~] Person–Any individual, partnership, corporation, association, governmental subdivision, or public or private organization.

(41) [~~(38)~~] Pesticide–A substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest, or any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

(42) [~~(39)~~] Pheromone–A substance that is secreted by an organism to the outside and that causes a specific reaction in a receiving organism of the same species.

(43) Poultry stock–Domesticated birds raised to produce meat, eggs or other products.

(44) [~~(40)~~] Principal display panel–A part of the label most likely to be seen by the consumer at retail sale[~~. It is this part of the package which shall bear~~] bearing the declaration of net quantity of contents and statement of identity.

(45) [~~(41)~~] Processing–Cooking, baking, heating, drying, mixing, grinding, churning, separating, extracting, cutting, fermenting, eviscerating, preserving, dehydrating, freezing, or otherwise manufacturing, including [~~and includes~~] the packaging, canning, jarring, or otherwise enclosing of food in a container. Fiber processing includes fiber opening, blending, cleaning, combing, garneting, compacting, drying, bonding, scouring, bleaching, bio-polishing, color brightening, softening, webbing, stitching, knitting, wefting, laydown, carding, hackling, drawing, lapping, gilling, roving, winding, spinning, plying, wrapping, creeling, warping, slashing, weaving, sanforizing, calendering, tentering, finishing, napping, sueding, brushing, or dyeing.

(46) [~~(42)~~] Processor–A person who is engaged in the business of manufacturing raw agricultural commodities into food or fiber products.

(47) [~~(43)~~] Producer–A person who is engaged in the business of growing or producing food or fiber.

(48) [~~(44)~~] Propagation materials–Plant materials including seeds, transplants, cuttings, layerings, bulbs, tubers, slips, crowns, offsets, grafts, buddings, and root stocks or other plant materials used to cultivate plants.

(49) [~~(45)~~] Raw manure–Agricultural animals' excrement, both solid and liquid, that has not been aged, aerated, composted, fermented, aerobically digested, or otherwise humified or processed in such a way as to improve its value as a biological activator.

(50) [~~(46)~~] Retailer–A person, other than the operator of a restaurant, who is engaged in the business of selling certified food or fiber at retail to its ultimate consumer.

[~~(47) SCS–United States Department of Agriculture Soil Conservation Services.~~]

[~~(48) Semiochemical–A pheromone, allelochemic, or other naturally occurring substance involved in the chemical interaction between organisms.~~]

(51) Slaughter stock–An animal or animals raised for meat or meat products.

(52) [~~(49)~~] Synthetic–A substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

(53) [~~(50)~~] Texas Department of Agriculture (TDA) Materials [~~Material~~] List–A list of substances categorized as allowed, allowed with restrictions, or prohibited for organic crop or livestock production inputs, processing ingredients, and aids, and handling materials as provided under these rules or the OFPA.

[~~(51) Toxin–A chemical, drug, radiological agent, or biological agent that is present in an amount sufficient to cause significant adverse effects in humans, crops, livestock, other beneficial organisms or the environment.~~]

(54) [~~(52)~~] Transitional period–A period of 36 months from the last date of application of a prohibited material during which a farm or field unit may be certified as Transitional-Organic Certification Pending. Products so certified are permitted to be sold as Transitional following 12 months from the last date of an application of a prohibited material. [~~Upon completion of the required transitional period a farm or field unit may then be certified as Organically Produced.~~]

(55) Vaccine–A diluted suspension of killed, attenuated or live microorganisms, such as viruses or bacteria, incapable of inducing severe infection, but capable of counteracting a disease-causing organism by stimulating the immune system of an animal.

§18.2. Certification, Application, and Inspection.

(a) Certification.

(1) (No change.)

(2) A person may not label, market, advertise, or represent as organic or transitional any food or fiber that is sold, kept, offered, or exposed for sale, unless that person is:

(A) (No change.)

(B) certified by an organic certifying agent registered with [~~accredited by~~] the department under this chapter; or [~~.~~]

(C) a retailer eligible for voluntary certification as described in §18.14(b) of this title (relating to Retailers).

(3) A producer may not label, market, advertise, or represent as organic or transitional any agricultural product harvested within 90 days of receipt of application by the department. [~~Certification process under this chapter shall become effective as follows:~~]

[~~(A) producers and processors may apply for certification upon the effective date of this chapter; and~~]

[~~(B) distributors and retailers may apply for certification 90 days after the effective date of this chapter.~~]

(4) If a certified organic farm is sold or leased during the crop production season, crops may be sold as organic or transitional provided:

(A) the new owner or operator provides a notarized affidavit of compliance with organic standards;

(B) the new owner or operator immediately applies for certification;

(C) the department approves the application; and

(D) the department issues the certification.

(5) [~~(4) Except as provided by Chapter 2, subchapter B of this title (relating to Consolidated Licenses),~~] Producers [~~producers~~], processors, distributors, and retailers will be certified on an annual basis from January 1 to December 31 of each year, except initial applicants whose certification will expire December 31.

(b) Application.

(1) Applications submitted under this chapter shall be in writing on a form prescribed by the department and submitted to the Coordinator for Organic Programs, Regulatory Programs Division, Texas Department of Agriculture, P.O. Box 12076 [~~12847~~], Austin, Texas 78711-2076.

(2) A separate application shall be submitted for certification of each producer, processing facility, distribution facility, and retail location [~~applying for certification~~], or registration of an [~~a person or private~~] organic certifying agent [~~applying for accreditation~~].

(3) An application shall consist of the prescribed application form and any additional supporting documentation for each farm or field unit(s), processing facility, distributor location, or retailer location to be evaluated for certification. [~~Producer applications will not be accepted for farms or field units in which crops will be harvested within 90 days of receipt of application by the department.~~]

(4) Additional verification documents as prescribed in §18.13 of this title (relating to Producers), including inspection reports and the results of any required laboratory analysis as prescribed in §18.11 of this title (relating to Fertility, Water Quality, and Residue Testing), shall be submitted to the department upon request [~~by the department~~].

(5) (No change.)

(6) Upon the department's request, the Certification Review and Standards Advisory Committee shall review and make recommendations on any application or registration [~~accreditation~~] under this chapter.

(7) Upon receipt of all required verification documents, including inspection reports[~~,~~] and the results of any required laboratory analysis, the department shall make an initial determination of whether such certification [~~and permission~~] should be granted or denied, and notify the applicant in writing, setting forth the reasons for such grant or denial.

(c) Inspections of producers, processors, distributors, and retailers.

(1) Initial inspections.

(A) The department or organic certifying agent, upon receipt of an application for certification that fulfills initial screening requirements [~~or permission to use department logos~~] under these rules, shall schedule an inspection of the applicant's farm, facility, or site [~~of each applicant who fulfills initial screening requirements~~].

(B) If the initial inspection is not conducted at a time of year when normal production or sales activity can be observed, a follow-up inspection shall be conducted at the appropriate time. [~~The department, or organic certifying agent, shall perform inspections of applicants for certification at a time when normal production or sales activity can be observed.~~]

(C) (No change.)

(2) Annual renewal inspections.

(A) (No change.)

(B) The department, or organic certifying agent, shall perform routine annual inspections for recertification at a time when normal production or sales activity can be observed.

(C) [~~(B)~~] The department, or an organic certifying agent, shall conduct at least one on-site inspection prior to or during harvest of certified producers and processors who produce and process annual crops for processed products.

(3) Enforcement inspections. The department may conduct unannounced inspections in cases of suspected violations of the department's Organic Standards and Certification, or violations of such standards by an organic certifying agent registered [~~accredited~~] under this chapter.

(d) Complaints.

(1)-(2) (No change.)

(3) The department shall maintain, for ten years, records of all complaints, investigations, and remedial actions. These records shall become part of the reviewing record of any proceeding involving a certified person or applicant for certification by the department or by an organic certifying agent registered [~~accredited~~] under this chapter.

§18.3. Certification Review and Standards Advisory Committee.

(a) The department shall appoint a Certification Review and Standards Advisory Committee (the committee) which shall, at the department's request, review applications for certification and registration [~~accreditation~~] under this chapter. It shall advise the department on revisions to this chapter and administration of the Organic Standards and Certification Program.

(b)-(e) (No change.)

§18.4. Registration [~~Accreditation~~] of Organic Certifying Agents.

(a) Organic certifying agents shall be registered [~~accredited~~] by the department prior to providing organic certification services to a producer, processor, distributor or retailer. The organic certifying agent shall submit [~~by submitting~~] an application (certifying policies and procedures), and a nonrefundable annual fee prescribed by the department.

(b) The department may issue a certificate of registration [~~accreditation~~] under this chapter only if it determines that the applicant's:

(1)-(2) (No change.)

(c) An organic certifying agent registered [~~accredited~~] under this chapter shall provide a copy of all certification documents to the department within 30 days of certification of each certified producer, processor, distributor, and retailer.

§18.5. Fees.

(a) A [~~An~~] non-refundable application fee prescribed by the department shall be paid in conjunction with submission of a new application or an application for renewing certification.

(b) The department may require additional fees or refund fees submitted by producers, processors, distributors, and retailers for overpayment or underpayment of prescribed annual fees or for a portion of a certification period. Additional fees may be charged for additions of fields or categories to be certified after initial application fees are submitted. Prorated fees may be charged for extension of an annual certification period which is prescribed by the department.

(1) Producers. Fees for certification or renewal of certification are based on the following schedules [~~schedule~~]. [~~:~~]

(A) Field production shall include actual production acres (including hay, livestock feed grains, or pasture), cover crop and rotation acres, and required buffer zones. Fees for field production are as follows:

(i) less than one acre: $40;

(ii) one to less than five acres: $65;

(iii) five to less than 25 acres: $90;

(iv) 25 to less than 50 acres: $115;

(v) 50 to 100 acres: $140; and

(vi) greater than 100 acres: $140 + $15 for each additional increment or portion of 100 acres.
[~~Figure: 4 TAC §18.5(b)(1)(A)~~]

(B) Greenhouse/indoor production areas shall include actual production area and required buffer zones. Fees for greenhouse/indoor production are:

(i) less than 1,000 sq. ft.: $20;

(ii) 1,000 to 3,000 sq. ft.: $40; and

(iii) greater than 3,000 sq. ft.: $40 + $20 for each additional increment or portion of 3,000 sq. ft..
[~~Figure: 4 TAC §18.5(b)(1)(B)~~]

(C) Livestock production fees shall be based on the land area used to produce the livestock, with a separate fee required for each type of livestock production. Fees for livestock production are as follows:

(i) less than five acres: $15;

(ii) five to less than 50 acres: $25; and

(iii) greater than 50 acres: $50.

(2) Processors. Fees for certification or renewal of a certification for each processing facility are based on the following schedule (if more than one category applies, fees are additive.):

(A) certified producer with on-farm state licensed kitchen processing own certified food ingredients: $25;

(B) certified producer with on-farm state licensed kitchen processing certified food ingredients other than his own: $25;

(C) certified producer with on-farm processing of own certified feed: $25;

(D) certified producer with on-farm processing of certified feed other than his own: $25;

(E) certified producer with on-farm processing of own certified milk products: $25;

(F) certified producer with on-farm processing of certified milk products other than his own: $25;

(G) cotton ginning: $150;

(H) textile manufacturing: $150;

(I) commercial food processor: $150; and

(J) commercial feed processor: $150.
[~~Figure: 4 TAC §18.5(b)(2)~~]

(3) Distributors. Fees for certification or renewal of a certification for each distribution facility are based on the following schedule:

(A) broker/trader food products: $100;

(B) broker/trader feed products: $100;

(C) broker/trader fiber products: $100;

(D) warehousing/storage of food products: $150;

(E) warehousing/storage of feed products: $150;

(F) warehousing/storage/textile converter (cut & sew) of fiber products: $150;

(G) packing/grading/sizing of food products: $150; and

(H) packing/grading/sizing of feed products: $150.
[~~Figure: 4 TAC §18.5(b)(3)~~]

(4)-(5) (No change.)

(c) (No change.)

[~~(d) A producer, processor, distributor or retailer who fails to submit a renewal application and prescribed fees by the expiration date of:~~]

[~~(1) at least 91 but less than 180 days, shall be required to complete a new application including all prescribed supporting documentation and will not require an on-site inspection;~~]

[~~(2) at least 180 but less than 365 days, shall be required to complete a new application including any prescribed supporting documentation and undergo an on-site inspection.~~]

[~~(e) The fees provided in this section are applicable to the extent that they do not conflict with Chapter 2, subchapter B of this title (relating to Consolidated Licenses).~~]

§18.6. Logos[~~, Use of Logos, Approval of Printers, Drugs and Medicinal Claims,~~] and Labeling [~~of Nonprocessed and Processed Food or Fiber~~].

(a) (No change.)

(b) Use of logos.

(1) Use of certified organically produced logo. The Texas Department of Agriculture Certified Organically Produced logo and the phrase "Texas Department of Agriculture Certified Organically Produced" shall be applied or used to refer only to food or fiber produced on land or production units that the department has certified under this chapter.

(2) Use of transitional logo. The Texas Department of Agriculture Transitional-Organic Certification Pending logo shall be applied or used to refer to food or fiber produced on land or production units that the department classifies as in transition to organic certification under this chapter.

(3) Other use of logos. A person who is certified under this chapter may use department logos as provided by this chapter.

(A)-(B) (No change.)

(C) A person certified by the department under this chapter may use the Texas Department of Agriculture Certified Organically Produced or Transitional-Organic Certification Pending logo, whichever is applicable, on containers, labels, tags, signs, stickers, decals, or other packaging, promotional, or information materials, subject to the conditions specified under this chapter.

[~~(D) A certified retailer or distributor may purchase such materials (except pressure-sensitive labels) only from an approved printer.~~]

[~~(E) A certified producer, processor, or packer may purchase pressure-sensitive labels or packaging materials bearing a department logo only from an approved printer.~~]

(D) [~~(F)~~] No hand-drawn department logo shall be used.

(4) (No change.)

[~~(c) Approval of printers. The department shall approve printers to manufacture signs, price cards, shelf talkers, pressure-sensitive labels, and other labeling or packaging materials bearing a department logo and shall maintain a list of approved printers.~~]

[~~(1) The department shall furnish approved printers with a list of certified producers, processors, distributors and retailers.~~]

[~~(2) Approved printers may sell materials bearing a department logo only to persons on this list.~~]

[~~(3) An approved printer shall maintain records of purchasers, quantities, types of materials, and dates of sale of all materials bearing a department logo and make these records available to the department upon request.~~]

(c) [~~(d)~~] Drugs and medicinal claims. The department, or an organic certifying agent, shall not certify drugs or drug ingredients under these rules.

(1) No person shall use a Texas Department of Agriculture Certified Organically Produced or Transitional-Organic Certification Pending logo in connection with, nor represent as certified by the department or an organic certifying agent, any product or any ingredient of a product that is regulated as a drug or that has been determined by a state or federal agency of competent jurisdiction to be subject to regulation as a drug.

(2) No person shall use a department logo or represent any product or ingredient as certified by the department or an organic certifying agent, in an advertisement (including, but not limited to, a printed or broadcast advertisement, advertorial, flier, point-of-purchase material, signage, or other printed material) that makes medicinal claims.

(d) [~~(e)~~] Labeling of nonprocessed food or fiber. Certified food or fiber may be labeled using:

(1) the applicable logo applied to food or fiber certified in-state by a producer, processor, or packer certified under this chapter, or the logo of an organic certifying agent (if approved or made available by the organic certifying agent);and/or

(2) a price card displaying a printed department logo or logo of an organic certifying agent. [~~; or~~]

[~~(3) both the applicable logo set forth in paragraph (1) of this subsection and the price card set forth in paragraph (2) of this subsection.~~]

(e) [~~(f)~~] Labeling of processed food or fiber.

(1) Processed food or fiber products which contain department-certified organically produced ingredients, are processed under this chapter, and contain no prohibited ingredients, may include the term "Organic" and the Texas Department of Agriculture "Certified Organically Produced" logo on the principal display panel.

(2) Processed food or fiber products which contain department certified organically produced ingredients, but include additional ingredients, additives, or processing aids, may state "the 'certified ingredient' in this product is organically produced and processed to Texas Organic Standards & Cert. Reg., 4 TAC, Ch. 18," and may include the "Certified Organically Produced" logo in an area on the packaging other than the primary display panel. The organic ingredient(s) and their total percentage shall be listed in the information panel and be identified as "organic."

(3) Processed food or fiber products produced under this chapter as transitional, but including [~~include~~] additional ingredients, additives, or processing aids, may state "the 'certified ingredient' in this product is produced and processed to Texas Organic Standards & Cert. Reg., 4 TAC, Ch. 18, and is Transitional-Organic Certification Pending," and may include the "Transitional-Organic Certification Pending" logo in an area on the packaging other than the primary display panel. The organic ingredient(s) and their total percentage shall be listed in the information panel and be identified as "transitional."

(4) Processed food or fiber products that meet the requirements for a certified organic product or containing certified organically produced ingredients, which are certified by a single organic certifying agent, and are processed under this chapter, may use the logo (if approved or made available by the organic certifying agent) and/or the name of the applicable organic certifying agent and the statement "processed to Texas Organic Standards & Cert., 4 TAC, Ch. 18." on the primary display or information panel as allowed under this chapter and the OFPA.

(5) Processed food or fiber products that meet the requirements for a certified organic product or containing certified organically produced ingredients, which are certified by multiple organic certifying agents, and are processed under this chapter, may use the term "Third-Party Certified" and the statement "processed to Texas Organic Standards & Cert., 4 TAC, Ch. 18." on the primary display or information panel as allowed under this chapter and the OFPA.

(6) The identity of the certifying agent, including the name and address must be listed immediately adjacent to the information identifying the manufacturer on the packaging or the label.

§18.7. Recordkeeping and Auditing by the Department.

(a) (No change.)

(b) Auditing.

(1) The department may conduct or provide for audits of all documents that it uses to verify that certified products meet organic standards whether certified under this chapter , by the department, or by an organic certifying agent.

(2)-(3) (No change.)

§18.8. Department Regulatory Authority.

(a) Denial, suspension, or revocation of organic certification or organic certifying agent registration [~~accreditation~~].

(1) The department may deny, suspend, or revoke a certification of a producer, processor, distributor, or retailer or a certificate of registration [~~accreditation~~] issued to an organic certifying agent under this chapter if the person:

(A)-(D) (No change.)

(E) has previously had a certification or registration [~~accreditation~~] revoked under this chapter.

(2) Proceedings for the revocation, denial, or suspension of certification or registration shall be conducted in the manner provided for contested cases by the Texas Administrative Procedure Act, the Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Procedures), where applicable, and Title 1, Texas Administrative Code, Chapter 155 .

(3) Revocation, denial, or suspension of a certification by an organic certifying agent shall be subject to review by the department under the procedures provided for contested cases by the Texas Administrative Procedure Act, the Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Procedures), where applicable, and Title 1, Texas Administrative Code, Chapter 155.

(b) Stop-sale order.

(1) If food or fiber is being sold in violation of this chapter or a rule adopted under this chapter, the department may issue a written order to stop the sale of that item of food or fiber by a person in control of the item. The person named in the order may not sell the item as organic or transitional until:

(A) (No change.)

(B) the department determines that the sale of the item is in compliance with this chapter [~~and rules adopted under the Code, Chapter 18~~].

(2) The person named in the order may bring suit in a court in the county where the item is located. After a hearing, the court may permit the item to be sold if the court finds the item is not being sold in violation of this chapter [~~or a department rule adopted under the Code, Chapter 18~~].

(3) (No change.)

§18.9. Penalties.

(a) (No change.)

(b) Civil penalty; injunction.

(1) A person who violates this chapter [~~or a rule adopted under the Code, Chapter 18,~~] is liable to the state for a civil penalty not to exceed $500 for each violation. Each day a violation continues is a separate violation for purposes of a civil penalty assessment.

(2)-(3) (No change.)

(4) The department is entitled to appropriate injunctive relief to prevent or abate a violation of this chapter [~~or a rule adopted under the Code, Chapter 18~~]. On request of the department, the attorney general or the county or district attorney of the county in which the alleged violation is threatened or occurring shall file suit for the injunctive relief. Venue is in the county in which the alleged violation is threatened or is occurring.

(5) The civil penalty of an injunction is applicable only if the department chooses to seek a civil remedy as opposed to a criminal penalty under this section [~~the penalties section of this chapter~~].

§18.10. Pesticide Drift and Emergency Spray or Pest Management Programs.

(a) Pesticide drift policy.

(1) (No Change)

(2) If the pesticide residue level exceeds the residue level allowed under the OFPA or the tolerance established in §18.11(b)(3) of this title (relating to Fertility, Water Quality and Residue Testing), the crop shall not be sold as "Organically Produced" or "Transitional-Organic Certification Pending."

(3) (No change.)

(b) Emergency spray or pest management programs.

(1) (No change.)

(2) The department shall provide the applicable officers and agents of federal, state, or local emergency spray programs or pest management programs with a list [~~information on the location~~] of certified organic and transitional producers [~~farms or field units~~] in each emergency spray or pest management zone.

(3) (No change.)

§18.11. Fertility, Water Quality[~~,~~] and Residue Testing.

(a) Testing and monitoring.

(1)-(2) (No change.)

(3) An applicant for certification shall present water quality test results (if irrigated) for each source of water supplied to each field or greenhouse unit to be certified initially and every third year thereafter.

(A) In irrigated crop management and livestock operations, an initial application for certification shall include a basic water [~~irrigability~~] analysis including pH, potability, water quality, salinization, etc.

(B) (No change.)

(b) Residue testing.

(1)-(2) (No change.)

(3) Products or crops that are contaminated with toxic, synthetic or other prohibited substances in excess of 5% of the Environmental Protection Agency tolerance or Food and Drug Administration action level shall not be represented or sold as organic or transitional.

§18.12. Materials and Materials List.

(a) For the purpose of this chapter, materials for crop and livestock production, processing, and handling are classified as follows:

(1) (No change.)

(2) Allowed with Restrictions. These materials may be used upon a demonstrated need, if a farm plan, use report, or other written plan [~~is~~] submitted by a certified person or an applicant for certification shows that these restricted materials will be discontinued over time, or if no alternative materials are available. Materials allowed with restrictions may vary according to regional production practices, specific processing, or handling needs.

(3) (No change.)

(b) The department shall publish in the *Texas Register*, a listing of materials categorized as allowed, allowed with restrictions, and prohibited. This list shall be known as the Texas Department of [~~Of~~] Agriculture Organic Certification and [~~And~~] Standards Materials List (TDA Materials List).

(c) Manufacturers of materials other than those listed by name in the TDA Materials List or the National List, for production, processing, or handling of certified organic food or fiber may submit information on the ingredients, manufacturing processes, and other supporting documents, as directed by the department for categorization as allowed, allowed with restrictions, or prohibited. Materials categorized as prohibited shall not be used for production, processing, or handling of organic products. [~~Unless properly registered, pesticides requiring registration with the responsible state and federal agencies including the Environmental Protection Agency (EPA) and the department shall not be used.~~]

(d) Unless properly registered, pesticides requiring registration with the responsible state and federal agencies including the Environmental Protection Agency (EPA) and the department shall not be used. [~~Manufacturers of materials other than those listed by name in the TDA Materials List or the National List, for production, processing, or handling of certified food or fiber shall submit information on the ingredients, manufacturing processes, and other supporting documents, as required by the department for categorization as allowed, allowed with restrictions, or prohibited. Materials determined by the department as prohibited shall not be used for production, processing, or handling.~~]

(e) Materials labeled as fertilizers, soil amendments, or affecting plant growth must be approved or exempted by the Texas Feed and Fertilizer Control Service, P.O. Drawer 3160, College Station, Texas 77841, as required by Texas Agriculture Code, Chapter 63.

§18.13. Producers.

(a) Verification Documents. Verification documents consist of application forms, past three-year production and material input history, including Farm Service Agency (FSA) [~~ASCS and SCS~~] records, farm plans, inspection reports, laboratory analyses, production practices, harvest and handling plans, showing the path taken by [~~an~~] organic food or fiber products through production, post-harvest handling, and distribution.

(b) Farm and field certification.

(1)-(5) (No change.)

(6) An applicant for initial certification or renewal of certification shall submit to the department or to a registered [~~an accredited~~] organic certifying agent, in prescribed forms, a detailed farm plan including:

(A)-(G) (No change.)

(7)-(8) (No change.)

(c) (No change.)

(d) Soil management.

(1)-(2) (No change.)

(3) Manuring.

(A) Raw manure may be applied to green manure crops; perennial crops; and crops not for human consumption [~~;or crops for human consumption, if the crop is harvested 60 days or more following the most recent application~~].

(B) Raw manure may not be applied to crops for human consumption within 90 days of harvest, or within 120 days of harvest for crops likely to be eaten raw.

(C) [~~(B)~~] Raw manure may not be applied to any crop in a way that significantly contributes to water contamination by nitrates or bacteria.

(D) [~~(C)~~] Use of manure composted either by aerobic digestion (high heat) or controlled fermentation (low heat) is allowed.

(E) [~~(D)~~] Use of liquid manure slurry is allowed if the slurry is aerated from a source that adds carbon to the slurry.

(e) (No change.)

(f) Crop Management.

(1) (No change.)

(2) Pest management.

(A) (No change.)

(B) Disease management.

(i) A producer shall plan production schedules, crop selection, location and sizing of plantings, and soil management [~~soil- management~~] practices to prevent diseases.

(ii)-(v) (No change.)

(C) Insect management.

(i) A producer shall plan production schedules, crop selection, location and sizing of plantings, and soil management [~~soil-management~~] practices to prevent insect infestations.

(ii)-(vii) (No change.)

(viii) A producer may use microbial diseases including viral, bacterial, and entomopathic fungal diseases such as *Bacillus thuringiensis* (Bt),*Bacillus* spp., *Beauveria* [~~Beuvaria~~] spp., *Nosema* spp., and Nuclear Polyhedrosis Virus (NPV).

(ix) (No change.)

(D) Management of rodents, gophers, deer, and other varmints. A producer may use for control or as a repellent:

(i) live traps, physical barriers, sound, electrical devices, shooting, or materials listed as allowed in the TDA Materials [~~Material~~] List or the National list; or

(ii) (No change.)

(3) Growth regulators, growth promoters, activators, and inoculants.

(A) A producer may use natural enzymes, herbal preparations, biodynamic preparations, rhizobial inoculants, free-living nitrogen-fixing microbial cultures, blue-green algae, cellulolytic bacteria, natural rooting hormones, adjuvants or wetting agents for foliar applications; and materials listed as allowed in the TDA Materials [~~Material~~] List; or

(B) A producer may use materials listed as allowed with restrictions in the TDA Materials [~~Material~~] List if justified as a temporary measure in production of food or fiber.

(g) Propagation materials.

(1) A producer shall only use propagation materials that are certified organically produced unless the producer provides verification that they were grown with accepted organic practices and materials as defined under this chapter.

(A) An exception to the requirement for certified organic propagation materials may be allowed only if:

(i) organically produced propagation materials are not available;

(ii) the producer documents efforts to obtain organic propagation materials; and

(iii) the producer develops a plan to obtain organic propagation materials for future crops.

(B) If conventional propagation materials must be used, those produced without pesticides shall be used in preference to those produced using pesticides.

(C) Annual transplants that have been treated with pesticides may not be used for organic production.

(2)-(5) (No change.)

(6) A producer may use commercial soil mixes which contain materials listed as allowed in the TDA Materials [~~Material~~] List or the National List.

(7) (No change.).

(8) Seeds and beans used for producing edible sprouts must be 100% certified organically produced.

(h) Recordkeeping.

[~~(1)~~] Producers shall maintain complete, auditable records including:

(1) [~~(A)~~] general crop production practices;

(2) [~~(B)~~] crops produced, harvesting and handling methods and records, including harvest dates and yields, product inventory and sales;

(3) [~~(C)~~] records of use of materials listed as allowed or allowed with restrictions (including a material use report) in the TDA Materials [~~Material~~] List or the National List for Pest Management, Fertility and Soil Management, and production of propagation materials;

(4) [~~(D)~~] material use reports for manure, compost, or soil mixes used in transplant, field, or greenhouse production;

(5) [~~(E)~~] material use reports for propagation materials used in transplants, field, or greenhouse production; and

(6) [~~(F)~~] material use reports which shall be maintained and submitted to the department or the organic certifying agent upon request for verification and approval, and shall include information (if applicable) on:

(A) [~~(i)~~] type of material applied;

(B) [~~(ii)~~] source of material;

(C) [~~(iii)~~] label and manufacturer information;

(D) [~~(iv)~~] date and rate of application;

(E) [~~(v)~~] method and type of equipment used;

(F) [~~(vi)~~] type of crop or propagation material applied;

(G) [~~(vii~~] field or greenhouse numbers as specified in farm maps to which material was applied; and

(H) [~~(viii)~~] justification of need and plan to discontinue restricted practice or application over time; and

(7) [~~(G)~~] records of application of natural fruit waxes, including information on type material applied, type of crop, and records of numbers of boxes or lots treated.

§18.14. Retailers.

(a)-(d) (No change.)

(e) Retailers shall display certification labeling as follows: [~~.~~]

(1)-(2) (No change.)

(3) Products bearing a department or other certification agency logo shall be easily identifiable to consumers and shall be clearly distinguishable from similar products.

(f) (No change.)

§18.15. Distributors.

(a)-(d) (No change.)

(e) The following shall apply to post-harvest handling.

(1) A distributor shall not:

(A) add any synthetic ingredient which is prohibited under these rules including, but not limited to fumigants, sprouting inhibitors, ripeners; or growth regulators, preservatives, coloring agents, [~~ionizing radiation,~~] or synthetic waxes or oils;

(B)-(F) (No change.)

(G) apply any material listed as allowed with restrictions on the TDA Materials [~~Material~~] List or the National List to any certified product for immediate control of pests or food spoilage without justification of need;

(H) apply any prohibited disinfectants to storage containers and handling equipment without prior approval from the department or an organic certifying agent, including a specified waiting period that must expire before the handler uses the container or equipment for certified food or fiber; [~~or~~]

(I) use in such products, water that does not meet all Safe Drinking Water Act requirements (42 United States Code §300f, et seq.) ; or [~~.~~]

(J) use ionizing radiation to preserve, sterilize, extend shelf life, or control pests in organic products. X-rays may be used to detect foreign objects in packaged products.

(2) (No change.)

(f) (No change.)

§18.16. Processors.

(a)-(e) (No Change.)

(f) Restrictions listed in §18.15(e)(1) of this title (relating to Distributors), also apply to processors.

(g) [~~(f)~~] The following percentage of ingredients are required.

(1) Processed products may not be labeled as "organic" on the principal display panel, unless they contain at least 95% certified organically produced ingredients by weight, excluding water and salt from the calculation, and do not contain any prohibited ingredients or additives.

(2) Processed products which contain at least 50% certified ingredients by weight, excluding water and salt, may state or label the applicable certification on the principal display panel,

only for the limited purpose of identifying the organically produced ingredients.

(3) Processed products that contain less than 50% certified ingredients by weight, excluding water and salt, may state the applicable certification in the ingredient information panel, including the percentage of each ingredient certified.

[~~(4) Seeds and beans used for producing edible sprouts must be 100% certified organically produced. Sprouts shall not be produced from non-certified seed after 180 days from the effective date of this chapter.~~]

(h) [~~(g)~~] Processors shall maintain complete, auditable records for two years including:

(1) records of all organic or transitional products, including dates of purchases, sales, billings, receipts, invoices, and volumes of products purchased; and

(2) proof of certification of all products labeled as organic or transitional and record of the applicable organic certifying agent.

§18.17. Harvest, Handling, and Ginning (Processing) of Cotton.

[~~(a) To ensure that organically produced fiber and by-products are certifiable, producers, distributors, and processors shall harvest, transport, store, and process organically produced fiber in a manner to ensure segregation and prevention from contamination. Methods and materials in manufacturing of organically produced cotton products must be low impact, energy conserving, or environmentally sound processing methods.~~]

(a) [~~(b)~~] Harvesting [~~and handling~~].

(1) Harvest aids.

(A) A producer shall use:

(i) seasonal weather conditions such as frost and freeze; and/or

(ii) upon approval by the department or an organic certifying agent, use other materials listed in the TDA Materials List or the National List or other prescribed methods.

(B) A producer may use soaps, detergents or natural plant or vegetable-based oils listed in the TDA Materials List or the National List as a as a harvest aid for spindle picking methods.

(2) Equipment.

(A) Cotton harvesting equipment, module units or containers compressing or holding cotton fiber, and module trucks or trailers shall be physically or mechanically cleaned to remove any lint or trash from previous harvesting.

(B) An on-site inspection of all harvest equipment and/or authorization by the department or an organic certifying agent shall be completed [~~for each field~~] prior to harvest.

(b) [~~(3)~~] Handling.

(1) [~~(A)~~] Modules or containers of certified cotton shall be segregated in an area specified on each farm site by the department or an organic certifying agent. The department or an organic certifying agent shall be notified prior to relocation of any module or container of certified cotton.

(2) [~~(B)~~] Modules or containers of cotton fiber shall be segregated in an area specified for each processing site by the department or an organic certifying agent. The department or an organic certifying agent shall be notified prior to relocation or processing of certified cotton.

(3) [~~(C)~~] Bale units of processed cotton fiber or containers or units of by-products shall be segregated in an area specified by the department or an organic certifying agent at each certified processing facility (gin) and/or each certified distributing (warehouse) location.

(4) [~~(D)~~] Distributor (warehouse) locations shall be inspected and/or audited for records of certified bale units or by-products by the department or an organic certifying agent prior to shipment.

(c) Ginning [~~Processing~~] (processing) [~~(ginning)~~].

(1) Ginning may include module feeding, suction feeding, conveying, drying, pre-cleaning, ginning, lint cleaning, baling and bagging, bale conveying, mote conveying, pressing and bagging, gin trash conveying and storage, and seed conveying and storage.

(2)-(5) (No change.)

[~~(d) Processing of organically-produced fibers into textile materials.~~]

[~~(1) Processing of cotton fiber into non-wovens including filling, stuffing, batting, felting, health and beauty aid materials, interfacing, and other types. Processing may include:~~]

[~~(A) fiber opening, conveying, feeding, blending, and cleaning;~~]

[~~(B) combing, garneting, or compacting;~~]

[~~(C) drying or bonding; or~~]

[~~(D) baling, wrapping or packaging.~~]

[~~(2) All equipment used in the processes shall be physically or mechanically cleaned to remove any lint and/or a specified quantity of certified cotton, as it is being passed through each stage of processing, may be utilized to clean contact surfaces during each specific processing stage and to purge the equipment of any tufts of previously processed stock. Cleaning waste shall be discarded and may not be certified organic or transitional.~~]

[~~(A) Additional waste if segregated and prevented from contamination from other fiber and audited via lot, bin or weight, may be recycled or certified consistent with the certification of the raw cotton from which it was derived.~~]

[~~(B) Scouring of non-woven cotton fiber.~~]

[~~(i)~~] ~~A processor may use hot water; low impact and biodegradable anionic, cationic and non-ionic surfactants; citric or acetic acid; and protease, lipase, amylase and cellulase enzymes.~~]

[~~(ii)~~] ~~A processor shall not use hydrochloric or sulfuric acid as a processing ingredient.~~]

[~~(C) Bleaching, bio-polishing, color brightening, and softening.~~]

[~~(i)~~] ~~A processor may use:~~]

[~~(I)~~] ~~hot water; protease, lipase, amylase and cellulase enzymes; and citric acid or acetic acid; or~~]

[~~(II)~~] ~~soda ash; sodium silicate; caustic soda at a maximum concentration of 3% on weight of goods; and hydrogen peroxide at a maximum of 3% on weight of goods, if removed by a final enzymes and/or hot water and citric acid or acetic acid scour, so that no residual materials remain in the finished fabric.~~]

[~~(ii)~~] ~~A processor shall not use chlorine; sodium chlorite and sodium hypochlorite; optical brighteners and/or bluing;~~

or perborate bleaches including sodium perborate and sodium monopersulfate.]

[(D) Bonding non-wovens materials.]

[(i) A processor may use mechanical compaction, webbing, and entangling; stitching, knitting and wefting; hydroentaglement; or polyvinyl alcohol (PVA) as a bonding agent.]

[(ii) A processor shall not use adhesive or glue bonding agents; chemical solvent bonding; or synthetic polymer bonding.]

[(3) Processing knitted, woven or other fabric types.]

[(A) Processing may include the following:]

[(i) opening, laydown, cleaning, and blending to feed bale units into the processing system;]

[(ii) carding, drawing; and combing for the production of sliver from certified bale units;]

[(iii) roving, winding, ring spinning, open-end spinning, air jet spinning, plying, and wrapping for production of yarn from sliver;]

[(iv) creeling, warping, and slashing of yarn packages onto beams for woven fabrics;]

[(v) weaving or knitting of fabrics;]

[(vi) compaction, Sanforizing, and finishing greige good; or]

[(vii) dyeing.]

[(B) All equipment used in the processes listed above shall be physically or mechanically cleaned to remove any lint and/or a specified quantity of certified cotton, as it is being passed through each stage of processing, may be utilized to clean contact surfaces during each specific processing stage and to purge the equipment of any tufts of previously processed stock. Cleaning waste shall be discarded and may not be certified organic or transitional.]

[(C) Additional waste including raw stock cotton, carding, drawing, combing noils, sliver, roving, yarn, pneumafil, yarn, beam, or greige good fabric, if segregated and prevented from contamination from other fiber and volume recorded via lot, bin or weight, may be certified consistent with the certification of the raw cotton from which it was derived.]

[(D) All packages including sliver, roving, yarn warp beams, and bolts of finished fabric shall be clearly marked during each stage of processing consistent with the certification of the raw cotton from which it was derived, including records via individual package numbers or lots, beam numbers or lots, or bolt numbers or lots, and volume or weight of each package or unit of waste stock to be certified.]

[(E) Treatment of cotton for opening, laydown, cleaning, and blending. A processor may use water or other humidity control methods to enhance feeding; enzymes as a topical treatment to enhance processing due to excessive sugar or honeydew content; or natural vegetable oils, plant oils, and natural waxes as a topical treatment to enhance ease of processing of weathered cotton.]

[(F) Preparation and conditioning of yarn.]

[(i) A processor may use:]

[(I) as a processing ingredient, beeswax or tallow wax;]

[(II) as a processing aid, paraffin-based wax, if removed with allowed scouring materials later in the manufacturing process; or]

[(III) as a processing aid, soluble acid fugitive tint to identify individual yarn packages, if removed with allowed scouring materials later in the manufacturing process.]

[(ii) A processor shall not use silicone resin or other synthetic based resins.]

[(G) Preparation of beamed yarns for woven fabrics.]

[(i) A processor may use:]

[(I) starches derived from natural sources, including, corn starch and potato starch; hydrogenated tallow; or natural waxes as a processing ingredient for sizing;]

[(II) polyvinyl alcohol (PVA); gelatin; waxes; and glycerin as a processing aid, if removed by an allowed final scour which may include hot water; enzymes; and citric acid or acetic acid, so that no residual materials remain in the finished fabric.]

[(ii) A processor shall not use synthetic resins, synthetic gums, or synthetic oils.]

[(H) Desizing to remove processing aids in beamed yarns.]

[(i) A processor may use hot water; citric acid or acetic acid; salt; protease, lipase, amylase and cellulase enzymes; low impact and biodegradable anionic, cationic, and non-ionic surfactants; sodium gluconate; or other organic chelating agents.]

[(ii) A processor shall not use hydrochloric or sulfuric acid.]

[(I) Preparation of warp beam yarns or package yarns for dyeing.]

[(i) a processor may use:]

[(I) as a processing aid, hot water; citric acid; acetic acid; low impact and biodegradable anionic, cationic and non-ionic surfactants; and soda ash; or]

[(II) sodium silicate; caustic soda at a maximum concentration of 3% on weight of goods; hydrogen peroxide at a maximum of 3% on weight of goods; as a processing aid, if removed by a final enzyme and/or hot water and citric or acetic acid scour, so that no residual materials remain in the finished fabric.]

[(ii) A processor shall not use chlorine, sodium chlorite and sodium hypochlorite, optical brighteners and/or bluing, perborate bleaches including sodium perborate and sodium monopersulfate, or heavy metals or mordants.]

[(J) Bleaching, bio-polishing, color brightening, and softening of fabrics for final finishing of greige good fabric or for fabric or garment dyeing.]

[(i) A processor may use:]

[(I) protease, lipase, amylase and cellulase enzymes; hot water; and citric or acetic acid; or]

[(II) soda ash; sodium silicate; caustic soda at a maximum concentration of 3% on weight of goods; and hydrogen peroxide at a maximum of 3% on weight of goods as a processing aid, if removed by a final enzymes and/or hot water and citric or acetic acid scour, so that no residual materials remain in the finished fabric.]

[~~(K) Mechanical finishing of knit and woven fabrics. A processor may use calendering, tentering, or Sanforizing for final finishing of greige good fabrics or for preparation for fabric or garment dyeing, or mechanical compaction and/or relaxation; and heat shrinkage.~~]

[~~(L) Finishing knit or woven greige good fabric or fabric for garment dyeing.~~]

[~~(i)~~ ~~A processor may use:~~]

[~~(I)~~ ~~as a final finishing ingredient, enzymes as bio-polishes or finishes, natural oils including coconut oil, banana oil, pine (tall) oil, or other natural plant or animal oils, natural fatty acids including oleic acid and stearic acid, other plant or animal acids, or tallow; and corn or potato starch; or~~]

[~~(II)~~ ~~cationic softeners, as a finishing aid in Sanforization or finishing, or polyvinyl alcohol (PVA) in glazing or beetling finishing.~~]

[~~(ii)~~ ~~A processor shall not to use as a processing ingredient formaldehyde and formaldehyde-urea resins, silicone or silicone-based finishes, synthetic resins or resin-based finishes, synthetic gums or gum-based finishes, synthetic oils, or synthetic waxes.~~]

[~~(M) Surface finishing of knit or woven fabrics. A processor may use napping, sueding, or brushing.~~]

[~~(N) Dyeing of package yarns, beams yarns, or fabric or garment dyeing. A processor may use natural, low-energy, non-metal, reactive dyes, bi-functional dyes, or low impact dyes.~~]

§18.18. Processing of Organically Produced Fibers into Textile Products.

(a) General Fiber Processing Principles. To ensure that organically produced fiber and by-products are certifiable, producers, distributors, and processors shall harvest, transport, store, and process organically produced fiber in a manner to ensure segregation and prevention from contamination. Methods and materials used in manufacturing of organically produced fiber products should be low impact, energy conserving, or environmentally sound processing methods.

(b) Materials used in processing. Materials used in organic fiber processing, including scouring, bleaching, biopolishing, color brightening, softening, bonding, conditioning, desizing, finishing and dyeing must be listed as Allowed or Allowed with Restrictions on the TDA Materials List or the National List.

(c) Fiber processing methods.

(1) Methods used to produce non-wovens may include:

(A) fiber opening, conveying, feeding, blending, and cleaning;

(B) combing, garneting, or compacting;

(C) drying;

(D) bonding, using:

(i) mechanical compaction, webbing, and entangling;

(ii) stitching, knitting and wefting; or

(iii) hydroentanglement; and

(E) bagging, baling, wrapping or packaging.

(2) Methods used to produce knitted, woven, or other fabric types may include:

(A) opening, laydown, cleaning, and blending to feed bale or fiber units into the processing system;

(B) carding, hackling, drawing, lapping, gilling, and combing for the production of sliver from certified bale or fiber units;

(C) roving, winding, ring spinning, open-end spinning, woolen spinning, semi-worsted or worsted spinning, air jet spinning, plying, and wrapping for production of yarn from sliver;

(D) creeling, warping, or slashing of yarn packages onto beams for woven fabrics;

(E) weaving or knitting of fabrics;

(F) compaction, Sanforizing, and finishing greige good; or

(G) dyeing.

(d) Cleaning equipment. All equipment shall be physically or mechanically cleaned to remove any fiber or lint and/or a specified quantity of certified fiber may be passed through each stage of processing to clean contact surfaces during each specific processing stage and to purge equipment of any tufts of previously processed stock.

(e) Waste fiber.

(1) Cleaning waste used to purge equipment may not be certified organic or transitional.

(2) Additional waste including raw stock fiber, carding, drawing, combing noils, sliver, roving, pneumafil, yarn, beam, or greige good fabric, if segregated and prevented from contamination from other fiber, volume recorded and audited via lot, bin or weight, may be recycled or certified consistent with the certification of the raw fiber from which it was derived.

(f) Recordkeeping and labeling of waste fiber. All packages including sliver, roving, yarn warp beam, and bolts of finished fabric shall be clearly marked during each stage of processing consistent with the certification of the raw fiber from which it was derived, including records via individual package numbers or lots, beam numbers or lots, or bolt numbers or lots, and volume or weight of each package or unit of waste stock to be certified.

§18.19. Production of Livestock, Livestock Fiber, and Livestock Products.

(a) Livestock sourcing.

(1) Livestock (except slaughter stock) should be purchased from organic sources if possible, but may be purchased from any source and shall be maintained in accordance with organic feed and health care standards under this section from the time of arrival on a certified farm.

(2) Slaughter stock shall be progeny of certified organic breeder stock and shall be maintained in accordance with organic feed and health care standards under this section from birth through slaughter.

(3) For a one-time transition to organic production, slaughter animals may be maintained in accordance with organic feed standards under this section for a minimum of 12 months. This stock will be considered "Transitional-Organic Certification Pending".

(4) Restrictions.

(A) Breeder stock must be maintained in accordance with this section during the last third of gestation, and thereafter as long as the animal is used to produce organic progeny.

(B) Poultry stock must be no more than one-day-old at purchase.

(C) Aquaculture stock (eggs, hatchlings, fingerlings) shall be purchased at the youngest available life stage.

(b) Livestock breeding.

(1) Breeding for the production of progeny sold as organically produced may include:

(A) natural service; and

(B) artificial insemination.

(2) Animals used for organic production may not be the result of genetic engineering or cloning.

(3) Progeny shall not be deliberately separated from female breeder stock sooner than the following minimums:

(A) beef cattle (calves)–three months;

(B) dairy cattle (calves)–12 to 24 hours;

(C) sheep (lambs) or goats (kids)–two months; and

(D) swine (piglets)–four weeks.

(c) Livestock feed standard.

(1) Feed fed to livestock shall be certified as organically produced, processed and handled under all requirements defined under this chapter.

(2) Farms or field units on which livestock are fed or reared shall be certified as Transitional or Organic.

(3) Feed supplements and additives that are agricultural products shall be certified as organically produced.

(4) Feed supplements and additives that are not agricultural products (such as fish meal or oystershell), or that are not available as organic may be allowed if included on the TDA Materials List.

(5) Additional feeding requirements shall include the following.

(A) Breeder stock shall be fed 100% certified organically produced feed and feed supplements during the last third of gestation and thereafter as long as the animal is used to produce organic progeny.

(B) Slaughter stock shall be fed 100% certified organically produced feed from birth until slaughter.

(C) Dairy stock or replacement dairy stock shall be fed 100% certified organically produced feeds for not less than 12 months prior to the sale of milk or milk products labeled as organically produced from such stock.

(D) Dairy calves, orphans, and young animals requiring milk, that due to justifiable reasons must be separated from certified organic female breeder stock prior to the minimums stipulated in paragraph (b)(2) of this section, may be provided organic whole milk and colostrum supplements not containing medicated additives. These animals may be marketed as organically produced slaughter stock if records indicate that 100% certified organically produced feed and feed supplements were the only products consumed by the animal for a period of 150 days after termination of providing whole milk or colostrum supplements.

(E) Poultry stock, with the exception of day-old poultry, shall be fed 100% certified organically produced feed.

(F) Aquaculture stock shall be fed 100% organically produced feed from the time they arrive at the organic farm.

(G) Fiber animal stock shall be fed 100% certified organically produced feed for not less than 12 months prior to the sale of fiber labeled as organically produced from such stock.

(6) A livestock producer shall feed only certified organically produced feeds which do not contain:

(A) hormones, antibiotics or other prohibited growth promoters;

(B) plastic pellets for roughage;

(C) manure refeeding;

(D) mammalian or poultry animal byproducts;

(E) urea; or

(F) materials listed as prohibited in the TDA Materials List or in the National List.

(7) Feed additives fed to livestock shall meet the following requirements.

(A) Natural feed additives may be from any source provided the additive is not categorized as prohibited in the TDA Materials List or in the National List.

(B) Synthetic feed additives may be used only if they are categorized as allowed or allowed with restrictions in the TDA Materials List or in the National List.

(C) Synthetic vitamin and mineral supplements are permitted only in documented cases of nutritional deficiency if a natural source of the supplement is not available.

(8) "Feed availability emergency" is a temporary shortage of certified organically produced feed due to circumstances beyond the control of the producer.

(A) Emergency use of non-organically certified feeds may be approved by the department or a certifying agent as a temporary exemption provided the department or the certifying agent is immediately notified of the emergency. The department or the certifying agent shall establish a maximum time period during which the non-organically certified feed may be used, and shall require documentation of efforts to locate suitable feed.

(B) When an exemption is granted, the producer shall use the following in order of priority:

(i) feed certified as transitional-organic certification pending; or

(ii) non-certified feeds documented to be produced without prohibited materials; or

(iii) under exceptional circumstances, conventional feed may be allowed as a last resort. In addition to the provisions outlined in subparagraph (8)(A) of this subsection, the department or the certifying agent shall specify a waiting period of a minimum of 90 days prior to slaughter or production of food products after organic feed is resumed, and may require residue testing of the feed, meat or food product.

(C) If an exemption is not granted and conventional feed is used, the animal is considered to be conventionally produced.

(d) Health care.

(1) A producer shall not use synthetic growth promoters or hormones, whether implanted, ingested, or injected, including antibiotics and trace elements used to stimulate growth or milk production.

(2) For parasite management a producer shall use:

(A) quarantine and fecal exams for all incoming livestock;

(B) periodic fecal exams and culling of seriously infested individuals;

(C) adequate pasture rotation and pasture management;

(D) maintaining clean facilities and proper manure management;

(E) vector and intermediate host control using biological controls; and

(F) parasite, vector or intermediate host control using materials categorized as allowed or allowed with restrictions in the TDA Materials List or in the National List.

(3) A producer shall not use synthetic internal parasiticides in the production of organic slaughter stock.

(4) On animals other than slaughter stock a producer may use synthetic internal parasiticides listed as allowed with restrictions in the TDA Materials List. All parasite management techniques listed paragraph (2) of this subsection must be employed before the use of any synthetic internal parasiticides is allowed.

(5) Materials listed as allowed or allowed with restrictions in the TDA Materials List or in National List may be applied, if registered for use as an external parasiticide, for immediate control of external parasites.

(6) A producer shall not use antibiotics or synthetic medication other than vaccinations and parasiticides allowed under paragraphs (4) and (5) of this subsection in the production of organic livestock.

(7) If an animal becomes ill and treatment with prohibited materials is necessary to prevent suffering or death of the animal, the producer must provide appropriate treatment and divert the animal into a conventional herd or market. Failure to provide veterinary care to sick animals in order to maintain organic certification is grounds for revocation of certification.

(8) Animals other than slaughter stock may qualify for recertification after completion of the FDA withdrawal period if they meet requirements listed under subsection (a) of this section. Dairy stock, fiber animal stock, and laying hens must be raised under organic standards for a minimum of 12 months after completing the required withdrawal period prior to selling milk, fiber, or eggs as organic.

(9) A producer may vaccinate stock for endemic diseases including, but not limited to, those required by state or federal law.

(10) The following materials and practices are prohibited:

(A) genetically modified vaccines;

(B) chemically induced or forced molting of laying hens;

(C) debeaking of poultry; and

(D) artificial lighting used to extend daylength beyond 16 hours per day to stimulate egg production.

(e) Testing. The department or an organic certifying agent may require a producer or processor to provide test results from a qualified laboratory including, but not limited to, tests to detect antibiotics, growth hormones and parasiticides.

(f) Living conditions and shelter.

(1) Livestock shall be provided with living conditions that minimize stress and are suited to their individual and collective needs including but not limited to:

(A) appropriately constructed and managed pens, housing or shelter systems which naturally or physically allow fresh air and daylight;

(B) under normal grazing conditions, free access to pastures, outside runs or adequate mobility enabling the animal to sit, stand, turn around, lie down, or move about freely in a normal manner;

(C) limited periods of restrictive confinement only for farrowing (no more than seven days), breeding, health treatment, temporary feeding, or inclement weather; and

(D) clean and dry bedding appropriate to the husbandry system, provided that if the bedding is typically consumed by the livestock species, the consumption shall not violate feed standards set forth under this section.

(2) A producer shall not use:

(A) stacked or battery cage confinement;

(B) continued use of farrowing crates or boxes;

(C) physical constraints such as chaining (as in white veal production); or

(D) other confinement systems which do not allow for free movement and mobility.

(3) Proper sanitation and cleaning shall be maintained to control parasites and disease.

(4) Proper manure management and waste water management shall be maintained to reduce disease and parasite recycling.

(5) Materials categorized as prohibited may not be used for sanitation or pest control in production unit facilities.

(g) Recordkeeping.

(1) Records shall include source and, if applicable, verification of certification of all purchased livestock.

(2) An identification system shall be maintained which ensures the identity of organic livestock throughout the life cycle and may include but is not limited to:

(A) ear-tagging or individual marking; and

(B) tracking by flock or lot of poultry or aquaculture stock.

(3) For a farm or field unit to be certified under this chapter for livestock production, producers shall keep adequate farm records and maintain a detailed, verifiable audit trail so that each animal (or each flock or lot of poultry or aquaculture stock) can be traced back to the certified farm or production unit.

(4) Producers shall maintain accurate records pertaining to all feeds, feed supplements and additives, including:

(A) amounts and sources of all feeds, feed supplements and feed additives bought and fed; and

(B) verification of required certification of feed products.

(5) Records shall be maintained of all health care applications including:

(A) sources, labels and FDA recommended withdrawal information for all medications including, but not limited to, antibiotics, internal and external parasiticides, and vaccinations;

(B) records of applications including dates and rates of all materials administered for health care by individual, flock or lot of livestock; and

(C) required medical records of administration of antibiotics, internal and external parasiticides and vaccinations.

(6) Producers shall maintain all required testing results and/or reports.

(7) Producers shall maintain complete auditable records by weight or lot of all livestock, livestock products or by-products packaged or sold including, but not limited to, meat, milk, milk products, eggs or fiber.

(8) Dairy records must include:

(A) milk production records;

(B) date began organic feed;

(C) date bred/calved,; and

(D) beginning date and ending date of lactation.

(9) All records shall be maintained for a minimum of five years.

(h) Processing and handling.

(1) Processing and handling of livestock products shall be consistent with all processing and handling standards and materials defined under this chapter.

(2) Food produced under this section may not be processed using synthetic preservatives, coloring, flavoring, texturizers, emulsifiers or additives unless listed as allowed or allowed with restrictions in the TDA Materials List or in the National List.

(3) Food produced under this section may be processed using:

(A) appropriate bacterial cultures or fermentation systems;

(B) certified organically produced fruit, plant extracts, natural sweeteners, spices or other certified organically produced ingredients;

(C) sea salt or brine preparations; or

(D) freezing, drying, vacuum packing, heat processing, or wood smoking if the wood has not been treated with synthetic or prohibited materials.

(4) Certified organically produced milk shall be tested for bacteria and somatic cells.

(5) Certified organically produced meat shall not come in contact with non-organically produced meat.

(6) All slaughter or processing of livestock or agricultural products produced under this chapter shall be in accordance with federal and state health standards and requirements.

(7) Processing of organically produced or transitional animal fibers shall be in accordance to the rules established under §18.18 of this title (relating to Processing of Organically Produced Fibers Into Textile Products).

(i) Labeling. Labeling of livestock and livestock products shall be in accordance with the following rules established under this chapter if applied for, and approved by the United Stated Department of Agriculture (USDA)-Federal Safety Inspection Service (FSIS) or the Texas Department of Health (TDH).

(1) Products produced from livestock raised according to requirements specified in this section may be sold under a "Certified Organically Produced" primary display label that may contain the "Certified Organic Logo".

(2) Products produced from livestock which has been produced on a certified organic or certified transitional farm or field unit or has been fed less than 100% organic feed (except for an approved emergency feed exemption) may be sold under a "Transitional-Organic Certification Pending" principal display label and contain the Texas Department of Agriculture "Transitional-Organic Certification Logo". This includes livestock in the one time 12-month transition period to Organic Production.

(3) Products produced from livestock that has not been produced under the provisions of this title, or has not met the requirement for use of antibiotics or parasiticides cannot be sold as "Organic" or "Transitional".

(j) Use of additional labeling claims. This title does not preclude a producer or processor from applying for, or obtaining approval by the United States Department of Agriculture or the Texas Department of Health for the use of additional labeling claims including, but not limited to, natural or negative production claim labels.

§18.25. Expiration Provision.

Unless specifically acted upon by review and readoption in accordance with the Texas Government Code, Chapter 2001, subchapter B, §2001.039, all the sections in this chapter shall expire on December 1, 2003.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907954
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4075

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4 TAC §18.18

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §18.18 is proposed under the Texas Agriculture Code, §18.002, which provides the Department with the Authority to adopt rules necessary for the enforcement and administration of Chapter 18, subchapter A, concerning Organic Standards and Certification.

The Code sections which will be affected by the proposal are the Texas Agriculture Code, Chapter 18, and the Texas Agriculture Code, §12.002.

§18.18. Expiration Provision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907955
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4075

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Part 12. TEXAS FOREST SERVICE

Chapter 215. FOREST ZONE DETERMINATION PROCEDURE

4 TAC §§215.1, 215.5, 215.9, 215.13, 215.17, 215.21, 215.25, 215.35

The Texas Forest Service (the forest service) proposes new Chapter 215, §§215.1, 215.5, 215.9, 215.13, 215.17, 215.21, 215.25, and 215.35, concerning the rules and requirements on determining whether a timberland qualifies as forest zone where restricted-use appraisal applies for purpose of ad valorem taxation.

This rulemaking is to implement part of the Senate Bill 977, enacted by the 76th Legislation, 1999. The new sections are proposed to set out the criteria, application requirements, and procedures in forest zones determination by the forest service. The new sections serves to establish and communicate simple and effective rules and procedures for landowners desiring to receive local property tax incentive in exchange for accepting harvest restrictions to provide environmental benefits to the general public. These rules will help the chief appraisers and the taxing units effectively and equitably process applications for restricted-use appraisal.

New §215.1 provides definitions to be used in this chapter. New §215.5 sets out the criteria that's used by the forest service to determine whether a timberland qualifies as aesthetic management zone upon request from a chief appraiser or taxing unit. New §215.9 sets out the criteria that's used by the forest service to determine whether a timberland qualifies as critical wildlife habitat zone upon request from a chief appraise or taxing unit. New §215.13 sets out the criteria that's used by the forest service to determine whether a timberland qualifies as streamside management zone upon request from a chief appraiser or taxing unit. New §215.17 specifies filing requirements and procedures relating to request for zone determination from a chief appraiser or taxing unit. New §215.21 provides the director's action on the zone determination requested from a chief appraiser or taxing unit. New §215.25 establishes criteria on computing time for deadlines on filing, notices, and delivery of information. New §215.35 provides the application requirements for designation of timberland as aesthetic management zone-special or unique area.

Ed Barron, the Associate Director for Resource Development Department, has determined that for the first five-year period that the proposed new sections are in effect, there may be fiscal implications as a result of enforcing or administering the sections. However, because the program is voluntary, it is not possible to determine the number of requests for determinations and applications for designation as special or unique areas or, as a result, the costs to the state in implementing its part of the program. The legislation did not appropriate any funds to the forest service to administer the new sections. Any cost will have to be borne from the existing resources. Based on the cost of administering these sections in the first two years the forest service may request legislative approval to charge application and determination fees to cover the costs beyond FY 2001. There will be some fiscal implications for local government as a result of enforcing or administering the new sections. This local task may not be significantly different from what they are presently staffed and equipped to perform. We are unable to determine the cost to the local government as the program is voluntary and it is not possible to determine the amount of applications by landowners at this time. We expect the rules and procedures to streamline the process and equip landowners to file applications with appropriate documentation to minimize the additional workload on the chief appraiser in implementing the new sections.

Mr. Barron has also determined that for the first five years that the proposal is in effect the public benefit resulting from enforcing or administering the new sections will be increased participation in establishing streamside management zones along waterways to protect water quality, establishing aesthetic buffers adjacent to public roads and other public use area to enhance visual quality, establishing critical habitat to protect threatened and endangered species of animals and plants, and protecting areas that are special or unique due to their natural beauty, topography, or historical significance by providing tax incentives to participating landowners. There is an anticipated beneficial economic effect on small businesses that participate in the program; however, there will be costs relating to application and harvest restrictions. The actual amount of that benefit will be determined by the nature and the extent of the zones. There may be costs to the applicants, depending on the nature and extent of the zone, relating to applying for restricted-use timberland appraisal on forest zones. These costs may include a management plan that addresses harvest restrictions, maps of the zone showing location and extent, and acquiring supporting information where needed.

Written comments may be submitted to Edwin Barron, Associate Director, Texas Forest Service, John B. Connally Bldg., 301 Tarrow Suite 364, College Station, Texas 77840; or by fax at (409) 458-6655. All comments must be received no later than 15 days from the date of the publication of the proposal in the *Texas Register* .

The new sections are proposed under Tax Code (the Code), §23.9801(1)(b), which provides the forest service with the authority to designate qualified timberland as aesthetic management zone-special or unique area; the Code, §23.9806(a),

which authorizes the forest service to issue forest zone determination letter upon request from the chief appraiser; the Code, §23.9806(e), which authorizes the forest service to adopt rules to determine the forest zones; and the Code, §41.03(b), which provides the forest service with the authority to issue forest zone determination letter upon request from a taxing unit.

The codes affected by the proposal will be the Tax Code, Chapter 23, Chapter 25, Chapter 31, and Chapter 41.

§215.1. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AMZ-Aesthetic management zone, a timber land on which timber harvesting is restricted for aesthetic or conservation purposes, including:

(A) maintaining standing timber adjacent to public rights-of-way, including highways, roads and public use areas such as public park, school, lake, cemetery, church, also referred to as "AMZ-public rights-of-way"; and

(B) preserving an area in a forest, as defined by Natural Resources Code, §152.003, that is designated by the director of the Texas Forest Service as special or unique because of the area's natural beauty, topography, or historical significance, also referred to as "AMZ-special or unique area".

(2) CWHZ–Critical wildlife habitat zone, a timber land on which timber harvesting is restricted so as to provide at least three of the following benefits for the protection of an animal or plant that is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 *et seq.*) and its subsequent amendments or as endangered under Parks and Wildlife Code, §68.002:

(A) habitat control;

(B) erosion control;

(C) predator control;

(D) providing supplemental supplies of water;

(E) providing supplemental supplies of food;

(F) providing shelters; and

(G) making of census counts to determine population.

(3) SMZ–Streamside management zone, a timber land on which timber harvesting is restricted in accordance with a management plan to:

(A) protect water quality; or

(B) preserve a waterway, including intermittent and perennial streams, river, lake, slough, pond, creek, reservoir, watershed, or wetland (ephemeral streams are excluded).

(4) Ephemeral stream–A stream or drain that flows only during and for short periods following precipitation and flows in low areas that may or may not have a well-defined channel.

(5) Intermittent stream–A stream that flows only during wet periods of the year (or 30-90% of the time) and flows in a continuous, well-defined channel.

(6) Perennial stream–A stream that flows throughout a majority of the year (or greater than 90% of the time) and flows in a well-defined channel.

(7) Forest zone–an AMZ, CWHZ, or SMZ, also referred to as "zone".

(8) Management plan–A written plan or a collection of written directives governing management of an applicant's timberland that the landowner has developed, written, and implemented, with or without professional assistance. The plan must uses forestry best management practice consistent with the agricultural and silvicultural nonpoint source pollution management program administered by the State Soil and Water Conservation Board under Agriculture Code, §201.126, identifying specific management practice, including restrictions on harvest, for each of the types of zones included in the plan.

(9) Director–The director of the Texas Forest Service.

(10) Public right-of-way–A United States or state highway, a county road, a farm-to-market road, other public maintained roads, and public use areas such as public park, school, lake, cemetery, and church.

(11) Basal area–The cross-sectional area of tree, in square feet, measured at 4 1/2 inch above the ground.

§215.5. The Criteria for Determining Aesthetic Management Zone upon Request from a Chief Appraiser or Taxing Unit.

(a) The criteria that Texas Forest Service uses in determining AMZ-public rights-of-way upon request from a chief appraiser or taxing unit is set out as follows.

(1) AMZ must be a band of standing trees at least ten years old or 35 feet tall.

(2) The width of the AMZ must be at least 100 feet but within 200 feet in width from the edge of the road or public use area.

(3) A management plan must be provided that address harvest restriction to ensure the continued aesthetic value of the zone. It must also include a statement that the landowner must comply with the harvesting or cutting restrictions and other parts of the plan that relate to the zone.

(4) Harvesting is restricted to the extent that an average 50 square feet per acre of basal area must be retained in trees evenly distributed within AMZ.

(b) The criteria the Texas Forest Service uses in determining whether an application qualifies as a designation of AMZ-special or unique area due to the area's natural beauty, topography, or historical significance is set out as follows.

(1) Qualified area possesses special or unique traits such as:

(A) archeological sites, including historic and prehistoric sites (*e.g.*, Native American site, early settlement sites);

(B) rare geological formation (*e.g.*, waterfall or overlooks);

(C) unique scenic beauty;

(D) unique plants or animals communities (*e.g.*, old growth forests, pitcher plant bog);

(E) other traits that suggest a special importance to society.

(2) The historical/archeological area must be registered with the Texas Archeological Research Lab, the University of Texas at Austin, with a registration number assigned.

(3) The area is recommended by a specialist who's findings prove the area has features that are unique or special and worthy of preservation. The specialist must be qualified because

of their area of expertise to identify area in need of preservation or conservation. Minimum qualification of the specialist include an advanced degree in the area of claimed expertise, experience in identifying and preserving sites in the area of expertise, and/or current employment by an organization engaged in identifying and preserving such sites. A letter stating the specialists' qualifications and experience must be submitted with the application.

(4) Compliance with the following harvest restriction provisions is required:

(A) Harvesting may be totally restricted if necessary to protect the special features that make this site unique.

(B) A management plan developed with inputs from the appropriate specialists must be provided addressing restricted timber harvesting as to the extent and frequency; a statement must be included in the management plan that states the landowner must comply with the harvesting or cutting restrictions and other parts of the plan that relate to the zone.

(C) If harvesting is permitted, an average 50 square feet per acre of residual basal area must be retained in trees evenly distributed within the AMZ.

(D) Special or unique area may be regenerated using different methods, however, the specialist assisting with the management plan must address how the special features will not be adversely affected.

§215.9. The Criteria for Determining Critical Wildlife Habitat Zone upon Request from a Chief Appraiser or Taxing Unit.

The criteria that the Texas Forest Service uses in determining CWHZ upon request from a chief appraiser or taxing unit is set out as follows.

(1) The presence of qualified endangered or threatened animal or plant, as defined in paragraph (2) of this section, in the zone and the existence of a plan to protect it must be evidenced by a memorandum of understanding, conservation agreements, or other documentation pertaining to the protection of such animal or plant life with a federal, state, or private organization with recognized responsibility for protecting this species.

(2) The animal or plant is listed as endangered or threatened under the Endangered Species Act of 1973 (16 U.S.C. §1531 *et seq.*) and its subsequent amendments, or as endangered under Parks and Wildlife Code, §68.002, including:

(A) bald eagle- *Haliaeetus leucocephalus*

(B) red-cockaded woodpecker- *Picoides borealis*

(C) Houston toad- *Bufo houstonensis*

(D) Texas trailing phlox-*Phlox nivalis ssp. Texensis*

(E) white bladderpod- *Lesquerella pallida*

(F) Navasota ladies'-tresses- *Spiranthes parksii*

(3) This list is subject to change. A current listing is available from the Texas Parks and Wildlife Department.

(4) A management plan developed with inputs from an endangered species specialist that addresses federal and state critical habitat requirement by species must be provided. The plan must state how restricted harvesting-the extent and frequency-will benefit critical habitat. The plan must addresses at least three of the following benefits:

(A) habitat control;

(B) erosion control;

(C) predator control;

(D) providing supplemental supplies of water;

(E) providing supplemental supplies of wood;

(F) providing shelters; and

(H) making of census counts to determine population.

(5) In addition, a statement must be included in the plan that states the landowner must comply with the harvesting or cutting restrictions and other parts of the plan that relate to the zone.

§215.13. The Criteria for Determining Streamside Management Zones upon Request from a Chief Appraiser or Taxing Unit.

The criteria that the Texas Forest Service uses in determining SMZ upon request from a chief appraiser or taxing unit is set out as follows.

(1) SMZ includes forested buffers adjacent to streams or bodies of water, including intermittent and perennial streams, river, lake, slough, pond, creek, reservoir, watershed, or wetland (ephemeral streams are excluded).

(2) The minimum width of an SMZ on each side and above the head of streams or adjacent to bodies of water should be 50 feet from each bank (however, with sufficient evidence shown, the width can be extended to no more than 200 feet depending on the slope, soil, cover type, and proximity to municipal water supply).

(3) Total SMZ width includes average stream channel width plus buffer width.

(4) If the SMZ's boundary are not self-evident (*e.g.*, clear-cut and young plantation) and not at a uniform width, the boundaries must be marked with paint or signs. Boundary marks can be no further than 100 feet apart.

(5) Newly established SMZ's must have trees average ten years of age or more with a minimum of 300 well-spaced trees per acre, or an average 50 square feet per acre of basal area in trees evenly distributed within the zone.

(6) A management plan must be provided addressing best management practices for the SMZ consistent with the management plan for the silvicultural nonpoint source pollution management program developed by the Texas State Soil and Water Conservation Board. These guidelines are available from the Texas Forest Service or Texas Forestry Association. A statement must be included in the plan that states future harvesting maintain the average 50 square feet per acre of residual basal area, as prescribed in paragraph (7) of this section, and that the landowner must comply with the plan.

(7) Harvesting is restricted to the extent that a minimum of 50 square feet per acre, on average, of basal area should be retained in trees evenly distributed within SMZ.

§215.17. Request for Zone Determination by a Chief Appraiser or Taxing Unit.

(a) Request for zone determination by a chief appraiser.

(1) Prior to denial of an application based on zone location, a chief appraiser must request a determination letter from the director, pursuant to Tax Code, §23.9806(a), not later than 30 days after the date of receipt prior to April 1 and 15 days after the date of receipt after April 1 of an application for restricted-use timberland appraisal. The chief appraiser shall accept the director's determination letter as conclusive proof of the type, size, and location of the zone, if any, pursuant to Tax Code, §23.9806(c) and §23.9806(d).

(2) To request for a zone determination, the chief appraiser must complete and deliver the request form, as prescribed in Figure 4 TAC §215.17(a)(2), to the Texas Forest Service, including the following information:
Figure: 4 TAC §215.17(a)(2)

(A) a copy of application for restricted-use timberland appraisal based on zone location, showing the applicant's name, address, and telephone number and the date of the application;

(B) a statement certifying:

(i) the date the chief appraiser received the application;

(ii) that the chief appraiser has delivered a copy of the request to the applicant; and

(iii) the date on which such notice was given;

(C) a list of the taxing units in which the subject land is located;

(D) the type of zone for which restricted-use timberland appraisal is sought;

(E) the number of acres included in the zone;

(F) the location of the zone;

(G) a map showing tract location and a map of tract showing the zone location if location or acreage is contested;

(H) information to document the case if the minimum 50 square feet per acre of basal area is contested;

(I) any other information or evidence required according to the instructions for submitting information or evidence, as prescribed in paragraph (3)(B) of this subsection, to support the chief appraiser's position;

(J) a statement of the grounds upon which the chief appraiser seeks to deny the application; and

(K) any other information or evidence the chief appraiser believes should be considered by the director in making a determination.

(3) The chief appraiser shall deliver to the applicant and each taxing unit in which the land is located:

(A) a notice, as prescribed in Figure 4 TAC §215.17(a)(3)(A), to notify the applicant and taxing unit that a determination has been requested.
Figure: 4 TAC §215.17(a)(3)(A)

(B) appropriate instructions to the applicant and taxing units, as prescribed in Figure 4 TAC §215.17(a)(3)(B), specifying:
Figure: 4 TAC §215.17(a)(3)(B)

(i) that the applicant or the taxing unit has the right to present information and evidence to the director;

(ii) the time in which the applicant and the taxing unit must submit such information and evidence as defined in subsection (b)(2) and (b)(5) of this section;

(iii) the information or evidence required by the director for each type of zones to support each party's position; and

(iv) the director's mailing address and telephone number.

(C) a copy of the request and all information submitted to the director by the chief appraiser.

(4) If a request is not filed within the period required by paragraph (1) of this subsection, omits information required by paragraph (2) of this subsection, or fails to provide the notices required by paragraph (3) of this subsection, the director may not consider the request.

(b) Presentation of Information or Evidence by the Chief Appraiser, the Applicant, and the Taxing Units to the Director.

(1) If a chief appraiser requests a determination letter from the director prior to denial of an application based on zone location under Tax Code, §23.9806(a), the chief appraiser, the applicant, and a representative of each taxing unit in which the land is located may present information or evidence to the director before the director issues the determination letter, pursuant to Tax Code, §23.9806(e).

(2) The chief appraiser, the applicant, or each taxing unit may submit the information or evidence to the director. For the applicant and each taxing unit, this information or evidence must be submitted in writing not later than 30 days after the date of receipt prior to April 1 and 15 days after the date of receipt after April 1 of a copy of the request from the chief appraiser.

(3) The information or evidence that must be provided by the chief appraiser, the applicant, or taxing unit to the director is prescribed in subsection (a)(3)(B) of this section. Failure to provide the required information or evidence may result in an adverse determination for that party.

(4) If a taxing unit submits any information or evidence to the director that was not provided to the applicant by the chief appraiser, the taxing unit must deliver a copy of the information or evidence to the applicant.

(5) The applicant may respond to the additional information or evidence submitted by a taxing unit. Such response must be submitted in writing to the director not later than 15 days after the date of receipt from the taxing unit.

(c) Request for zone determination by a taxing unit.

(1) If a taxing unit challenges a determination that a timber land qualifies for restricted-use timberland appraisal on the ground that the land is not located in a zone, the taxing unit must first seek a determination letter from the director, pursuant to Tax Code, §41.03(b), within 15 days after the date the appraisal records are submitted to the appraisal review board. The appraisal review board shall accept the director's determination letter as conclusive proof of the type, size, and location of the zone, if any, pursuant to Tax Code, §41.03(b).

(2) To request for a zone determination, the taxing unit must complete and deliver a request form, as prescribed in subsection (a)(2) of this section, to the Texas Forest Service, including the following:

(A) a copy of the application for restricted-use timberland appraisal based on forest zone, showing the applicant's name, address, and telephone number and the date of the application;

(B) a statement certifying:

(i) the date the appraisal record was submitted to the appraisal review board;

(ii) that the taxing unit has delivered a copy of the request to the applicant; and

(iii) the date on which such notice was given;

(C) the type of zone for which restricted-use appraisal is sought;

(D) the number of acres included in the zone claimed;

(E) the location of the zone;

(F) a map showing tract location and a map of tract showing the zone location if location or acreage is contested;

(G) information to document the case if the minimum 50 square feet per acre of basal area is contested;

(H) any other information or evidence required by the Texas Forest Service according to the instructions for submitting information or evidence, as prescribed in subsection (a)(3)(B) of this section, to support the taxing unit's position;

(I) a statement of the grounds upon which the taxing unit seeks to challenge the application; and

(J) any other information or evidence the taxing unit believes should be considered by the director in making a determination.

(3) The taxing unit shall deliver to the applicant:

(A) a notice, as prescribed in Figure 4 TAC §215.17(c)(3)(A), to notify the applicant that a determination has been requested.
Figure: 4 TAC 215.17(c)(3)(A)

(B) appropriate instructions to the applicant, as prescribed in subsection (a)(3)(B) of this section, specifying:

(i) that the applicant has the right to present information and evidence to the director;

(ii) the time in which the applicant must submit such information and evidence as defined in paragraph (3) of this subsection;

(iii) the information or evidence required by the director to support the applicant's position; and

(iv) the director's mailing address and telephone number.

(C) a copy of the request and all information submitted to the director from the taxing unit.

(4) The applicant may respond to the request by submitting additional information or evidence to the director. Such information or evidence must be submitted in writing within 15 days of receipt from the taxing unit.

(5) If a request is not filed within the period required by paragraph (1) of this subsection, omits information required by paragraph (2) of this subsection, or fails to provide the notice required by paragraph (4) of this subsection, the director may not consider the request.

§215.21. Director's Action.

(a) Director's Action on Request from the Chief Appraiser.

(1) The director shall make the determination based on the written information or evidence submitted by the chief appraiser, the applicant, and taxing unit(s). The determination letter, as prescribed in Figure 4 TAC §215.21(a)(1), shall include the following information:
Figure: 4 TAC §215.21(a)(1)

(A) whether the land is located in a zone;

(B) the type of zone in which the land is located, if any;

(C) the number of acres included in the zone, if any; and

(D) the location of the zone.

(3) The director shall deliver a determination letter to the chief appraiser no later than June 30 or as soon thereafter as practicable.

(4) The director shall deliver a copy of the determination letter to the applicant and any taxing unit that submitted information to the director at the same time when the letter is sent to the chief appraiser.

(b) Director's Action on Request from a Taxing Unit.

(1) The director shall make the determination based on the written information and evidence submitted by the taxing unit and the applicant. The determination letter, as prescribed in subsection (a)(1) of this section, shall include the following information:

(A) whether the land is located in a zone;

(B) the type of zone in which the land is located, if any;

(C) the number of acres included in the zone, if any; and

(D) the location of the zone.

(2) The director shall issue a determination letter to the taxing unit no later than June 30 or as soon thereafter as practicable.

(3) The director shall deliver a copy of the determination letter to the applicant at the same time when a letter is sent to the taxing unit.

§215.25. The Recognized Date of Filing, Notices, and Delivery of Information.

(a) A document may be filed or delivered in person, by certified mail with return receipt requested, or courier delivery.

(1) In-person or hand delivery. The filing or delivery time for a document delivered by this method is the date shown on a receipt which is signed and dated by the receiving party acknowledging personal delivery. The sending and receiving party each shall keep a copy of the signed and dated receipt.

(2) Certified mail. The filing or delivery time for a document delivered by this method is the postmark shown on the receipt.

(3) Courier delivery. The filing or delivery time for a document delivered by this method is the postmark shown on the courier receipt.

(b) In computing a deadline that starts to run from the date of receipt of a notice or other information, the date of receipt shown on the return receipt or a courier receipt showing the date delivered to the correct address shall be the conclusive evidence of the date of receipt.

§215.35. Application for Designation of Timberland as AMZ-Special or Unique Area.

(a) Pursuant to Tax Code, §23.9801(b), to qualify as AMZ-special or unique area, timberland must be designated by the Texas

Forest Service based on the area's natural beauty, topography, or historical significance.

(b) To apply for such a designation, the applicant must complete and deliver the application form, as prescribed in Figure 4 TAC §215.35(b), to the Texas Forest Service. The application must contain adequate information to determine eligibility. Such information include:
Figure: 4 TAC §215.35(b)

(1) the applicant's information, including name, address, and phone number;

(2) size of proposed designated area;

(3) location of proposed designated site;

(4) historical/archeological site registration;

(5) a description of the significance of feature that warrants a designation;

(6) a management plan that meet harvesting restriction requirement as defined in §215.5(b)(4) of this title (relating to the Criteria for Determining AMZ upon Request from a Chief Appraiser or Taxing Unit); and

(7) any other information or evidence necessary to support the application.

(c) The Texas Forest Service shall use the criteria, as set forth in §215.5(b) of this title to determine whether an application qualifies as designated AMZ-special or unique area.

(d) If a timberland qualifies for designation, the director shall issue a letter, as prescribed in Figure 4 TAC §215.35(d), to the applicant designating the land as special or unique. The letter shall specify the location of the zone, the number of acres located in the zone, and the special or unique natural, topographical, or historical features of the land.
Figure: 4 TAC §215.35(d)

(e) The designation letter shall be issued within 60 days after the date the request is received by the director or by April 15, whichever is later.

(f) The director may revoke a designation issued under this section at any time if the timberland no longer qualifies for such designation. Before revoking a designation, the director must deliver notice of intent to revoke to the landowner, stating in detail the reasons for the proposed revocation, and provide the landowner with at least 15 days to respond with evidence showing continued qualification for the designation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907967
Edwin Barron
Associate Director of Resource Development Department
Texas Forest Service
Earliest possible date of adoption: January 2, 2000
For further information, please call: (409) 458-6650

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TITLE 10. COMMUNITY DEVELOPMENT

Part 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Chapter 1. ADMINISTRATION

Subchapter A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.5

The Texas Department of Housing and Community Affairs (Department) proposes new §1.5 concerning the Department's contract monitoring policy. The section defines the contract monitoring roles and responsibilities of divisions of the Department.

Anne Paddock, Deputy General Counsel, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Paddock also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be clarification of the contract monitoring roles and responsibilities of divisions of the Department. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Anne O. Paddock, Deputy General Counsel, P.O. Box 13941, Austin, Texas, 78711-3941, within thirty (30) days of the date of this publication.

The new section is proposed under Texas Government Code, §2306.053, which provides Texas Department of Housing and Community Affairs with the authority to promulgate rules consistent with the Code.

The Texas Administrative Code is affected by this new rule proposal.

§1.5. Contract Monitoring Policy.

(a) Purpose. The purpose of this section is to define the contract monitoring roles and responsibilities of certain divisions of the Department.

(b) Policy. Each program division is responsible for monitoring its programs, including conducting financial reviews, except as follows:

(1) The Compliance Division is responsible for monitoring during the affordability period of each multifamily housing project.

(2) The Compliance Division is responsible for monitoring single audit reports.

(3) The Compliance Division is responsible for other financial audits as appropriate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907947
Daisy Stiner
Executive Director

Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 475-3726

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Chapter 49. LOW INCOME TAX CREDIT RULES–1998

10 TAC §§49.1-49.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§49.1-49.16, concerning the Low Income Tax Credit Rules. The Sections are proposed to be repealed in order to enact new sections conforming to the requirements of new regulations enacted under the Internal Revenue Code of 1986, §42 as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Daisy A. Stiner, Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Stiner also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments may be submitted to Cherno M. Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306; and the Internal Revenue Code of 1986, § 42 as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Administrative Code is affected by these proposed repeals.

§49.1. Scope.

§49.2. Definitions.

§49.3. State Housing Credit Ceiling.

§49.4. Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.

§49.5. Set-Asides, Commitments and Preferences.

§49.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

§49.7. Compliance Monitoring.

§49.8. Housing Credit Allocations.

§49.9. Department Records; Certain Required Filings.

§49.10. Department Responsibilities.

§49.11. Program Fees.

§49.12. Manner and Place of Filing Applications.

§49.13. Withdrawals, Cancellations, Amendments.

§49.14. Waiver and Amendment of Rules.

§49.15. Forward Reservations; Binding Commitments.

§49.16. Deadlines for Allocation of Low Income Housing Tax Credits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907959
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 475-3726

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Chapter 49. 2000 LOW INCOME HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1-49.16

The Texas Department of Housing and Community Affairs proposes new §§49.1-49.16, concerning the 2000 Low Income Housing Tax Credit Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain low income housing tax credits available under federal income tax laws to owners of qualified low income rental housing developments.

Daisy A. Stiner, Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Stiner also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments may be submitted to Cherno M. Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941.

The new sections are proposed under the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, § 42,

as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Administrative Code is affected by these new sections.

§49.1. Scope.

The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of certain low income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Projects. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §§49.3-49.8 of this title (relating to State Housing Credit Ceiling, Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments, Set-Asides, Commitments and Preferences, Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; Compliance Monitoring, Housing Credit Allocations). Sections in this chapter establish procedures for applying for and obtaining an allocation of the low income housing tax credit, along with insuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount. The criteria utilized to realize this goal shall include, but are not limited to, evaluation of geographic location within the state of developments applying for tax credits, concentration of tax credit developments and other affordable housing developments within specific markets and submarkets, site conditions of the developments, and a development's impact on and conformance with the goals and objectives as stated in the QAP and the Rules. The foregoing shall be implemented to be consistent with ensuring that the tax credits are allocated to owners of Projects that will serve the Department's public policy objectives and federal requirements to provide housing to persons and families of very low and low income. It is the policy of the Department to encourage the use of Historically Underutilized Businesses (HUBs) in all of the Department's programs. In response to this policy, the Department has established a minimum goal of 30% participation of HUBs in the low income housing tax credit program. Project Owners are encouraged to achieve these minimum goals. To assure maximum utilization and optimum geographic distribution of tax credits in rural areas, although not mandated to do so, the Department is developing Memorandums of Understanding (MOU) with the TxRD-USDA. Such MOUs will seek to achieve increased sharing of information, reduction of processing procedures, and fulfillment of project compliance requirements involving existing, rehabilitated, and new construction housing projects financed by TxRD-USDA.

§49.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Ad Hoc Tax Credit Committee–That Committee comprised of members of the Board of the Department charged with the direct oversight of the Low Income Housing Tax Credit Program, also referred to as the "Committee."

(2) Adaptable Dwelling Unit–As described in the Fair Housing Act, a unit which meets the minimal accessibility requirements specified in the Act (i.e. usable doors, an accessible route, accessible environmental controls, and usable kitchens and bathrooms) and the "adaptable" structural feature or reinforced bathroom walls for later installation of grab bars."

(3) Affiliate–An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

(4) Agreement and Election Statement–A document in which the Project Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Project Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings, which Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month of execution of the agreement as to housing credit dollar amount.

(5) Applicable Percentage–The percentage used to determine the amount of the low income housing tax credit, as defined more fully in the Code, §42(b).

(6) Applicant–Any Person and any Affiliate of such Person, corporation, a partnership, joint venture, association, or other that submits an Application to the Department requesting a tax credit allocation pursuant to the Rules and the QAP. The Applicant is also the Project Owner unless the Applicant transfers or assigns its interest in the Project (which assignment can only occur with the consent of the Department). Each Project Owner, and each of the Project Owner's successors in interest, shall be obligated to carry out the commitments made to the Department by the Applicant.

(7) Application–An Application in the form prescribed by the Department, including any required exhibits or other supporting materials, filed with the Department by a Project Owner requesting a low income housing tax credit allocation.

(8) Application Acceptance Period–That period of time as published in the Texas Register during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department. An Application for a Tax Exempt Bond Project may be filed with the Department at any time during the year after the bond issuer has received a certificate of reservation from the Texas Bond Review Board. Tax Exempt Bond Project Applications must be received by the Department at least 30 days prior to the Ad Hoc Tax Credit Committee meeting at which the decision to issue a Determination Notice may be approved.

(9) Application Round–The period beginning with the start of the Application Acceptance Period and lasting until such time as all available credits from the State Housing Credit Ceiling (as stipulated by the Department) are allocated, provided that the Application Round not extend beyond the last day of the calendar year.

(10) Application Submission Procedures Manual–That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of Applications for

low income housing tax credits, which manual may be amended from time to time by the Department.

(11) Appraiser–A real estate professional certified or licensed by the Texas Appraiser Licensing and Certification Board who has satisfied continuing education requirements. The appraiser must have, at a minimum, five years appraisal experience, preferably in the geographic area of the property to be appraised. It is desirable, but not required, that the appraiser have a professional designation or be an active member of a professional accredited appraisal institution.

(12) Area Median Gross Income (AMGI)–The tenant income requirements pursuant to the qualified low income housing project requirements of the Code, §42(g).

(13) Applicable Fraction–The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, as defined more fully in the Code, §42(c)(1).

(14) Beneficial Owner–A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares;

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof; and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof.

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership;

(i) through the exercise of any option warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement.

(D) Provided, however, that any Person who acquires a security or power specified in subparagraph (C)(i), (ii) or (iii) of this paragraph, with the purpose or effect or changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

(15) Board–The governing Board of Directors of the Department and may also denote as used in this chapter, the Committee.

(16) Carryover Allocation–An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(17) Carryover Allocation Document–A document issued by the Department to a Project Owner pursuant to §49.4(k) of this title (relating to Applications; Environmental Assessments; Market Study; Reservations; Notification; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments).

(18) Carryover Allocation Procedures Manual–That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of request for Carryover Allocations for low income housing tax credits, which said manual may be amended from time to time by the Department.

(19) Code–The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service relating to the Low Income Housing Tax Credit Program authorized by the Code, §42, and as may be amended from time to time.

(20) Commitment Notice–A notice issued by the Department to a Project Owner pursuant to §49.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and also referred to as the "commitment".

(21) Compliance Period–With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(22) Control–(including the terms "controlling," "controlled by, and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the general partner interest in a limited partnership, or designation as a managing general partner or the managing member of a limited liability company.

(23) Cost Certification Procedures Manual–That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of requests for IRS Form 8609s for Projects placed in service under the Low Income Housing Tax Credit Program, which said manual may be amended from time to time by the Department.

(24) Credit Period–With respect to a building within a Project, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Project Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(25) Declaration of Land Use Restrictive Covenants (LURA)–An agreement between the Department, the Project Owner and all successors in interest in the Project Owner which encumbers the Project with respect to provisions stipulated in the Code, §42, this chapter, and the Texas Government Code, Chapter 2306, as may be amended from time to time. The LURA includes an Extended Low Income Housing Commitment Agreement.

(26) Department–The Texas Department of Housing and Community Affairs, a public and official governmental Department of the State of Texas created and organized under the Texas Department of Housing and Community Affairs Act, Texas Government Code, Chapter 2306 and Texas Civil Statutes, Article 4413(501) as amended by the 73rd Legislature, Chapter 725 and 141.

(27) Determination Notice–A notice issued by the Department to the Owner of a Tax Exempt Bond Project which states that the Project may be eligible to claim low income housing tax credits without receiving an allocation of credits from the State Housing Credit Ceiling, sets forth conditions which must be met by the individual project before the Department will issue the IRS Form(s) 8609 to the project owner, and specifies the amount of tax credits necessary for the financial feasibility of the project and its viability as a qualified low income housing project throughout the credit period.

(28) Development Team–All Persons or Affiliates thereof which play(s) a material role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

(29) Difficult Development Area–Any area which is so designated by the Secretary of the United States Department of Housing and Urban Development (HUD) as an area which has high construction, land, and utility costs relative to area median family income.

(30) Eligible Basis–With respect to a building within a Project, the building's Eligible Basis as defined in the Code, §42(d).

(31) Equity Gap–The difference between the total sources of financing for the Project and the total Project costs that is to be filled with the proceeds of the credit.

(32) Extended Low Income Housing Commitment Agreement–An agreement between the Department, the project owner and all successors in interest to the project owner concerning the extended low income housing use of buildings within the project throughout the extended use period as provided in the Code, §42(h)(6).

(33) Financial Statement–Document(s) which provides information about the Applicant's economic resources, claims against those resources, and the interests of owners at specific dates as more fully described in subparagraphs (A)-(D) of this paragraph.

(A) Statement of Financial Position/Balance Sheet–a listing, as of a particular date, of all assets and claims against those assets (liabilities). The difference is equity.

(B) Income Statement–a listing that relates to a specific period of time, presenting an entity's results of operations.

(C) Statement of Retained Earnings–reports all changes in retained earnings during the accounting period, reconciles beginning and ending retained earning balances and provides a connecting link between the income statement and the balance sheet.

(D) Cash Flow Statement–a report listing the changes in an entity's cash and cash equivalents, classified by principal sources and uses, for a given period.

(34) General Contractor–One who contracts for the construction, or rehabilitation of an entire building or Project, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "contractor".

(35) General Projects–Any project which is not a Qualified Nonprofit Project or is not under consideration in the Rural/Prison set-aside as such terms are defined by the Department.

(36) General Pool–The pool of credits that have been returned or recovered from prior years' allocations or current year's Commitment Notices after the Board has made its initial allocation of the current year's available credit ceiling. General pool credits will be used to fund Applications on the waiting list without regard to set-aside.

(37) Governmental Entity–Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(38) Historically Underutilized Businesses–Pursuant to Texas Civil Statutes, Article 601b, §§1.02, 1.03, and 1.04, entitled State Purchasing and General Services Act which is codified at Chapter 2161, Texas Government Code, entitled Historically Underutilized Businesses, a business in the form of a corporation, partnership or joint venture which is at least 51% owned, or a sole proprietorship which is 100% owned by a person or persons who have been historically underutilized due to their identification as a member of a certain group. The following are the groups which will be considered pursuant to this definition:

(A) African Americans–persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans–persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Asian-Pacific Americans–persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Philippines, Samoa, Guam, U.S. Trust Territories of the Pacific and the Northern Marianas;

(D) Native Americans–persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(E) Women–includes all women of any ethnicity.

(39) Homeless Person–An individual or family that lacks a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, § 841.1, and as may be amended from time to time.

(40) Housing Credit Agency–A governmental entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the proposes of these Rules, the Department is the sole "Housing Credit Agency" of the State of Texas.

(41) Housing Credit Allocation–An allocation by the Department to a Project Owner of low income housing tax credit in accordance with §49.8 of this title (relating to Housing Credit Allocations).

(42) Housing Credit Allocation Amount–With respect to a Project or a building within a Project, that amount the Department determines to be necessary for the financial feasibility of the Project and its viability as a qualified low income housing Project throughout the Compliance Period and allocates to the Project.

(43) HUD–The United States Department of Housing and Urban Development, or its successor.

(44) Ineligible Building Types–Single family detached housing, duplexes, and triplexes shall not be included in tax credit developments (except as provided for in this definition). Fourplexes are also prohibited unless they are developed in clusters of four or more contiguous property under common ownership, management and Control. The only exceptions to this definition are:

(A) Any project comprised of single family detached homes, duplexes or triplexes of 35 units or less that is located within a city or county with a population of not more than 20,000 or 50,000, respectfully, shall not be considered to include an Ineligible Building Type. The proposed units must be located on contiguous property under common ownership, management and Control or dispersed within an existing residential subdivision.

(B) An existing Rural Project that is federally assisted within the meaning of §42(d)(6)(B) of the Code and is under common ownership, management and Control shall not be considered to include an Ineligible Building Type. For qualifying federally assisted Rural Projects, construction activity must be rehabilitation only, with no expansion to the existing development. Rural Projects purchased from HUD will also qualify as being federally assisted.

(45) Intermediary Costs–Costs associated with the sale or use of tax credits to raise equity capital. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, environmental site assessment, etc.

(46) IRS–The Internal Revenue Service, or its successor.

(47) Local Tax Exempt Organization–An entity which is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, and which is registered or qualified to conduct business in the State of Texas and/or the governmental unit wherein the Project will be situated.

(48) Person–Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

(49) Persons with Disabilities–A person who:

(A) has a physical, mental or emotional impairment that;

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the ability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in §102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007).

(50) Prison Community–A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison as set forth in the Reference Manual.

(51) Project–A low income rental housing Property the owner of which represents that it is or will be a qualified low income housing Project within the meaning of the Code, §42(g). With regards to this definition, the "Project" is that Property which is the basis for the Application for low income housing tax credits. May also be referred to as the subject "property".

(52) Project Consultant–Any Person (without ownership interest in the Project) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(53) Project Owner–Any Person or Affiliate thereof that owns or proposes to develop the Project or expects to acquire Control of the Project pursuant to a purchase contract satisfactory to the Department.

(54) Property–The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(55) Qualified Allocation Plan–An allocation plan executed by the Governor of the State of Texas which sets forth the Threshold Criteria, Selection Criteria, priorities, preferences, and compliance and monitoring as provided in the Code, §42(m)(1) and as further provided in §§49.3-49.8 of this title (relating to State Housing Credit Ceiling, Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments, Set-Asides, Commitments and Preferences, Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; Compliance Monitoring, Housing Credit Allocations).

(56) Qualified Basis–With respect to a building within a Project, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(57) Qualified Census Tract–Any census tract which is so designated by the Secretary of HUD and, for the most recent year for which census data are available on household income in such tract, in which 50% or more of the households have an income which is less than 60% of the area median family income for such year.

(58) Qualified Market Analyst–A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's experience and educational background will provide the general basis for determining competency as a Market Analyst. Such determination will be at the sole discretion of the Department. The Qualified Market Analyst must not be related to or Affiliated with the Project Consultant, or the independent CPA employed for certifying the 10% test and/or the final Project cost certification.

(59) Qualified Nonprofit Organization–An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C).

(60) Qualified Nonprofit Project–A Project in which a Qualified Nonprofit Organization has Control (directly or through a partnership or wholly-owned subsidiary) and materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period.

(61) Real Estate Owned (REO) Projects–Any existing residential development that is owned or that is being sold by an insured depository institution in default, or by a receiver or conservator of such an institution, or is a property owned by HUD, Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), federally chartered bank, savings bank, savings and loan association, Federal Home Loan Bank or a federally approved mortgage company or any other federal agency.

(62) Reference Manual–That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

(63) Rehabilitation Expenditure–Amounts incurred in connection with the rehabilitation which the Project Owner represents to be "Rehabilitation Expenditures" within the meaning of the Code, §42(e)(2).

(64) Residential Development–Any Project that is comprised of at least one "Unit" as such term is defined in this title.

(65) Rules–The Department's low income housing tax credit Rules, in this chapter excluding §§49.3-49.8 of this title.

(66) Rural Project–A Project located within an area which:

(A) is situated outside the boundaries of a PMSA or MSA; or

(B) is situated within the boundaries of a PMSA or MSA if it has a population of not more than 20,000 and does not share boundaries with an urbanized area; or

(C) is located in an area that is eligible for funding by TxRD.

(67) Selection Criteria–Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program.

(68) Small Development–A Project consisting of not more than ten single-family detached Units or 35 multifamily Units, which is not a part of, or contiguous to, a larger Project.

(69) Special Housing Project–Any Project developed specifically for Special Housing Need Groups, including mental health/mental retardation Projects, group homes, housing for the homeless, transitional housing, elderly Projects, congregate care facilities, projects for persons with HIV/AIDS, or as otherwise defined in the State Consolidated Plan.

(70) State Housing Credit Ceiling–The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(71) Sustaining Occupancy–The figure at which occupancy income is equal to all operating expenses and mandatory debt service requirements for a Project.

(72) Tax Exempt Bond Project–A Project which receives at least 50% of its financing from the proceeds of Tax Exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4)(B).

(73) Threshold Criteria–Criteria used to determine the Project's qualifications which are the minimum level of acceptability for consideration under the Low Income Housing Tax Credit Program.

(74) Total Housing Development Cost–The total of all costs incurred or to be incurred by the Project Owner in acquiring, constructing, rehabilitating and financing a Project, as determined by the Department based on the information contained in the Project Owner's Application. Such costs include Intermediary Costs, reserves and any expenses attributable to commercial areas. Projects which include commercial space must allocate the relative portion of all applicable expenses to the commercial space and exclude the same from Total Housing Development Costs. In determining the Equity Gap calculation, the Department will not deduct from the Project's sources of funds the amount of financing associated with the commercial use, unless such financing specifically identifies in its terms that it is being provided for the commercial use.

(75) Town Home–Each Town Home living unit is one of a group of no less than four units that are adjoined by common walls. Town Homes shall not have more than two walls in common with adjacent units. Town Homes shall not have other units above or below another unit. Town Homes shall not share a common back wall. Town Homes shall have individual exterior entries.

(76) TxRD–The Rural Development (RD) services of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(77) Unit–Any residential rental unit in a Project consisting of an accommodation containing separate and complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation. The term "Unit" includes a single room occupancy housing unit used on a non-transient basis.

§49.3. State Housing Credit Ceiling.

(a) The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C).

(b) The Department shall publish each such determination in the *Texas Register* within 30 days after notification by the Internal Revenue Service.

(c) The aggregate amount of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. Housing Credit Allocations made to Tax Exempt Bond Developments are not included in the State Housing Credit Ceiling

§49.4. Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.

(a) Any Project Owner requesting a Housing Credit Allocation for a Project must submit an Application to the Department which Application shall be originally executed by the Project Owner. This Application shall contain full and complete information as to each item specified in the Application Submission Procedures Manual, as amended. The Department is also authorized to request the Project Owner to provide any additional information it deems relevant as clarification to the Application. Failure to provide any required information either in the Application Submission Procedures Manual or otherwise required by the Department will result in the Application being deemed incomplete and not accepted for filing. The Department will require, as a part of a completed Application, information to be submitted by the Project Owner which identifies the number of HUBs to be used in the development and/or continuous operation of the Project, in a form specified within the Application Submission Procedures Manual. Further, the Department will require the Project

Owner to supply sufficient documentation which will represent the means by which these HUBs were or are to be selected. The Project Owner is also advised that the Department will be requesting information pertaining to the use of HUBs in the actual development of the Project at the time of final allocation of tax credits, pursuant to §49.8(f) of this title (relating to Housing Credit Allocations).

(b) As part of the complete Application the Applicant must submit the most current Phase I Environmental Assessment of the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Assessment on the Project is older than 12 months, the Project Owner may supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided, however, that the Department will not accept any Phase I Environmental Assessment which is more than 24 months old. An environmental report that is not submitted with the Application will result in the Application being deemed incomplete and not accepted for filing.

(1) This environmental assessment should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Project Owner. The report must include, but is not limited to:

(A) a review of records, interviews with people knowledgeable about the Property;

(B) a certification that the environmental engineer has conducted an inspection of the Property, the building(s), and adjoining Properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) a noise study is recommended for developments located in close proximity to industrial zones, major highways, active rail lines and civil and military airfields;

(D) a copy of the current FEMA Flood Map encompassing the site and a determination of the flood risk for the proposed development; and

(E) the report should include a statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the development in any other way than receiving a fee for the environmental assessment.

(2) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Project Owner must act on such a recommendation or provide either a plan for the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(3) Projects which have had a Phase II Environmental Assessment performed and hazards identified, the Project Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Property or are applying for tenancy.

(4) Projects whose funds have been obligated by TxRD will not be required to supply this information; however, the Project Owners of such Projects are hereby notified that it is their responsibility to ensure that the Property is maintained in compliance with all state and federal environmental hazard requirements.

(5) Those Projects which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

(c) The Market Study required by the Department shall comply with the Uniform Standards of Professional Appraisal Practice paragraphs (1) and (2) of this subsection, the Market Analysis and Appraisal Policy provided in the Reference Manual. The Market Study shall be prepared for the Department at the expense of the Project Owner. The Market Study shall follow the format of and contain at a minimum, the information required by the Market Analysis and Appraisal Policy. If any of the required information in the Market Analysis and Appraisal Policy is not obtainable, the Market Analyst shall provide a statement to such effect and offer an alternative analysis intended to address the applicable question.

(1) A Market Study (must be prepared by a Qualified Market Analyst as described in this QAP and Rules and in the Market Analysis and Appraisal Policy). This Qualified Market Analyst shall be independent of the Project Owner. A Market Study, is required as part of the complete Application, unless the Project has an obligation of TxRD funds. Projects whose funds have been obligated by TxRD are not required to provide the Department with a market study; provided that the Department may request information with respect to the operating expenses, proposed new construction or rehabilitation cost or other information. The market study should not be updated more than six months prior to the first day of the Application Acceptance Period. In the event that a Market Study on a Project is older than six months, a Project Owner may supply the Department with an updated Market Study from the entity or organization which prepared the initial report. The Department will not accept any Market Study more than 12 months old.

(2) The Department may determine from time to time that information not requested in the Market Analysis and Appraisal Policy will be relevant to the Department's evaluation of the need for the Project and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Market Analyst to meet this need.

(3) A written opinion is required from the Qualified Market Analyst who prepared the Market Study required under paragraph (1) of this subsection, stating that:

(A) the projected Total Housing Development Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regards to the reasonableness of the projected development costs;

(B) the projected Total Operating Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the reasonableness of the projected operating costs;

(C) the proposed Project, in light of the vacancy and absorption rates for the applicable market area and/or any applicable submarket area, is or is not likely to result in an unreasonably high vacancy rate for comparable Units within the market area and/or any applicable submarket area (i.e., standard, well maintained Units within such market area that are reserved for occupancy by low and very low income tenants). The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regard to the effects of the Project's development

on the vacancy rates for comparable Units within the market area and/or any applicable submarket area;

(D) the projected initial rents for the Project are or are not below the rental range for comparable Projects within the market area. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with respect to the data on comparable rents in the Project's market area; and

(E) Project reserves are or are not adequate to cover operating shortfalls until the Project achieves Sustaining Occupancy. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the adequacy of the Project reserves.

(4) All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(d) A Project Owner may file an Application at any time during the Application Acceptance Period(s), as published from time to time by the Department in the *Texas Register*. Applicants which submit the Application prior to the close of the published Bonus Period will be notified of Threshold Criteria deficiencies to allow for corrective action. Applicants must submit the documentation required to correct the deficiency within 10 working days from the receipt of such notice. Only one opportunity to supply the required documentation will be granted. Applications with corrected deficiencies will not be eligible for the Selection Criteria points associated with the bonus period. Applications submitted after the close of the Bonus Period that show material deficiencies will be terminated per subsection (c)(3)(E) of this section and the Project Owners will only have the opportunity to re-apply if the Application Acceptance Period is still open.

(e) An Application that does not fulfill the requirements of this Qualified Allocation Plan and Rules and the current Application Submission Procedures Manual will be deemed not to have been timely filed and the Department shall not be deemed to have accepted the Application. The Department may, at its sole discretion, request supplemental information from an Applicant to clarify information contained in previously submitted documentation. The department may place additional time constraints for the timely filing of such documentation.

(f) The Department will not recommend an Application for funding if it includes a member of the Development Team who has been, or is:

(1) barred, suspended, or terminated from procurement in a state or federal program or who is listed in the List of Parties Excluded from Federal Procurement or Nonprocurement Programs, whether in the hard copy or electronic form;

(2) convicted within the past five years, under indictment for or is on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses;

(3) subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with a state or federal agency or another governmental entity unless any such action has been concluded and no adverse action or finding (or entry into a consent order) has been taken with respect to such member; or

(4) active in the ownership or management of any other low income housing tax credit Property (or any Property pursuant to an affordable housing program administered by a local, state or federal entity) that is or was materially out of compliance with the rules or regulations of the appropriate regulatory authority. The Department may recommend an Application whose Development Team member is working to remedy the condition of non compliance under a plan which was agreed to in writing by the appropriate regulatory entity. If such a problem exists, it should be clearly identified in Exhibit 106 and a copy of the executed remediation plan should be provided. If the Department is the regulatory entity, then the remediation plan entered into with the Compliance Division should be submitted.

(g) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules the Department shall make its recommendations to the Committee and the Board at their next meeting for the issuance of Commitment Notices.

(h) The Board's decisions shall be based upon its evaluation of the Project's consistency with the criteria and requirements set forth in the QAP and the Rules. In making a determination to allocate tax credits, the Department and Board shall be authorized not to rely solely on the number of points scored by an Applicant. They shall in addition, be entitled to take into account, as appropriate, such factors as Project feasibility, underwriting, concentration of low income Projects within specific markets or submarkets, geographic dispersion of multifamily housing in any particular market or submarket, as well as dispersion of the credits on a state-wide basis, site conditions, the experience of the Development Team, the type of housing being proposed and/or the Project's impact on the Low Income Housing Tax Credit Program's goals and objectives as stated in the QAP and the Rules and as otherwise provided under this chapter. The Board shall authorize the Department to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is built.

(1) If the Board approves the Application, the Department will issue a Commitment Notice to the Project Owner which:

(A) shall confirm that the Board has approved the Application; and

(B) shall state the Department's commitment to make a Housing Credit Allocation to the Project Owner in a specified amount, subject to the feasibility determination described at §49.8(a) of this title (relating to Housing Credit Allocations), compliance by the Project Owner with the remaining requirements of this chapter, and any other conditions set forth therein by the Department. This Commitment Notice shall expire on the date specified therein, unless the commitment has been accepted and the conditions to receipt of an allocation set forth therein shall have been met.

(2) The Department shall notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Boards issuance of a Commitment Notice.

(3) If the Board disapproves or fails to act upon the Application, the Department shall issue to the Project Owner a written notice stating the reason(s) for the Board's disapproval or failure to act.

(i) A Project Owner may request that the Department extend the expiration date of a Commitment Notice which has not expired or the date for the submission of the Carryover Allocation Document by submitting a written request for such action, accompanied by the extension fee specified in §49.11 of this title (relating to Program

Fees). The request shall specify the term of the extension requested and the reason(s) why the Project Owner has been unable to satisfy the requirements of this chapter prior to the original expiration date. The Department, in its sole discretion, may consider and grant such extension requests; provided, however, that in no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(j) A Project Owner must indicate acceptance of the Department's offer of a commitment of tax credit authority or determination of eligibility to claim tax credits by executing the Commitment Notice or Determination Notice and paying the commitment fee specified in §49.11 of this title (relating to Program Fees) prior to the expiration date set forth in the notice. Together with or following the Project Owner's acceptance of the commitment or determination, the owner may request the Department to execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Project as that for the month in which the commitment was accepted (or the month the bonds were issued for Tax Exempt Bond Projects), as provided in the Code, §42(b)(2). Upon receipt of a duly dated and executed Agreement and Election Statement and the accepted Commitment Notice or Determination Notice, if the Project Owner is in compliance with the Rules of this chapter, the Department shall execute the Agreement and Election Statement and return a copy to the Project Owner. For non Tax Exempt Bond Projects, the Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month in which the offer of commitment was accepted. Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Project Owner to make an effective election to fix the applicable credit percentage for a Project, the Commitment Notice must be executed by the Department and the Project Owner in the same month. The Department will cooperate with a Project Owner, as needed, to assure that the Commitment Notice can be so executed.

(k) Prior to the expiration of the Commitment Notice a Project Owner who has been issued a Commitment Notice may request the Department to execute a Carryover Allocation Document. The Carryover Allocation must be properly completed, signed, dated and notarized by the Project Owner and delivered to the Department along with any and all other documentation prescribed in the Carryover Allocation Procedures Manual, as amended. The commitment fee as specified in §49.11 of this title (relating to Program Fees) must be received by the Department prior to the processing of any Carryover Allocation Documentation.

(l) If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Department shall place all remaining Applications which have satisfied all Threshold Criteria on a waiting list. All such waiting list Applications will be weighed one against the other and a priority list shall be developed by the Department and approved by the Ad Hoc Tax Credit Committee. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Department shall issue a Commitment Notice to Applications on the waiting list in order of priority subject to the amount of returned credits and the 10% Nonprofit Set-Aside allocation required under §42(h)(5) of the Code. In the event that the Department makes a Commitment Notice or offers a commitment within the last month of the calendar year, it will require immediate action by the Applicant to assure that an allocation or Carryover Allocation can be issued before the end of that same calendar year.

(m) Within 15 business days of the date an Application is received, the Department shall notify in writing the mayor or other equivalent chief executive officer of the municipality, if the Project or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Project or a part thereof is located, to advise such individual that the Project or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Project. Such comments shall be part of the documents required to be reviewed by the Board under this subsection if received by the Department within 30 days after receipt of such certified mail notification to said individual; otherwise, if comments are received by the Department after 30 days, same may be reviewed at the discretion of the Board under this subsection. If the local municipal authority expresses opposition to the Project, the Department will give consideration to the objections raised and will visit the proposed site or Project within 30 days of notification.

(n) The Department shall give notice of a proposed project to the state representative and state senator representing the area where a project would be located. The state representative or senator may hold a community meeting at which the Department shall provide appropriate representation.

(o) Prior to the Department's issuance of the IRS Form 8609 declaring that the Project has been placed in service for purposes of the Code, §42, Project Owners must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Project Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real Property records of the county where the Project is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Project and/or the Property prior to the recording of the LURA, the Project Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department shall physically inspect the Property for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein before the IRS Form 8609 is issued.

§49.5. Set-Asides, Commitments and Preferences.

(a) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Projects which meet the requirements of the Code, §42(h)(5). Such organizations may compete in only one of the following set-asides:

(1) Non Profit 10%;

(2) Rural Projects/Prison Communities 15%; or

(3) General Projects 75%.

(b) The Department may redistribute the credits depending on the level of demand exhibited during the Allocation Round; provided that no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Projects which are not Qualified Nonprofit Projects. The Department will reserve 25% of the 15% Rural Projects/Prison Communities set-aside for projects financed through Rural Development (TxRD) (formerly Farmer's Home). Should there not be sufficient qualified applications submitted for the TxRD set-aside, then the allocations would revert back to the Rural Projects/Prison Communities set-aside pool. Information concerning the

appropriate set-aside for each Application Round will be published in the *Texas Register*. Applicants may submit only one Application for each site.

(c) Unless the Department makes a recommendation to the Board based on the need to fulfill the goals of the Program as expressed in this QAP and Rules and the Board grants a waiver, a Commitment Notice shall not be issued with respect to any Project where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board as more specifically provided in the Reference Manual. The Department's recommendation to the Board shall be clearly documented. The Department will reduce the Applicant's estimate of developer's and/or Contractor fees in instances where these fees are considered excessive, as more specifically provided for within the Application Submission Procedures Manual, as amended. In the instance where the Contractor is an Affiliate of the Project Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department will reduce the total fees estimated to a level that it deems appropriate. Further, the Department shall deny or reduce the amount of low income housing tax credits on any portion of costs which it deems excessive or unreasonable. The Department also may require bids in support of the costs proposed by any Applicant.

(d) The Department may, at any time and without additional administrative process, determine to award credits to projects previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. To the maximum extent feasible, the Department will use credits carried forward from the prior year or recovered during the current year to make awards pursuant to subsections (a)-(d) of this section.

§49.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

(a) Threshold Criteria. To have an Application considered for Selection Criteria, a Project Owner must first supply all required information and demonstrate that the Project meets all of the requirements of the Threshold Criteria set forth as follows and as more specifically provided for in the Application Submission Procedures Manual, as amended. Applications not meeting Threshold Criteria may be terminated as otherwise provided under this chapter. No Ineligible Building Types will be considered for allocation of tax credits under this QAP and the Rules, and thus Ineligible Building Types do not satisfy Threshold Criteria. Project Owners whose Applications do not meet Threshold Criteria will be so informed in writing. The following are the Threshold Criteria that are mandatory requirements at the time of Application submission:

(1) EXHIBIT 101. Label as EXHIBIT 101, the following documents:

(A) A letter from the Project Owner specifying the type of amenities proposed for the development. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage, etc.), then the amenity may not be included among those provided to satisfy this exhibit. Therefore, the letter must clearly indicate those amenities for which fees may be collected. Projects larger than 35 units must provide at least four of the amenities provided in clauses (i)-(x) of this subparagraph. Small Developments (35 Units or less) and Special Housing Projects must provide at least two of the amenities provided in clauses (i)-(x) of this subparagraph.

(i) full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room/laundry hook-up in Units;

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room;

(viii) storage areas;

(ix) computer facilities; or

(x) covered parking.

(B) All of the architectural drawings requested in clauses (i)-(iii) of this subparagraph must be submitted. While full size design or construction documents are not required, the drawings should have a scale and/or show the dimensions.

(i) a site plan;

(ii) typical floor plans for each residential and common area building configuration and typical unit floor plans for each type of unit. The net rentable area as calculated in Exhibit 2A of the Reference Manual should be clearly stated on each unit floor plan; and

(iii) typical elevations of residential and common area buildings. Elevations should include a percentage estimate of exterior composition, i.e. 50% brick, 50% siding.

(C) Original photographs of the development site and the surrounding area. Rehabilitation Projects must also submit original photographs of the existing signage, buildings, amenities, and interior photographs. The photos for Rehabilitation Projects should clearly document the typical areas and building components which exemplify the need for rehabilitation.

(D) A letter from the Project Owner stating that the Project will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies."

(2) EXHIBIT 102. Label as EXHIBIT 102, the completed "New Construction and Rehabilitation Breakdown" form provided in the Application Submission Procedures Manual. Rehabilitation developments must establish that the rehabilitation will be substantial and will involve at least $6,000 per unit in direct hard costs. Additionally, all rehabilitation Projects must provide a detailed work write-up/physical assessment report prepared by a registered architect, professional engineer or general Contractor. The work write-up/physical assessment report must detail the scope of work to be performed throughout the rehabilitation and must specify the estimated cost associated with each item of work to be performed.

(3) EXHIBIT 103. There shall exist evidence of readiness to proceed in the form of at least one of the items under each of subparagraphs (A)-(E) of this paragraph:

(A) Label as EXHIBIT 103(A), evidence of site control through one of the following:

(i) a recorded warranty deed in the name of the ownership entity, or entities which comprise the Applicant;

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) in the name of the ownership

entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase in the name of the ownership entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Label as EXHIBIT 103(B), evidence of current and appropriate zoning in the form of a letter from the appropriate municipal authority. In lieu of such documentation the Applicant must submit evidence that a rezoning request has been filed with the appropriate municipal authority as of the date of submission of the Application. Any commitment of tax credits to the Applicant will be contingent upon proper rezoning prior to Carryover Allocation. If zoning is not required, the Applicant must submit a letter from the local municipal/county authority so stating. If the Property is currently a non-conforming use as presently zoned, provide the following:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) owners rights to reconstruct in the event of damage; and

(iv) penalties of noncompliance.

(C) Label as EXHIBIT 103(C), evidence of the availability of all necessary utilities/services to the development site. Exhibits must be in the form of a letter from the appropriate municipal provider/local service provider, or in the form of the last monthly bill which must clearly identify the development by name and address. If utilities are not already accessible, then the letter must clearly state an estimated time frame for provision of the utilities and an estimate of the infrastructure cost that will be borne by the developer. Letters from the appropriate provider must not be older than 12 months from the first day of the Application Acceptance Period. If utilities are not already accessible (undeveloped areas), the letter should not be older than 3 months from the first day of the Application Acceptance Period. Necessary utilities are GAS/ELECTRIC, TRASH, WATER, and SEWER.

(D) Label as EXHIBIT 103(D), evidence of permanent financing in only one of the following forms:

(i) bona fide permanent financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in an amount not less than the projected liens to be placed upon the Project upon completion of construction in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the general partner;

(ii) bona fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed and accepted by both parties (the term of the loan must be for a minimum of 15 years with at least a 25 year amortization); or

(iii) if the development will be financed through owner contributions, provide a letter from an independent CPA verifying the capacity of the Applicant to provide the proposed financing and that funds are committed solely for such purpose with a letter from the Applicant's bank or banks confirming that such funds have been provided for or deposited in a separate account at said bank(s).

(E) Label as EXHIBIT 103(E), either:

(i) a copy of the current title policy which shows that the ownership of the land/Project is vested in the exact name of the Applicant, or entities which comprise the Applicant; or

(ii) a copy of a current title commitment with the proposed insured matching exactly the name of the Applicant or entities which comprise the Applicant and the title of the land/Project vested in the name of the exact name of the seller as indicated on the sales contract.

(4) EXHIBIT 104. Label as EXHIBIT 104, evidence of pre-Application notification by the Applicant to the local chief executive officer(s) (i.e., mayor and county judge), state senator, and state representative of the locality of the development. The pre-Application notification will consist of a letter which at least includes the text described in Exhibit 113. Evidence of such notification shall be a copy of the letter sent to the official and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said official. Proof of notification should not be older than three months from the first day of the Application Acceptance Period.

(5) EXHIBIT 105. Label as Exhibit 105, all of the following documentation (As instructed in the Application Submission Procedures Manual, this documentation should be filed separately from the volume containing the Threshold Criteria.):

(A) Using Exhibit 105(A) in the Application Submission Manual, provide a current financial statement for each Applicant (as defined in the QAP). Applicant's statement must not be older than 12 months from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified financial statements should not be older than 90 days; and

(B) the Authorization to Release Credit Information, Exhibit 105(B) (which is provided as part of the Application Submission Procedures Manual), must be completed by all Persons in Control of the Applicant.

(6) EXHIBIT 106. Label as EXHIBIT 106, all of the following documentation:

(A) the original copy of the completed and executed Previous Participation and Background Certification Form, Exhibit 106(A), which is provided as part of the Application Submission Procedures Manual. This form must be completed with respect to the ownership entity, general partner, general contractor and their principals;

(B) label as Exhibit 106(B), a chart which clearly illustrates the complete organizational structure of the Project Owner. This chart should provide the names and ownership percentage of all entities and sub-entities with an ownership interest in the development. The percentage ownership of all Persons in Control of these entities and sub-entities must also be clearly defined; and

(C) if an Applicant is active in the ownership or management of any other low income housing tax credit Property (or any Property pursuant to an affordable housing program administered by a local, state or federal entity) and any such property is or was materially out of compliance with the rules or regulations of the appropriate regulatory authority, such property should be clearly identified in Exhibit 106(A) and a copy of the executed remediation plan must be provided as Exhibit 106(C)."

(7) EXHIBIT 107. Label as EXHIBIT 107, a current rent roll for occupied Projects undergoing rehabilitation. The rent roll must disclose terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, dates of first occupancy and expiration of lease. Vacant and proposed new construction Projects are exempt from this requirement.

(8) EXHIBIT 108. Label as EXHIBIT 108, for new construction and rehabilitation developments, a 15-year proforma estimate of operating expenses and supporting documentation used to generate projections (excerpts from the market study, operating statements from comparable properties, etc.). Rehabilitation developments must also submit historical monthly operating statements of the subject development for 12 consecutive months ending not more than 45 days prior to the first day of the Application Acceptance Period. In lieu of the monthly operating statements, two annual operating statement summaries may be provided. If 12 months of operating statements or two annual operating summaries can not be obtained, then the monthly operating statements since the date of acquisition of the development and any other supporting documentation used to generate projections may be provided.

(9) EXHIBIT 109. Label as EXHIBIT 109 on the cover page only, a Market Study addressing all items listed in §49.4(c) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and/or required by the Reference Manual.

(10) EXHIBIT 110. Label as EXHIBIT 110 on the cover page only, a Phase I Environmental Study prepared in accordance with §49.4(c) of this title.

(11) EXHIBIT 111. Label as EXHIBIT 111, for Applicants seeking credits from the Non Profit Set-Aside, all of the following documents that confirm that the Applicant is a Qualified Nonprofit Organization pursuant to Code, §42(h)(5)(C):

(A) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501(c)(3) or (4) entity;

(B) if the Project involves a joint-venture between a Qualified Nonprofit Organization and a for-profit entity, an agreement which shows that the nonprofit organization Controls the Project (directly or indirectly) and will materially participate (within the meaning of the Code §469(h) in the development and operation of the Project throughout the Compliance Period;

(C) a current list of all directors and officers of the nonprofit organization, along with information pertaining to their primary occupations and disclosing any relationship; as an Affiliate or otherwise, with other members of the Applicant and/or any members or Affiliate of the Development Team, including any market analyst, CPA, appraiser, or other professional performing any services with respect to the Project and/or the subject Property; and

(D) a copy of the articles of incorporation of the nonprofit organization which specifically states the fostering of affordable housing is one of the entities exempt purposes.

(12) EXHIBIT 112. Label as EXHIBIT 112, for Applicants applying for acquisition credits or if the Applicant is affiliated with the seller, all of the following documentation:

(A) an appraisal, which complies with the Market Analysis & Appraisal Policy provided in the Reference Manual, of the Property separately stating the value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district; and

(C) a bona fide valid contract verifying the acquisition cost and clearly identifying the selling Persons or entities, and details any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Project.

(13) EXHIBIT 113. Label as EXHIBIT 113, a copy of the public notice published in a widely circulated newspaper in the area in which the proposed development will be located. Such notice must run at least twice within a two week period, except on holidays, prior to the submission of the Application to the Department. The notice must be prepared in accordance with the guidelines established in the Application Submission Procedures Manual. Such notice can not be older than 3 months from the first day of the Application Acceptance Period.

(14) EXHIBIT 114. This exhibit must be the original copy of the completed and executed General Contractor Certification Form provided as part of the Application Submission Procedures Manual.

(b) Evaluation Factors. The Department will consider Applications for a housing credit allocation using the evaluation and point system described in this subsection and in the Application Submission Procedures Manual.

(1) Applications will be initially evaluated against the Threshold Criteria as they are accepted for filing in the Department during any Application Acceptance Period. Applications not meeting the Threshold Criteria may be terminated and may, at the Department's discretion, be returned to the Applicant without further review. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any oversight or failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. All Applicants may withdraw and subsequently refile an Application, as well as file a new Application before the filing deadline.

(2) Applications will then be ranked according to the points scored under the Selection Criteria in accordance with the Rules and the Application Submission Procedures Manual. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for ranking purposes.

(3) In addition to the number of points scored, the decision to underwrite a Project shall be subject to considerations contained in §49.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments). The Department, the Committee, and the Board shall evaluate an Application on the basis of additional factors beyond scoring criteria such as underwriting analysis, geographic dispersion of multi-family housing as well as tax credit allocation, site conditions, impact on the Low Income Housing Tax Credit Program's goals and objectives as stated in the QAP and the Rules, and as otherwise provided under this chapter. If such evaluation warrants, the Application will be forwarded to the Committee and to the Board for approval. In making its recommendation to the Board, the Department shall enumerate the reason(s) for the Project's selection, including all discretionary factors used in making its determination. The Department may have an outside third party perform the underwriting evaluation to the extent it

determines appropriate. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(4) Applications which have not received a Commitment Notice at the end of the Application Round may be placed on a waiting list to be established by the Department and approved by the Committee and the Board. At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated, unless the Department shall determine to retain or act upon such Applications as provided hereinafter at §49.15 (relating to Forward Reservations; Binding Commitments). The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Selection Criteria. Pursuant to subsection (b) of this section, Applications receiving the highest number of points in each set aside category, in each Application Acceptance Period, if a sufficient amount of the State Housing Credit Ceiling is available, will be eligible for an evaluation by an Underwriter subject to §49.4(h) of this title. All Applications will be ranked according to the Selection Criteria listed in paragraphs (1)-(9) of this subsection. If no additional set-aside credits are available, the Application shall be scored and evaluated in the General Pool using the criteria to which such General Pool Applications are subject, without special set-aside scoring points being considered.

(1) DEVELOPMENT LOCATION.

(A) EXHIBIT 201. Label as EXHIBIT 201, evidence that the subject Property is located within:

(i) a Qualified Census Tract (QCT) as defined by the Secretary of HUD and qualifies for the 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), a Difficult Development Area (DDA) or a Targeted Texas County (TTC). Developments in a QCT should submit a copy of the census map must clearly show that the proposed development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual. Applicants for Projects in a Difficult Development Area or a Targeted Texas County must indicate this designation in the space provided in the Application Submission Procedures Manual;

(ii) a designated state or federal empowerment/ enterprise zone. Such developments must submit a letter and a map from a city/county official verifying that the proposed development is located within such a designated zone. Letter should be no older than 90 days from the first day of Application Acceptance Period; or

(iii) a city-sponsored Tax Increment Financing Zone (TIF), Public Improvement District (PIDs), or other neighborhood preservation/redevelopment district organized under the Texas Local Government code. Such developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(I) created by the local city council/county commission,

(II) targets a specific geographic area which was not created solely for the benefit of the Applicant, and

(III) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county (5 points).

(2) HOUSING NEEDS CHARACTERISTICS.

(A) The proposed development is located in a county in which 10% or more of the households are below the poverty level as set forth in the Department's "County Data Elements Guide" incorporated into the Reference Manual. Utilize the percentages in clauses (i)-(iv) of this subparagraph to assess the appropriate score:

(i) 10% to 20% of households are below the poverty level (3 points);

(ii) 21% to 31% of households are below the poverty level (5 points);

(iii) 32% to 42% of households are below the poverty level (7 points); or

(iv) 42% + of households are below the poverty level (9 points).

(B) The proposed development is located in a county in which 20% or more of the rental units have a cost burden as set forth in the County Data Elements guide. Utilize the following percentages to assess the appropriate score:

(i) 20% to 30% of rental units have a cost burden (4 points);

(ii) 31% to 41% of rental units have a cost burden (6 points); or

(iii) 42% + of rental units have a cost burden (8 points).

(3) PROJECT CHARACTERISTICS.

(A) EXHIBIT 202. Label as EXHIBIT 202, evidence that the proposed development to be purchased qualifies as a federally assisted building within the meaning of the Code, §42(d)(6)(B), and is in danger of having the mortgage assigned to HUD, TxRD, or creating a claim on a federal mortgage insurance fund (such evidence must be a letter from the institution to which the development is in danger of being assigned); OR evidence that the Applicant is purchasing(ed) a Property owned by HUD, an insured depository institution in default, or a receiver or conservator of such an institution, or is an REO Property. Such evidence must be in the form of a binding contract to purchase from such federal or other entity as described in this paragraph, closing statements, or recorded warranty deed (5 points).

(B) EXHIBIT 203. Label as EXHIBIT 203, evidence that the proposed development is a low income building with mortgage prepayment eligibility as provided for in the Code, §42(d)(6)(C). Such evidence must be a copy of the HUD regulatory agreement which evidences the prepayment clause (5 points).

(C) The proposed development's composition offers a Unit mix which is conducive to housing large families. To qualify for these points, these Units must have at least 1000 square feet of net rentable area for three bedrooms or 1200 square feet of net rentable area for four bedrooms. Unless the building is served by an elevator, the 3 or 4 bedroom Units should not be located above the building's second floor. If the Project is a mixed-income development, only tax credit Units should be used in computing the percentage of qualified Units for this selection item.

(i) 15% of the Units in the development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

(D) EXHIBIT 204. Label as Exhibit 204, a letter from the design architect which certifies that at least four of the following energy saving devices will be utilized in the construction of each tax credit Unit. The devices selected must be certified as included in each tax credit Unit of the Project upon Cost Certification. Letter must specify where the items will be used and what efficiency standards will be met (R-values, SEER rating, flue efficiencies, etc.) (3 Points):

(i) ceiling fans in living room and each bedroom;

(ii) insulation of at least R-19 for walls and R-30 for ceilings;

(iii) solar screens;

(iv) gas heating system with a minimum 80% flue efficiency;

(v) energy efficient air conditioning system with a 12 SEER or above rating;

(vi) dual pane insulating, low-e windows;

(vii) evaporative cooling system; or

(viii) utilization of appliances and residential light fixtures that qualify for the US EPA and the US Department of Energy's Energy Star Label. At a minimum, this shall include the installation of programmable thermostats, water heaters, refrigerators and dishwashers in each unit.

(E) The proposed development provides low density housing of less than 16 Units per acre or as follows:

(i) 16 Units or less per acre (6 points); or

(ii) 17 to 20 Units per acre (4 points).

(F) The subject Project is an existing Residential Development without maximum rent limitations or set-asides for affordable housing seeking rehabilitation credits. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the date of Application to the Department (8 points).

(G) The subject Project is a mixed-income development comprised of both market rate Units and qualified tax credit Units. To qualify for these points, the project must be located in a submarket where the average rents for comparable market rate units are at least 10% higher on a per net rentable square foot basis than the maximum allowable rents under the Program. Additionally, the proposed rents for the market rate units in the project must be at least 5% higher on a per net rentable square foot basis than the maximum allowable rents under the Program.

(i) Project's Applicable Fraction is no greater than 75% (6 points).

(ii) Project's Applicable Fraction is no greater than 60% (10 points).

(H) EXHIBIT 205. Label as EXHIBIT 205, evidence that the proposed historic residential development has received an historic property designation by a federal, state or local governmental entity. Such evidence must be in the form of a letter from the designating entity identifying the development by name and address and stating that the project is:

(i) listed in the National Register of Historic Places under the U.S. Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the U.S. Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark (6 points).

(I) Property Owner will set-aside Units for households with incomes at 50% or less of Area Median Gross Income (AMGI). The rents for these Units must not be higher than the allowable tax credit rents at the 50% AMGI level. The property owner will set aside Units at 50% AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. For the purposes of this subparagraph (maintaining the promised percentage of set aside 50% AMGI Units), if at re-certification the tenant's household income exceeds 140% of the 50% AMGI level, then the Unit remains a 50% AMGI Unit until the next available Unit of comparable or smaller size is designated to replace this Unit. Once the over 50% AMGI Unit is replaced, then the rent for the previously qualified 50% AMGI Unit may be increased under the LIHTC requirements. Rent increases, if any, should comply with lease provisions and local tenant-landlord laws. If the Project is a mixed-income development, only tax credit Units should be used in computing the percentage of qualified Units for this selection item. Utilize the percentages in clauses (i) and (ii) of this subparagraph to assess the appropriate score.

(i) four points will be awarded for the first 10% of the Units in the development that are set-aside for tenants with incomes at 50% or less of AMGI (4 points); and

(ii) an additional point will be awarded for every 5% of additional Units set-aside for tenants with incomes at 50% or less of AMGI up to a maximum of four points (4 points).

(J) Proposed development is comprised of fourplexes in clusters of four or more buildings or Town Home development of at least 16 Units. To qualify for these points the development must be on contiguous property under common ownership, management, and Control and must have a density of no more than 16 Units per acre (5 points).

(K) EXHIBIT 206. Label as EXHIBIT 206, for rehabilitation evidence that a majority of the development's residential Units, as of the end of the Application Acceptance Period, are vacant and uninhabitable. Such evidence must be in the form of a letter and report from the local municipal authority citing substantial code violations. To qualify for these points, the Applicant or its Affiliates must not have owned a significant interest in, or have had Control of the Project during the period in which such Units were rendered uninhabitable (4 points).

(L) EXHIBIT 207. Label as EXHIBIT 207, evidence from the local municipal authority stating that the proposed development fulfills a need for additional affordable rental housing as evidenced in a local Consolidated Plan, Comprehensive Plan, State Low Income Housing Plan or other planning document and is supported by the local municipal authority. If the State Low Income Housing Plan is utilized for this exhibit, then a letter from the local municipal authority stating that there is no local plan and that the city supports the state plan must be submitted with the letter from the state (5 points).

(M) The Project is a Small Development. A Small Development is defined as a Project consisting of not more than 35 multifamily Units, which is not a part of, or contiguous to, a larger Project. A Project may not receive points for this characteristic if it would otherwise qualify as a Rural Project (5 points).

(4) SPONSOR CHARACTERISTICS.

(A) EXHIBIT 208. Label as EXHIBIT 208, evidence that the Project Owner's general partner, General Contractor or their principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e. dormitory and hotel/motel). Evidence must be one of the following documents: AIA Document A111–Standard Form of Agreement Between Owner & Contractor, AIA Document G704–Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other appropriate documentation verifying that the general partner, General Contractor or their principals have the required experience. While points may be awarded for experience under this subparagraph during the application process, the criteria and conditions related to a General Contractor as outlined in §49.8(c) of this title (relating to Housing Credit Allocations) must be met in order to receive a final allocation of credits. If the General Contractor or its principals is shown not to have the required experience upon review of documents required pursuant to §49.8(c) of this title, then the conditions of the Commitment Notice or carryover agreement will not have been met and the final allocation of credits may be denied. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(i) The evidence must clearly indicate:

(I) that the project has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(II) that the names on the forms and agreements tie back to the ownership entity, general partner, general contractor and their respective principals as listed in the Application; and

(III) the number of units completed or substantially completed.

(ii) The term "successfully" is defined as acting in a capacity as the general contractor or developer of:

(I) at least 100 residential units or comparable commercial property; or

(II) at least 35 residential units or comparable commercial property if the project applying for credits is a Rural Project.

(iii) Property Owners in noncompliance or with a record of material noncompliance with HUD, TxRD, HOME, LIHTC or any other program monitored or involving funds awarded by the Department, but which are not barred from having an Application recommended by §49.4(f) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments), or which have had a continuing pattern of defaults and foreclosures are ineligible to claim the points for this item (10 points).

(B) EXHIBIT 209. Label as EXHIBIT 209, evidence that a Historically Underutilized Business ("HUB") as certified by the General Services Commission is the Project Owner or Controls the Project Owner. With respect to the filing of an Application and the development, operation and ownership of a Project, the historically underutilized person or persons whose ownership interests comprise a majority of a corporation, partnership, joint venture or other business entity, must maintain this majority and must demonstrate regular, continuous, and substantial participation in the operation and management activities of the entity. Likewise, with regard to a sole proprietorship, the individual who comprises the sole proprietorship must demonstrate regular, continuous, and substantial participation in the development, operation and ownership of the Project. The Department shall, during and after the Application Round, monitor those individuals whose purported ownership interest(s) and participation form the basis upon which the designation of HUB is being claimed and may require the submission of additional documentation as required to verify said evidence. The Department's goal is to have substantive participation by those individuals whose purported ownership interest(s) and participation form the basis which the designation as a HUB is claimed. A determination by the Department that there has been a material misrepresentation as to such participation or that insufficient evidence has been provided to substantiate such participation will be final and points awarded for HUB participation will be withdrawn accordingly. The following documentation must be provided to qualify for these points:

(i) certification from the General Services Commission that the Person is a HUB; and

(ii) evidence of regular, continuous and substantial participation. This evidence shall include, but not be limited to, the agreement to personally guarantee the interim construction loan secured relative to the development of a Project (and to personally provide all other guarantees to the equity investor) by the person or persons whose purported ownership interest(s) and participation form the basis upon which the designation of a HUB is being claimed. Any such guarantee wherein an Affiliate, partner and or Beneficial Owner of the guarantor agrees to indemnify, in whole or in part, the guarantor from the liability arising from the guarantee, shall not constitute said evidence (5 points).

(5) PARTICIPATION OF LOCAL TAX EXEMPT ORGANIZATIONS. EXHIBIT 210 Label as EXHIBIT 210, evidence that the Property owner has an executed agreement with a Local Tax Exempt Organization for the provision of special supportive services that would not otherwise be available to the tenants. The supportive services will be evaluated based upon the following:

(A) the duration of the service agreement;

(B) the accessibility and appropriateness of the service to the tenants;

(C) the experience of the service provider; and

(D) the importance of the service in enhancing the tenants standard of living. The supportive service will be included in the Declaration of Land Use Restrictive Covenants ("LURA") (Up to 5 points).

(6) TENANT POPULATIONS WITH SPECIAL HOUSING NEEDS.

(A) This criterion applies to elderly Projects which must provide significant facilities and services specifically designed to meet the physical and social needs of the residents. Significant services may include congregate dining facilities, social and recreation programs, continuing education, welfare information and counseling, referral services, transportation and recreation. Other attributes of such Projects include providing hand rails along steps and interior hallways, grab bars in bathrooms, routes that allow for barrier-free

lever type doorknobs and single lever faucets. All multistory buildings (two or more floors) must be served by an elevator. Individual Units shall not be multistory. Elderly Projects must not contain any Units with three or more bedrooms. Such a Project must conform to the Federal Fair Housing Act and must be a Project which:

(i) which is intended for, and solely occupied by Persons 62 years of age or older; or

(ii) in which all Units (excluding those occupied by an employee or owner) are constructed for, and occupied by at least one Person who is 60 years of age or older; and

(iii) which adheres to policies and procedures which demonstrate a firm commitment by the owner and manager to provide housing for Persons 60 years of age or older (10 points).

(B) EXHIBIT 211. Label as EXHIBIT 211, evidence which establishes that Units will be provided for persons with physical or mental disabilities as described in clause (i) or (ii) of this subparagraph. The points for clauses (i) and (ii) are mutually exclusive.

(i) The Project Owner agrees to set aside Units for Persons with Disabilities. The Department will require a minimum of nine months during which the set aside Units must either be occupied by tenants who are physically or mentally disabled or held vacant while being marketed to such tenants. The nine month period will begin on the date that each building receives its certificate of occupancy. For buildings which do not receive a certificate of occupancy, the nine month period will begin on the placed in service date as provided in the Cost Certification Procedures Manual. When a qualified tenant is located, the Project Owner will be responsible for adapting the Unit per the tenant's requirements. The cost of adapting the Unit will be borne by the Project Owner. If the Project Owner is unable to locate qualified Persons with Disabilities following a good-faith effort throughout the nine month set aside period, then the Units may be rented to tenants without disabilities, provided that the next available Unit (from among those set aside for Persons with Disabilities) shall first be made available to Persons with Disabilities. To comply with this provision, the Project Owner must maintain a waiting list of qualified tenants with disabilities throughout the Compliance Period. Each time a Unit set aside for Persons with Disabilities becomes available, the Project Owner must contact an individual on the waiting list and/or provide notice to local service providers that the Unit is available. If the waiting list or the local service provider cannot locate a qualified tenant for the next available Unit, then the Unit may be rented to a tenant without disabilities. The documentation requirements at the time of Application and the point system for this clause are contained in subclauses (I)-(IV) of this clause (documentation for all three subclauses, (I)-(III), must be provided):

(I) evidence verifying that Adaptable Dwelling Units will be specifically set aside for persons with physical or mental disabilities. Such evidence for physical disabilities must be in the form of a certification from an accredited architect stating the number of Units which are/will be designed to meet American National Standards for buildings and facilities providing accessibility and usability for Persons with Disabilities (ANSI A117.1 - 1986) and will conform to the Fair Housing Act. Such evidence for persons with mental disabilities must be in the form of a contract to provide appropriate supportive services for persons with mental disabilities between the Project Owner and an experienced service provider;

(II) a copy of the section from the market study which clearly establishes that there is a demand for the percentage of Units being set aside for Persons with Disabilities; and

(III) a copy of the Project Owner's marketing plan for Persons with Disabilities which conforms to the guidelines provided in the Application Submission Procedures Manual.

(IV) The point system for this clause is:

(-a-) at least 7% of the Units are set-aside for persons with physical or mental disabilities (5 points); or

(-b-) at least 10% of the Units are set-aside for persons with physical or mental disabilities (8 points).

(ii) Submit evidence verifying that the Project provides Units specifically accessible to persons with physical, visual or hearing disabilities as required by §504 of the Rehabilitation Act of 1973. As required by §504, a one time inspection and corresponding accessibility transition plan will be required upon completion of construction. Project Owners making this election must also comply with the Fair Housing Act. The documentation requirements at the time of Application and the point system for this clause are contained in subclauses (I)-(IV) of this clause (documentation for all three subclauses, (I)-(III), must be provided):

(I) a certification from an accredited architect stating the number of Units which are/will be accessible per the requirements of §504 as governed by the Uniform Federal Accessibility Standards (UFAS); and

(II) a copy of the section from the market study which clearly establishes that there is a demand for the percentage of Units being set aside for Persons with Disabilities; and

(III) a copy of the Project Owner's marketing plan for Persons with Disabilities which conforms to the guidelines provided in the Application Submission Procedures Manual.

(IV) The point system for this clause is:

(-a-) At a minimum, 5% of the Units must be usable for persons with mobility impairments and 2% of the Units shall be made accessible for people with hearing or visual impairments (5 points); or

(-b-) At a minimum 10% of the Units must be usable for persons with mobility impairments and 2% of the Units shall be made accessible for people with hearing or visual impairments (8 points).

(C) EXHIBIT 212. Label as EXHIBIT 212, evidence that the Project is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. Such evidence must include a detailed narrative describing the type of proposed housing; a referral agreement with an established organization which provides services to the homeless; and a marketing plan designed to attract qualified tenants and housing providers, as well as a list of supportive services (15 points).

(7) PUBLIC HOUSING WAITING LISTS. EXHIBIT 213. Label as EXHIBIT 213, evidence that the Property owner has committed in writing to the local public housing authority (PHA) the availability of Units and that the Property owner agrees to consider households on the PHA's waiting list as potential tenants. Evidence of this commitment must include all of the following documentation:

(A) a copy of the Property owner's letter to the PHA. If no PHA is within the locality of the development, the Property owner must utilize the nearest authority or office responsible for administering Section 8 programs;

(B) a copy of the marketing plan submitted with letter to the local PHA;

(C) verification of receipt by the PHA in the form of certified return receipt or overnight mail receipt; and

(D) a letter received from an appropriate municipal authority or local PHA stating the need for additional affordable housing Units within its jurisdiction (3 points).

(8) SUBSTANTIAL READINESS TO PROCEED. EXHIBIT 214. Label as EXHIBIT 214, evidence of substantial readiness to proceed. Such evidence must be in the form of an enforceable construction financing commitment from a regulated financial institution that is actively and regularly engaged in the business of lending money. Such a commitment must be a written approval of a loan or grant (i.e., preliminary approval by the lender's loan committee) and be subject only to conditions fully under the control of the Applicant to satisfy (excluding the allocation of tax credits) (4 Points).

(9) BONUS POINTS.

(A) EXHIBIT 215. Label as Exhibit 215, evidence that Sponsor agrees to provide a right of first refusal to purchase the Project upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, § 42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department; and an individual tenant with respect to a single family building or a tenant cooperative and/or a resident management corporation in the Project or other association of tenants in the Project with respect to multifamily developments (together, including the tenants of a single family building, a "Tenant Organization"). Sponsor may qualify for this bonus by agreeing that the LURA with respect to the Project will, in substance, contain the following terms.

(i) Upon the earlier to occur of:

(I) the Sponsor's determination to sell the Project, or

(II) the Sponsor's request to the Department, pursuant to §42(h)(6)(I) of the Code, to find a buyer who will purchase the Project pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Sponsor shall provide a notice of intent to sell the Project ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Sponsor determines that it will sell the Project at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period.

(ii) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Project only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(I) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. § 92.1 (a "CHDO") and is approved by the Department,

(II) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(III) during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iii) After the later to occur of:

(I) the end of the Compliance Period; or

(II) two years from delivery of a Notice of Intent, the Sponsor may sell the Project without regard to any right of first refusal established by the LURA if no offer to purchase the Project at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of such offer without the sale having occurred, provided that the failure to close within such 120-day period shall not have been caused by the Sponsor or matters related to the title for the Project.

(iv) At any time prior to the giving of the Notice of Intent, the Sponsor may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Project for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Project by such organization in accordance with and subject to the priorities set forth in paragraph (ii) of this section.

(v) The Department shall, at the request of the Sponsor, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Project at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in clause (ii) of this subparagraph (5 points).

(B) Application is received within the first ten working days of the Application Acceptance Period (2 points).

(d) Final Ranking. The Department will evaluate Projects according to the strength of the Project in meeting the Threshold and Selection Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category, the Department in addition to factors outlined in §49.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) will utilize the following factors in the order presented in paragraphs (1)-(7) of this subsection in making a determination as to which Project will receive a preference in consideration for a tax credit commitment:

(1) which serve the lowest income tenants;

(2) which serve low income tenants for the longest period of time, in the form of a longer Compliance Period and/or extended low income use period (as set forth in the Extended Low Income Housing Commitment Agreement);

(3) which is a Special Housing Project as defined in §49.2 of this title (relating to Definitions);

(4) which have substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Project;

(5) which demonstrates the highest substantial readiness to proceed as evidenced by the Selection Criteria, more specifically provided for in subsection (c)(8) of this section;

(6) which provide for the most efficient usage of the low income housing tax credit on a per Unit basis; and

(7) whose Unit composition provides the highest percentage of three bedrooms or greater sized Units.

(e) Past Performance. In reaching the final ranking of an Application, the Department will take into consideration the Project Owner's history in the tax credit program and other affordable housing programs. The Department may disqualify from this Application Round, any Applicant, Project Owner, developer and its partners, principals, and/or Affiliates who received an allocation of credits in the 1998 Application Round and who did not close the construction loan as required under the Carryover Allocation. The Department may deduct up to ten points from the final score of any Applicant (or an Affiliate of) which, in the past, has not placed into service developments for which the Department has made an allocation, or from the score of a Project Owner that has failed to perform under the obligations of any previous Commitment Notice. The Department may, at its sole discretion disqualify or impose limitations or restrictions upon an Applicant, Project Owner, developer, and its partners, principals and/or Affiliates with respect to the competition for allocations of tax credits as a consequence of material misstatement or omission, noncompliance with any Code requirements, or failure to fulfill any of the terms, conditions or obligations of the program for any Project that has received a commitment or allocation, or for failure to place in service buildings for which credits were allocated. The Department will disqualify an Applicant who has been convicted of fraud, theft, misappropriation of funds, or who has made misrepresentations to the Department. The Department will also disqualify an Applicant who is in noncompliance with the LURA or other similar agreement for any Project monitored by the Department, or who is in noncompliance under this program or another program administered by this Department or other governmental entities unless the Applicant is working to remedy the condition of noncompliance under a plan which was agreed to in writing by the appropriate regulatory entity. Additionally, Applicants are advised that the Department reserves the right to reject Applications which include principals who have been:

(1) excluded from federal and non federal procurement programs (either debarment or suspension);

(2) convicted of a felony offense;

(3) indicted or subject to enforcement action under state of federal securities law; and

(4) negligent in the physical upkeep and/or operation of the subject Property or any other property owned by the Applicant which is receiving funds from the Department, as deemed so by another federal or state authority. All such rejections of Applications shall be at the sole discretion of the Department.

(f) Credit Amount.

(1) The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Project throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Project by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Project or $2.4 million per Applicant. For these purposes this limitation will apply to all Affiliates of any Applicant, developer, Project Owner, general partner, sponsor or their Affiliates or related entities unless otherwise provided for by the Department. Tax Exempt Bond Project Applications are not subject to the per Project and per Applicant credit limitations.

(2) In making determinations with respect to the limitation the Department may take into account such factors as the percentage of interest held by a particular individual or any Affiliate thereof in a Project, the amount of fees or other compensations paid to a particular individual or any Affiliate thereof with respect to a Project, any other financial benefits, either directly or indirectly through Beneficial Ownership received by a particular individual or any Affiliate thereof with respect to a Project. The Committee, in its sole discretion, may allocate credits to a Project Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Project's financial viability as a qualified low income Project. The limitation does not apply:

(A) to an entity which raises or provides equity for one or more Projects, solely with respect to its actions in raising or providing equity for such Projects (including syndication related activities as agent on behalf of investors);

(B) to the provision by an entity of "qualified commercial financing" within the meaning of the Code, §49(a)(1)(D)(ii) of this title (without regard to the 80% limitation thereof);

(C) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Project by such organization consists of the provision of loan funds or grants; and

(D) to a Project Consultant with respect to the provision of consulting services.

(g) Limitations on the Size of Projects.

(1) Minimum Project size will be limited to 16 units unless otherwise provided for under the Ineligible Building Types definition.

(2) Rural Projects involving new construction must not exceed 76 Units. All other Projects involving new construction or requesting a combination of rehabilitation and new construction tax credits will be limited to 250 Units. (248 Units if fourplexes).

(h) Tax Exempt Bond Financed Projects.

(1) Tax Exempt Bond Project Applications are also subject to evaluation under the QAP and Rules.

(2) Submission Requirements. Tax Exempt Bond Project Applications are subject to the requirements and underwriting review criteria described in the Application Submission Procedures Manual. Such projects must meet all Threshold Criteria requirements stipulated in the most recently approved QAP and Rules. Tax Exempt Bond Financed Projects are not subject to the Selection Criteria and related items and are not required to submit such documentation. While Tax Exempt Bond Developments are not subject to the Selection Criteria, such Projects must demonstrate consistency with the bond issuer's local Consolidated Plan as more fully described in subsection (c)(3)(L) of this section, Exhibit 207.

(3) Tax Exempt Bond Project Applications are subject to the size restrictions specified in subsection (g) of this section.

(4) The issuer (if other than the Department) may, at its discretion, enter into a contractual agreement to allow the Department to underwrite the Project for financial feasibility If the Department is not the issuer and does not have such an agreement, it will require evidence that the issuer has underwritten the Project for financial feasibility in accordance with the Department's guidelines contained in the Reference Manual. The Department will review the issuer's feasibility determination and may make such changes in the amount of credits to be taken as are appropriate under those guidelines. In the absence of a contractual agreement between the issuer and the

Department or evidence that the issuer has underwritten the Project, the Department will underwrite the Project and may make such changes in the amount of credits to be taken as are appropriate under the Department's guidelines.

(5) Tax Exempt Bond Project Applications are subject to review and approval by the Ad Hoc Tax Credit Committee of the concentration of low income Projects within specific markets or submarkets, geographic dispersion of multifamily housing in any particular market or submarket and site conditions.

(6) If the Department determines that all requirements have been met, the Ad Hoc Tax Credit Committee, without further action, shall authorize the Department to issue an appropriate notice to the Sponsor that the Project satisfies the requirements of the QAP and Rules in accordance with §42(m)(1)(D).

(i) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the applications process for a Project, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Project, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Project, shall be reflected in the LURA. All such representations are enforceable by the Department, including enforcement by administrative penalties for failure to perform as stated in the representation and enforcement by inclusion in deed restrictions to which the Department is a party.

§49.7. Compliance Monitoring.

(a) The Code, §42 (m)(1)(B)(iii), requires each State Allocating Agency to include in its "Qualified Allocation Plan" a procedure that the agency (or an agent or other private Contractor of such agency) will follow in monitoring Projects for noncompliance with the provisions of the Code, §42 and in notifying the Internal Revenue Service (the "Service"), or its successor, of such noncompliance of which such agency becomes aware. This procedure does not address forms and other records that may be required by the Service on examination or audit.

(b) The Department will also monitor compliance with any additional covenants made by the Project Owner in the Extended Low Income Housing Commitment Agreement.

(c) The owner of a low income housing Project must keep records for each qualified low income building in the Project showing:

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged on each residential rental Unit in the building including documentation to support the utility allowance;

(4) the number of occupants in each low income Unit;

(5) the low income Unit vacancies in the building and information that shows when, and to whom, the next available Units were rented;

(6) the annual income certification of each low income tenant per Unit, in the form designated by the Department in the Compliance Reference Guide, as may be amended;

(7) documentation to support each low income tenant's income certification, consistent with the verification procedures required by HUD under §8 of the United States Housing Act of 1937 (§8). In the case of a tenant receiving housing assistance payments under §8, the documentation requirement is satisfied if the public housing authority provides a statement to the Project Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Reference Guide;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the Project); and

(10) additional information as required by the Department.

(d) Record retention provision. The owner of a low income housing Project is required to retain the records described in subsection (c) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the tax Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(e) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Project Owner of a completed Project an Owner's Certification of Program Compliance to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Project for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Project Owner, will be considered not in compliance with the provisions of the Code. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include the following statements of the Owner:

(A) the Project met the minimum set-aside test which was applicable to the Project;

(B) there was no change in the Applicable Fraction of any building in the Project, or that there was a change, and a description of the change;

(C) the owner has received an annual income certification from each low income tenant and documentation to support that certification;

(D) each low income Unit in the Project was rent-restricted under the Code, §42(g)(2) and Internal Revenue Service Final Regulation §1.42-10 regarding utility allowances;

(E) all Units in the Project were for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under the Code, §42(i)(3)(B)(iii));

(F) each building in the Project was suitable for occupancy, taking into account local health, safety, and building codes;

(G) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Project, or that there has been a change, and the nature of the change;

(H) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(I) if a low income Unit in the Project became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income before any other Units in the Project were, or will be, rented to tenants not having a qualifying income;

(J) if the income of tenants of a low income Unit in the Project increased above the limit allowed in the Code, §42(g)(2)(D)(ii), the next available Unit of comparable or smaller size in the Project was, or will be, rented to tenants having a qualifying income;

(K) a LURA including an extended low income housing commitment agreement as described in the Code, §42(h)(6)(B), was in effect for buildings subject to the Revenue Reconciliation Act of 1989, §7106(c)(1) (generally any building receiving an allocation after 1989);

(L) no change in the ownership of a Project has occurred during the reporting period;

(M) the Project Owner has not been notified by the Internal Revenue Service that the Project is no longer "a qualified low income housing project" within the meaning of the Code, §42; and

(N) the Project met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Project met all representations of the Project Owner in the Application for credits.

(2) Review.

(A) The Department will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) Each year, the Department will perform monitoring reviews of at least 20% of the low income housing Projects. A monitoring review will include an inspection of the income certification, the documentation the Project Owner has received to support that certification, the rent record for each low income tenant, and any additional information that the Department deems necessary, for at least 20% of the low income Units in those Projects. The Department shall give reasonable notice to the Project Owner that an inspection will occur; however, the Projects and records to be reviewed will be selected by the Department in its discretion. Monitoring reviews will be performed at the location of the Project, unless the Project is required to have fewer than ten low income Units.

(C) The Department may, at the time and in the form designated by the Department, require the Project Owners to submit for compliance review, information on tenant income and rent for each low income Unit, and may require a Project Owner to submit for compliance review a copy of the income certification, the documentation the Project Owner has received to support that certification and the rent record for any low income tenant.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TxRD, whereby the TxRD agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TxRD under its §515 program. Owners of such buildings may be excepted from the review procedures of paragraph (2)(B) or (C) of this subsection or both; however, if the information provided by TxRD is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Project Owner must provide the Department with additional information.

(f) Inspection provision. The Department retains the right to perform an on site inspection of any low income housing Project including all books and record pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment Agreement, whichever is later. An inspection under this subsection may be in addition to any review under subsection (e)(2) of this section.

(g) Notices to Owner. The Department will provide prompt written notice to the owner of a low income housing Project if the Department does not receive the certification described in subsection (e)(1) of this section or discovers through audit, inspection, review or any other manner, that the Project is not in compliance with the provisions of the Code, §42. The notice will specify a correction period which will not exceed 90 days, during which the owner may respond to the Department's findings, bring the Property into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Project Owner under this section is returned to the Department as unclaimed or undeliverable, the Project may be considered not in compliance without further notice to the Project Owner.

(h) Notice to the Internal Revenue Service.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823, Low Income Housing Credit Agencies Report of Noncompliance, with the Internal Revenue Service. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner, but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Project Owner has corrected the noncompliance or has otherwise responded to the Department's findings.

(2) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in this section for three years from the end of the calendar year the Department receives the certifications and records.

(i) Notices to the Department.

(1) A Project Owner must notify the Department in writing prior to any sale, transfer, exchange, or renaming of the Project or any portion of the Project, and this notification requirement shall be included in a LURA with respect to each Project. For Rural Projects that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any apportionment of the entire tax credit development.

(2) A Project Owner must notify the Department in writing of any change of address to which subsequent notices or communications shall be sent.

(j) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the owner including the owner's noncompliance with the Code, §42.

(k) These provisions apply to all buildings for which a low income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Project was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the Service in a manner consistent with subsection (g) of this section.

§49.8. Housing Credit Allocations.

(a) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Project throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a housing credit allocation; and/or the date the building is placed in service. Any housing credit allocation amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department dependent upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), AND THE DEPARTMENT IN NO WAY OR MANNER REPRESENTS OR WARRANTS TO ANY PROJECT OWNER, SPONSOR, INVESTOR, LENDER OR OTHER ENTITY THAT THE PROJECT IS, IN FACT, FEASIBLE OR VIABLE.

(b) When the Project Owner is in full compliance with the QAP and the Rules in this chapter, the Commitment Notice, the Carryover Allocation Procedures Manual and all fees as specified within §49.11 of this title (relating to Program Fees) have been received by the Department, the Department, if requested, shall execute a Carryover Allocation Document which has been properly completed, executed and notarized by the Project Owner. The Department shall return one executed copy to the Project Owner. Requirements for Carryover Allocations apply only to projects which receive an allocation from the State Housing Credit Ceiling.

(c) The General Contractor hired by the Project Owner must meet specific criteria as defined by the Seventy-fifth Legislature. A general contractor hired by an applicant or an applicant , if the applicant serves as general contractor must demonstrate a history of constructing similar types of housings without the use of federal tax credits. Evidence must be submitted to the Department which sufficiently documents that the general contractor has constructed some housing without the use of low income housing credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) All Carryover Allocations will be contingent upon the following:

(1) the Project Owner's closing of the construction loan shall occur within 150 days from the date of the execution of the Carryover Allocation Document with a one-time 30 day extension. All requests for extensions by Applicants shall be submitted to the Department for review. The Committee may grant extensions, in its sole discretion, on a case-by-case basis. The Committee may, in its sole discretion, waive related fees. Copies of the closing documents must be submitted to the Department within two weeks after the closing. The Carryover Allocation will automatically be revoked if the Project Owner fails to meet the aforementioned closing deadline, and all credits previously allocated to that Project will be returned to the general pool for reallocation; and

(2) the Project Owner must commence and continue substantial construction activities within a year of the execution of the Carryover Allocation document and evidence such activity in a format prescribed by the Department, (as more fully defined in the Carryover Allocation Procedures Manual), outlining progress towards placing the Project in service in an expeditious manner. All requests for extensions by Applicants shall be submitted to the Department for review, and the Committee may grant extensions, in its sole discretion, on a case-by-case basis.

(e) The Department shall not allocate additional credits to a Project Owner who is unable to provide evidence, satisfactory to the Department, of progress towards placements in service for a Project(s) that is in carryover or that has received a Determination Notice. An allocation will be made in the name of the Applicant identified in the related Commitment Notice or Determination Notice. If an allocation is made in the name of the party expected to be the general partner in an eventual owner partnership, the Department may, upon request, approve a transfer of allocation to such owner partnership in which such party is the sole general partner. Any other transfer of an allocation will be subject to review and approval by the Department. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant

(f) The Department shall make a housing credit allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Project Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.11 of this title, have been received by the Department. For Tax Exempt Bond Projects, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Project with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Project Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will only occur only after the Project Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Project which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a project basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in

the Project until the issuance of IRS Form 8609s with respect to such buildings.

(g) In making a housing credit allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(h) Project inspections shall be required to show that the Project is built or rehabilitated according to required plans and specifications. At a minimum, all Project inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Project is placed in service. All such Project inspections shall be performed by the Department or by an independent, third party inspector acceptable to the Department. The Project Owner shall pay all fees and costs of said inspections.

(i) After the entire Project is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document, the Project Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. A newly constructed or rehabilitated building is not placed in service until all units in such building have been completed and certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire project, therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Project as well as for the closing of all interim and permanent financing for the Project. If the Applicant does not fulfill all representations made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609 or may withhold issuance of the IRS Form 8609s until these representations are met.

§49.9. Department Records; Certain Required Filings.

(a) At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Not less frequently than quarterly during each calendar year, the Department shall publish in the Texas Register each of the items of information referred to in subsection (a) of this section.

(c) The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Project Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Project Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section.

§49.10. Department Responsibilities.

In making a housing credit allocation under this chapter, the Department shall rely upon information contained in the Project Owner's Application to determine whether a building is eligible for the credit under the Code, §42. The Project Owner shall bear full responsibility for claiming the credit and assuring that the Project complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Project Owner who receives a housing credit allocation from the Department will qualify for the housing credit. The Department will reject, and consider barring the Project Owner from future participation in the Department's tax credit program as a consequence thereof, any Application in which fraudulent information, knowingly false documentation or other misrepresentation has been provided. The aforementioned policy will apply at any stage of the evaluation or approval process.

§49.11. Program Fees.

(a) Each Project Owner that submits an Application shall submit to the Department, along with such Application, a non refundable Application fee, as set forth in the Application Submission Procedures Manual.

(b) For each Project that is to be evaluated by an independent third party underwriter in accordance with §49.6(b)(3) of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects), the Project Owner will be so informed in writing prior to the commencement of any reviews by said underwriter. The cost for the third party underwriting will be set forth in the Application Submission Procedures Manual, and must be received by the Department prior to the engagement of the underwriter. The fees paid by the Project Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (c) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Project Owner.

(c) Each Project Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the commitment billing notice, a non refundable commitment fee, as set forth in the Application Submission Procedures Manual. The commitment fee shall be paid by cashier's check. Projects located within one of the targeted Texas counties, as indicated in the Reference Manual, will be exempt from the requirement to pay a commitment fee, in the event that Commitment Notice is issued.

(d) Each Project Owner that requests an extension of the expiration date of a Commitment Notice, or an extension of the documentation submission date for Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service and Cost Certification, shall submit to the Department, along with such request, a non refundable extension fee. The amount of the extension fee shall be set forth in the Application Submission Procedures Manual. This fee shall be paid by cashier's check and shall be submitted as discussed in §49.12 of this title (relating to Manner and Place of Filing Applications). All extensions shall be granted at the discretion of the Department.

(e) Upon the Project being placed in service, the Project Owner will pay a compliance monitoring fee in the form of a cashier's check, as set forth in the Application Submission Procedures Manual. The compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Project.

(f) Public information requests are processed by the Department in accordance with the provisions of Texas Civil Statutes, Article 6252-17a, codified as Government Code, Chapter 552, and as amended by the Acts during the 73rd Legislature, and as may be amended from time to time. The General Services Commission and the Department determine the cost of copying, and other costs of production.

(g) The amounts of the Application fee, commitment fee, compliance monitoring fee, administrative fees, extension fee, and other applicable fees as specified in the Application Submission Procedures Manual will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses.

§49.12. Manner and Place of Filing Applications.

(a) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All Applications and related documents submitted to the Department shall be mailed or delivered to Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas 78701.

§49.13. Withdrawals, Cancellations, Amendments.

(a) A Project Owner may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation.

(b) The Department may consider an amendment to a Commitment Notice, Determination Notice or Carryover Allocation or other requirement with respect to a Project if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Project is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Project's ranking is adjusted because of such change);

(4) do not involve a change in the Project's site; or

(5) do not involve a change in the set-aside election.

(c) The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Project if:

(1) the Project Owner or any member of the Development Team, or the Project, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Project Owner in the applications process for the Project;

(2) any statement or representation made by the Project Owner or made with respect to the Project Owner, the Development Team or the Project is untrue or misleading;

(3) an event occurs with respect to any member of the Development Team which would have made the Project's Application ineligible for funding pursuant to §49.4(f) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments), if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) the Project Owner, any member of the Development Team, or the Project, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§49.14. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases of natural disasters such as fires, hurricanes, tornadoes, earthquakes, or other acts of nature as declared by Federal or State authorities.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the provisions of Texas Civil Statutes, Article 6252-13a, codified as Government Code, Chapter 2001, and as amended by the Acts of the Seventy-third Legislature, and as may be amended from time to time.

§49.15. Forward Reservations; Binding Commitments.

(a) Anything in §49.4 of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) or elsewhere in this chapter to the contrary notwithstanding, the Department with approval of the Board may determine to issue commitments of tax credit authority with respect to Projects from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Department may make such forward commitments:

(1) with respect to Projects placed on a waiting list in any previous Application Round during the year; or

(2) pursuant to an additional Application Round.

(b) If the Department determines to make forward commitments pursuant to a new Application Round, it shall provide information concerning such round in the Texas Register. In inviting and evaluating Applications pursuant to an additional Allocation Round, the Department may waive or modify any of the set-asides set forth in §49.5(a) and (b) of this title (relating to Set-Asides, Commitments and Preferences) and make such modifications as it determines appropriate in the Threshold Criteria, evaluation factors and Selection Criteria set forth in §49.6 of this title (relating to Threshold Criteria, Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects) and in the dates and times by which actions are required to be performed under this chapter. The Department may also, in an additional Application Round, include Projects previously evaluated within the calendar year and rank such

Projects together with those for which Applications are newly received.

(c) Unless otherwise provided in the Commitment Notice with respect to a Project selected to receive a forward commitment or in the announcement of an Application Round for Projects seeking a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated allocation rather than in the calendar year of the forward commitment.

(d) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. No more than 15% of the per capita component of State Housing Credit Ceiling anticipated to be available in the State of Texas in a particular year shall be allocated pursuant to forward commitments to Project Applications carried forward without being ranked in the new Application Round pursuant to subsection (f) of this section. If a forward commitment shall be made with respect to a Project placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(e) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Project which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Project.

(f) In addition to or in lieu of making forward commitments pursuant to subsection (a) of this section, the Department may determine to carry forward Project Applications on a waiting list or otherwise received and ranked in any Application Round within a calendar year to the subsequent calendar year, requiring such additional information, Applications and/or fees, if any, as it determines appropriate. Project Applications carried forward may, within the discretion of the Department, either be awarded credits in a separate allocation round on the basis of rankings previously assigned or may be ranked together with Project Applications invited and received in a new Application Round. The Department may determine in a particular calendar year to carry forward some Project Applications under the authority provided in this subsection, while issuing forward commitments pursuant to subsection (a) of this section with respect to others.

§49.16. Deadlines for Allocation of Low Income Housing Tax Credits.

(a) Not later than November 15 of each year, the Department shall prepare and submit to the Board for adoption the draft Qualified Allocation Plan required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.

(b) The Board shall adopt and submit to the governor the Qualified Allocation Plan not later than January 31.

(c) The governor shall approve, reject, or modify and approve the Qualified Allocation Plan not later than February 28.

(d) An Applicant for a low income housing tax credit to be issued a Commitment Notice during the initial Application Round in a calendar year must submit an Application to the Department not later than May 15.

(e) The Board shall authorize the Department to issue a Commitment Notice for allocation for the initial Application Round of low income housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907958
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 475-3726

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TITLE 16. ECONOMIC REGULATION

Part 1. RAILROAD COMMISSION OF TEXAS

Chapter 3. OIL AND GAS DIVISION

16 TAC §3.1, §3.58

The Railroad Commission of Texas (commission) proposes amendments to §§3.1 and 3.58, relating to Organization Report; Retention of Records; Notice Requirements, and Oil, Gas, or Geothermal Resource Producer's Reports.

The amendments, in part, implement Senate Bill 639, 75th Regular Session, (Texas Natural Resources Code §91.114), to assist the commission in cross-referencing operators who may be prohibited from conducting operations subject to the jurisdiction of the commission because of outstanding administrative or civil enforcement action. The amendments require individual licensees to submit social security numbers as required by the Family Code to aid in child support enforcement. Safeguards are in place to protect the confidentiality of this information. The amendments also provide for the suspension or revocation of an organization report containing materially false information. Further, the amendments require organizations that file for bankruptcy to notify the commission within 72 hours by sending notice to the Enforcement Section of the Office of General Counsel. All bankruptcy-related notices shall be sent to that section. Last, the amendments allow permits to be issued in certain prescribed circumstances without an entity having to possess an active organization report.

The commission simultaneously proposes the review and readoption of these rules. The notice of proposed review was filed with the *Texas Register* concurrently with this proposal. As stated in the concurrent rule review, the commission proposes to readopt these rules, with the proposed changes, in accordance Texas Government Code §2001.039. The agency's reasons for adopting these rules continue to exist.

The commission proposes to amend §3.1(a)(1) to require financial security prior to conducting operations within the jurisdiction of the commission.

The commission proposes to amend §3.1(a)(4)(A) to require each organization to provide a telephone number and emer-

gency after-hours telephone number for the organization in addition to current information reported to the commission.

The commission proposes to amend §3.1(a)(4)(C)(i) to require each entity or individual to report its full legal name, any name under which the entity or individual conducts business in Texas, and all assumed names.

The commission proposes to amend §3.1(a)(4)(C)(ii)(I) to require an individual to submit his or her social security number.

The commission proposes to amend §3.1(a)(4)(C)(ii)(II) to require an entity to submit a valid driver's license number of each officer, director, or other person, who, under Texas Natural Resources Code, §91.114, holds a position of ownership or control of the organization.

The commission proposes to replace the current language of §3.1(a)(4)(C)(ii)(III) to provide that if an individual does not have a valid driver's license or social security number, the individual shall submit a valid Texas Identification Card number issued by the Department of Public Safety.

The commission proposes to add new §3.1(a)(4)(E) to require the submission by an entity of any designated non-employee agent authorized to act on behalf of the entity to sign Oil and Gas Division certificates of compliance which initially designate the operator or change the operator designation. Organizations may also designate non-employee agents on the organization report to execute subsequent organization reports. That designation must be authorized by the organization and not by a non-employee agent.

The commission proposes to amend §3.1(a)(7) to allow operators to designate a specified address to the commission (other than the primary organization report address) for correspondence, other than hearing notices, relating to a particular district.

The commission proposes to add new §3.1(a)(8) to allow improperly completed organization reports to be disapproved and returned by the commission. The subsection also provides for the suspension or cancellation of an organization report if the commission determines that it contains information that was materially false at the time of submission.

The commission proposes to add new §3.1(d) which provides for the issuance of permits in certain circumstances to organizations that do not have an active organization report.

The commission proposes to add new §3.1(e) to require organizations that file for bankruptcy to notify the commission within 72 hours by providing written notice to the Enforcement Section of the Office of General Counsel. All bankruptcy-related notices must be sent to that section.

The commission proposes to amend §3.58(a)(1) to require organizations to file with each organization report the names of non-employee agents who are authorized to sign Oil and Gas Division certificates of compliance which initially designate the operator or change the operator designation.

Rita E. Percival, Oil and Gas Division planner, has determined that for the first five years the proposed amendments will be in effect, the fiscal implications as a result of enforcing or administering them will be a cost to the state of $7,800 in fiscal year 2000. This will be for computer programming to incorporate data on assumed names, and non-employee agents. For years 2-5, there is no additional cost nor savings to the state as a result of enforcing or administering the rule amendments.

There will be no effect on local government. There is no anticipated cost of compliance with the proposed rule amendments for the small business operator.

Boyd Johnson, Director of the Enforcement Section, Office of General Counsel, has determined that the public benefit as a result of the proposed amendments to §§3.1 and 3.58 will be the ability of the commission to more accurately identify and cross-reference operators who are prohibited from conducting operations because of outstanding administrative or civil enforcement action.

The commission has not requested a local employment impact statement pursuant to Texas Government Code §2001.022(h).

Comments on the proposed amendments should be submitted to Boyd Johnson, Director of the Enforcement Section, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967 or via the internet at boyd.johnson@rrc.state.tx.us. The commission will accept comments until 5:00 p.m. on the thirtieth day after publication in the *Texas Register*.

The commission proposes the amendments to §§3.1 and 3.58 under Texas Natural Resources Code, §81.052, which authorizes the commission to adopt all necessary rules for governing persons and their operations under the jurisdiction of the commission under §81.051; Texas Natural Resources Code, §85.161-7, which authorizes the commission to require, administer, and cancel certificates of compliance; Texas Natural Resources Code, §91.114, which authorizes the commission to accept, reject, or revoke reports filed with the commission; and Texas Natural Resources Code, §91.142 which authorizes the commission to require business entities to file organization reports.

Texas Natural Resources Code §§81.052, 85.041, 85.042, 85.161-7, 85.201, 85.202, 91.114, and 91.142 are affected by the proposed amendments.

§3.1. Organization Report; Retention of Records; Notice Requirements.

(a) Filing requirements.

(1) Except as provided under subsection (d) of this section, no [~~No~~] organization, including any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the commission shall perform such operations without having on file with the commission an approved [~~prior to acceptance and approval by the commission of an~~] organization report and financial security as required by Texas Natural Resources Code §§91.103-91.1091. Operations within the jurisdiction of the commission include, but are not limited to, the following:

(A)-(K) (No change.)

(2)-(3) (No change.)

(4) The organization report shall [~~must~~] contain the following information:

(A) the name, street address, [~~and~~] mailing address, telephone number, and emergency after-hours telephone number of the organization;

(B) (No change.)

(C) for each officer, director, general partner, owner of more than 25% ownership interest, or trustee (hereinafter controlling entity) of the organization:

(i) that entity's or individual's full legal name, the name(s) under which such entity or individual conducts business in the State of Texas, and all assumed names [~~name~~];

(ii) the following:

(I) if the entity is an individual, his or her social security number [~~driver's license number~~];

(II) if the entity is not an individual, [~~either~~] the name and valid driver's license number of each officer, director, or other person, who, under Texas Natural Resources Code, §91.114, holds a position of ownership or control of the organization [~~of the primary individual in control of the entity,~~] or an active P-5 number for that entity;

(III) if any individual subject to this subparagraph has no valid driver's license or social security number, the individual shall submit a valid Texas State Identification Card number issued by the Texas Department of Public Safety.

~~*{(III)* if any individual subject to this clause has a driver's license, he or she may, at such individual's option, submit his or her social security number instead of his or her driver's license number. If any individual subject to this subparagraph has no driver's license and does not wish to submit a social security number, he or she shall submit an official state identification number, such a Texas state identification card number issued by the Texas Department of Public Safety. If such individual has no driver's license or official state identification number, and does not wish to submit his or her social security number, then such individual shall submit his or her full legal name;}~~

(iii) a street address different than that of the organization; and

(iv) if different from the mailing address of the organization, a mailing address;

(D) (No change.)

(E) the name of any non-employee agent that the organization authorizes to act for the organization in signing Oil and Gas Division certificates of compliance which initially designate the operator or change the designation of the operator. Organizations may designate non-employee agents to execute subsequent organization reports. That designation shall be authorized by the organization and not by a non-employee agent.

(5)-(6) (No change.)

(7) An organization shall refile an organization report annually according to the schedule assigned by the commission. Prior to the filing date, the commission shall mail notification and information to each organization for update of the organization report file. An organization shall file an amended organization report within 15 days after a change in any information required to be reported in the organization report. Only address changes may be made by letter. [~~Organization reports must be refiled annually according to the schedule assigned by the commission. Prior to the filing date, the commission will mail notification and information to each organization for update of the organization report file. An amended organization report must be filed within 15 days after a change in any information required to be reported in the organization report. Address changes only may also be reported by letter. Any requirement under statute or commission rule for an order to be sent or notice to be given by the commission to an organization may be met by mailing the item to the organization's mailing address shown on the most recently filed organization report or the most recently filed letter notification of change of address. Notices sent by regular first-class mail may be presumed to have been received if, upon arrival of the deadline for any response to the notice, the wrapper containing the notice has not been returned to the commission. Service of notices and orders sent by certified mail is effective upon: acceptance of the item by any person at the address; initial failure to claim or refusal to accept the item by any person at the address prior to its eventual return to the commission by the United States Postal Service; or return of the item to the commission by the United States Postal Service bearing a notation such as "addressee unknown," "no forwarding address," "forwarding order expired," or any similar notation indicating that the organization's mailing address shown on the most recently filed organization report or address change notification letter is incorrect. Any commission action or proceeding for which notice is required may go forward on the basis of the notice provided under this subsection, whether or not actual notice has been received.~~]

(8) The commission shall meet any requirement under statute or commission rule for an order to be sent or notice to be given by the commission to an organization by mailing the item to the organization's mailing address shown on the most recently filed organization report or the most recently filed letter notification of change of address. Notices sent by regular first-class mail shall be presumed to have been received if, upon arrival of the deadline for any response to the notice, the wrapper containing the notice has not been returned to the commission. Any commission action or proceeding for which notice is required shall go forward on the basis of the notice provided under this subsection, whether or not actual notice has been received. Service of notices and orders sent by certified mail is effective upon:

(A) acceptance of the item by any person at the address;

(B) initial failure to claim or refusal to accept the item by any person at the address prior to its eventual return to the commission by the United States Postal Service; or

(C) return of the item to the commission by the United States Postal Service bearing a notation such as "addressee unknown," "no forwarding address," "forwarding order expired," or any similar notation indicating that the organization's mailing address shown on the most recently filed organization report or address change notification letter is incorrect.

(9) An organization may also designate to the commission in writing a specified address for all commission correspondence relating to a particular district. If designated by an operator, this specified address shall be used in lieu of the organization address for any notices, other than hearing notices, pertaining to that district.

(10) The commission may return, unapproved, to the organization address an organization report which is submitted to the commission not fully completed according to the report's written instructions and not timely corrected. In the event that the commission returns an organization report, all submitted financial assurances shall remain non-refundable. If an organization report approved by the commission is found to contain information that was materially false at the time it was submitted for approval, the commission may suspend or revoke the organization report after notice and opportunity for hearing.

(b)-(c) (No change.)

(d) Issuance of permits to organizations without active organization reports.

(1) Notwithstanding any contrary provisions of this section, the commission or its delegate may issue a permit to an organization or individual who does not have an active organization report or does not ordinarily conduct oil and gas activities when the issuance of such a permit is determined to be necessary to manage or dispose of oil and gas wastes, to implement a compliance schedule, or to remedy circumstances or a violation of a commission rule, order, license, permit, or certificate of compliance relating to safety or the prevention of pollution. For permits issued under this subsection, the commission may impose special conditions or terms not found in like permits issued pursuant to other commission rules. Any organization or individual who requests such a permit shall file an organization report and any other required forms for record- keeping purposes only. The report or form shall contain all information ordinarily required to be submitted to the commission.

(2) This section shall not limit the commission's authority to plug or to replug wells or to clean up pollution or unpermitted discharges of oil and gas waste.

(e) Organizations that file for bankruptcy shall provide written notice to the commission within 72 hours by submitting the notice to the Enforcement Section of the Office of General Counsel. All bankruptcy-related notices sent to the commission shall be submitted in writing to that section.

§3.58. Oil, Gas, or Geothermal Resource Operator's Reports.

(a) Producer's transportation authority and certificate of compliance.

(1) Each operator who is a producer of crude oil, natural gas, or geothermal resources shall [~~is required to~~] file with the commission's Austin office a producer's transportation authority and certificate of compliance for each of the operator's [~~his~~] producing properties certifying that the operator has complied with the conservation laws and the oil, gas, and geothermal resources conservation orders, rules, and regulations of the commission in respect to each property. When this report is filed, the oil and gas division shall [~~will~~] review the report for completeness and accuracy. When [~~and, when~~] approved, this report shall authorize [~~authorizes~~] a transporter (whether the operator or someone else) to transport the oil, gas, or geothermal resources from such property. No certificate of compliance designating or changing the designation of an operator will be approved that is signed, either as transferor or transferee, by a non-employee agent of the organization unless the organization has filed with the commission, on its organization report, the name of the non-employee agent it has authorized to sign such certificates of compliance on its behalf.

(2)-(4) (No change.)

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 16, 1999.

TRD-9907780
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 475-1295

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Chapter 20. ADMINISTRATION

Subchapter D. ELECTRONIC COMPLIANCE AND APPROVAL PROCESS (ECAP)

16 TAC §20.301

The Railroad Commission of Texas proposes new §20.301, relating to the Electronic Compliance and Approval Process (ECAP) advisory committee, which is proposed to be in new Subchapter D entitled "Electronic Compliance and Approval Process (ECAP)." Pursuant to the requirements of Texas Government Code, §§2110.001-2110.008, the new section creates the ECAP advisory committee of the Commission and establishes its duration; sets forth the purpose and duties of the committee; prescribes the composition of the committee, the nomination and appointment process, and the membership terms of the committee; and sets forth the mechanisms by which the committee meets, performs its work, and is evaluated.

Proposed new §20.301 creates the Electronic Compliance and Approval Process (ECAP) advisory committee, effective February 15, 2000, and abolishes it on December 31, 2005, unless the Commission amends the rule to change that date. The purpose of the committee is to give the Commission the benefit of the members' collective business, technical, and operating expertise and experience to help the Commission implement paperless permitting through the implementation of an electronic compliance and approval process in the Oil and Gas Division. The committee, whose duties are advisory only, advises the Commission on ECAP direction and implementation strategies.

The advisory committee is composed of ten members, nine of whom have full voting rights; the presiding officer votes only in the event of a tie. Nominations for and appointments to committee membership are made by the Commission. The members' terms are for the entire duration of the committee, but they all serve at the pleasure of the Commission. Should a member resign or otherwise vacates his or her position prior to the end of his or her term, the Commission appoints a replacement to serve the remainder of the unexpired term. The Commission will not reimburse members for travel or other expenses related to service on the committee or subcommittees.

The committee includes three major industry representatives; three independent industry representatives; three representatives of the electronic commerce industry; and one representative of users of Commission data. The committee is authorized to use other non-member participants with expertise in certain areas for the purpose of obtaining advice and information on a particular subject. The proposed new rule also include a conflict of interest provision.

The committee meets at the call of the presiding officer or the Commission. The presiding officer schedules meetings through e-mail appointments sent to committee members and participants, and reports the committee's advice and attendance in writing to the Commission no less often than quarterly.

Finally, as required by statute, the Director of the Oil and Gas Division will evaluate and report to the Commission, by

October 1 each year for the previous fiscal year, the committee's work, the committee's usefulness, and the costs related to the committee's existence, including the cost of Commission staff time spent in support of the committee's activities. Biennially, the Commission reports to the Legislative Budget Board the information developed by the Oil and Gas Division Director in evaluating the committee's costs and benefits.

Rita E. Percival, Planner, Oil and Gas Division, has determined that for each year of the first five years the new section is in effect, there will be negligible fiscal implications for state government as a result of enforcing or administering the section. The amount of staff time spent in support of the ECAP Advisory Committee, as provided in the proposed rule, will be minimal and will be provided within the existing Oil and Gas Division and Information Technology Services Division staffing and budget. It should be noted that many Commission staff members will be concurrently, but separately, designing, developing, and implementing electronic permitting and compliance, as well as preparing progress reports on those activities. The Commission considers the costs it will incur as a result of the latter functions to be separate from those costs incurred as a result of the proposed rule, which speaks only to advisory functions.

There will be no fiscal implications for local governments.

There is an anticipated economic cost to small businesses, micro-businesses, and to individuals, but only to those small business and micro-business owners or individuals who are members of the ECAP Advisory Committee. Due to the nature of the rule's provisions, however, the amount of that cost cannot be determined. The anticipated economic cost arises from the provision that the Commission will not reimburse advisory committee members for travel or other expenses related to service on the committee. Such expenses are likely to be different for each committee member. Because membership on the committee is voluntary, none of the anticipated cost is mandatory.

Richard A. Varela, Director, Oil and Gas Division, has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the creation of a network through which the Commission will obtain information needed to implement information strategies that will reduce operating costs for the oil and gas industry; expedite permitting and approval and regulatory filing through an electronic workflow process; increase public access to Commission data; and develop information solutions that will lead the Commission toward its goal to implement paperless permitting, serving as a pacesetter for state oil and gas regulators.

Comments on the proposal may be submitted to Richard A. Varela, Director, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas, 78711-2967. Comments may also be e-mailed to richard.varela@rrc.state.tx.us. Comments will be accepted for 30 days after publication in the *Texas Register*. For more information, telephone Mr. Varela at (512) 463-6810 or visit the Commission's web site at http://www.rrc.state.tx.us.

The Commission proposes the new section under Texas Natural Resources Code, §81.052, which gives the Commission the authority to adopt all rules necessary for governing and regulating persons and their operations under the jurisdiction of the Commission, and Texas Government Code, §§2110.001-2110.008, which mandate specific requirements for state agency advisory committees.

Texas Natural Resources Code, §81.052, and Texas Government Code, §§2110.001-2110.008, are affected by the proposed new section.

Issued in Austin, Texas, on November 16, 1999.

§20.301. Electronic Compliance and Approval Process (ECAP) Advisory Committee.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Chairman–The Chairman of the Commission.

(2) Commission–The Railroad Commission of Texas.

(3) Committee–The Electronic Compliance and Approval Process (ECAP) Advisory Committee of the Commission.

(4) Director–The Director of the Oil and Gas Division.

(5) Division–The Oil and Gas Division of the Commission.

(6) ECAP–Electronic Compliance and Approval Process.

(7) Electronic commerce industry representative–A member of the committee whose primary business is the development and implementation of systems and processes for electronic commerce.

(8) Fiscal year–September 1 of a year through August 31 of the following year.

(9) Independent industry representative–A member of the committee who is engaged in the business of non-integrated oil and gas operations, or who represents operators of such companies.

(10) Major industry representative–A member of the committee who is engaged in the business of oil and gas operations for a fully integrated company, or who represents operators of such oil and gas companies.

(11) Member–A major or independent industry representative, an electronic commerce industry representative, a representative of users of Commission data, or a representative of another category or interest appointed by the Commission who serves on the committee.

(12) Presiding officer–The chair of the committee.

(13) Participant–A person who is not a member of the committee, but participates on the committee for the purpose of advising and/or providing expertise in a particular subject area and performing the work assigned to the committee by the Commission. Participants may include: consumers who are end users or representatives of end users of the information filed at or maintained by the Commission; technicians who provide technical support for oil and gas exploration and production operations; staff who are employees of the Commission; and contractors whom the Commission has engaged to perform particular work.

(14) User of Commission data–A person who obtains Commission data for his or her own use or for resale to others or who represents such persons.

(b) Establishment; duration. The ECAP Advisory Committee is hereby established effective February 15, 2000. The committee is abolished on December 31, 2005, unless the Commission amends this subsection to establish a different date.

(c) Purpose and duties. The purpose of the committee is to give the Commission the benefit of the members' collective business, technical, and operating expertise and experience to help the Commission implement paperless permitting through the implementation of ECAP. The committee shall advise the Commission on direction and implementation strategies concerning the ECAP project. The committee's sole duty is to advise the Commission. The committee has no executive or administrative powers or duties with respect to the operation of the division; all such powers and duties rest solely with the Commission.

(d) Composition of committee; membership terms. The committee shall be composed of ten members, nine of whom shall have full voting rights. The presiding officer shall vote only in the event of a tie. The members' terms shall be for the entire duration of the committee.

(1) The members, all of whom serve at the pleasure of the Commission, shall include:

(A) three major industry representatives;

(B) three independent industry representatives;

(C) three electronic commerce industry representatives; and

(D) one user of Commission data.

(2) The committee may use other non-member participants with expertise in certain areas for the purpose of obtaining advice and information on a particular subject and implementing ECAP proposals approved by the Commission.

(e) Conflict of interest.

(1) A member may not:

(A) have an interest in, or in any manner be connected with, a contract or bid for a purchase of goods or services by the Commission for the ECAP project; or

(B) in any manner, including by rebate or gift, accept or receive from a person to whom a contract is or may be awarded, directly or indirectly, anything of value or a promise, obligation, or contract for future reward or compensation.

(2) A member who violates this subsection is subject to dismissal.

(3) The Commission shall not accept a bid or award a contract for goods or services for the ECAP project that includes proposed financial participation by a member who participated in preparing the specifications or request for proposals on which the bid or contract is based.

(f) Presiding officer; other officers. The Chairman shall appoint a presiding officer who shall report the committee's advice and attendance in writing to the Commission no less often than quarterly. The committee may elect other officers at its pleasure.

(g) Nominations for committee membership. The Commission shall make nominations for membership on the committee.

(h) Appointment and replacement of members. The Commission shall appoint members of the committee by February 15, 2000. All members of the committee serve at the pleasure of the Commission If a member resigns or otherwise vacates his or her position prior to the end of his or her term, the Commission shall appoint a replacement who shall serve the remainder of the unexpired term.

(i) Meetings. The committee shall meet at the call of the presiding officer or the Commission. Meetings shall be scheduled through e-mail appointments sent by the presiding officer to committee members and participants.

(j) Other committee authority. The ECAP advisory committee may create other guidelines and may create subcommittees as necessary and appropriate to carry out its purpose. Subcommittees may establish their own operating guidelines.

(k) Reimbursement of members' expenses. The Commission shall not reimburse members for travel or other expenses related to service on the committee or any subcommittees.

(l) Committee and subcommittee records. The Commission shall maintain and make available records of each committee and any subcommittee meeting.

(m) Evaluation of committee costs and benefits. By October 1 of each year, the director shall evaluate for the previous fiscal year and report to the Commission:

(1) the committee's work;

(2) the committee's usefulness; and

(3) the costs related to the committee's existence, including the cost of Commission staff time spent in support of the committee's activities.

(n) Report to Legislative Budget Board. The Commission shall biennially report to the Legislative Budget Board the information developed under subsection (m) of this section in evaluating the committee's costs and benefits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907972
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 475-1295

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Part 2. PUBLIC UTILITY COMMISSION OF TEXAS

Chapter 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

Subchapter J. COSTS, RATES AND TARIFFS

Division 2. RECOVERY OF STRANDED COSTS

16 TAC §25.265

The Public Utility Commission of Texas proposes new §25.265, relating to Securitization by River Authorities and Electric Cooperatives. The proposed new rule implements Senate Bill 7 (SB 7) Act of May 21, 1999, 76th Legislature, Regular Session, Chapter 405, 1999 Texas Session Law Service 2543, 2602,

2608 (Vernon) (to be codified as amendments to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §40.003 and §41.003) and will govern the procedures for the securitization of stranded costs for river authorities and electric cooperatives. Project Number 21077 has been assigned to this proceeding.

Although PURA requires the commission to establish rules and procedures for the securitization of stranded costs for river authorities and electric cooperatives, the statute is silent on several key issues. Parties are invited to address the following questions:

1. Is the proposed definition of stranded costs in this rule appropriate?

2. What entity is responsible for determining (a) whether a river authority has stranded costs; and (b) the amount of stranded costs eligible for securitization?

3. Does §40.001 of SB 7 specifically exempt river authorities from the definition of stranded costs found in §39.251?

4. What is the scope of the commission's authority over a cooperative's or river authority's wholesale customers?

5. Does the existence of a wholesale power contract between a river authority and its customer affect the river authority's or cooperative's ability to securitize?

6. Does the commission have the authority to impose a non-bypassable charge on the customers of a cooperative or river authority, or to add such a charge to the rates of a securitizing Chapter 40 or 41 entity? If the commission does not have such authority, does this affect the feasibility of issuing securitized bonds?

7. Does the governing body of a Chapter 40 or 41 entity have the authority to impose a non-bypassable charge upon its wholesale customers?

8. If non-bypassable transition charges can be imposed upon wholesale customers of a river authority, can those charges continue to be imposed upon wholesale customers once their contract with the river authority expires?

9. Can those charges be imposed upon wholesale customers who were once, but are no longer, served by the river authority?

10. If a cooperative or river authority securitizes stranded costs and adopts a non- bypassable charge that it collects from its wholesale customers, do these customers have a means of recovering these costs from their retail customers?

Thomas F. Best, Attorney for the Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Best has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of issuing this rule will be the establishment of standards governing securitization by river authorities and electric cooperatives.

There will be no effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Best has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, Wednesday, January 12, 2000 at 10:00 a.m. in the Commissioners' Hearing Room.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 25 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 21077.

This new rule is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically, Senate Bill 7 (SB 7), Act of May 21, 1999, 76th Legislature, Regular Session, Chapter 405, 1999 Texas Session Law Service 2543, 2625 (Vernon) (as required by uncodified section 65 of SB 7), which requires the commission to establish rules and procedures for the securitization of stranded costs for river authorities and electric cooperatives not later than the 180th day after the effective date of SB 7.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 40.003, 41.003 and section 65 of SB7.

§25.265. Securitization by River Authorities and Electric Cooperatives.

(a) Application. This section applies to securitization transactions carried out by a river authority or electric cooperative. A river authority or electric cooperative may adopt and use securitization provisions having the effect of the provisions provided by the Public Utility Regulatory Act (PURA), Chapter 39, Subchapter G, to recover its stranded costs in accordance with this section.

(b) Definition of stranded costs.

(1) For electric cooperatives, the term "stranded costs" when used in this section shall mean "stranded investment" as defined in PURA §41.002(3).

(2) For river authorities, the term "stranded costs" when used in this section shall mean the positive excess of the net book value of generation assets over the market value of the assets, taking into account all of the river authority's generation assets, any above market purchased power costs, and any deferred debit related to a utility's discontinuance of the application of Statement of Financial Accounting Standards Number 71 ("Accounting for the Effects of Certain Types of Regulation") for generation-related assets.

(c) Quantification of stranded costs. Only those river authorities and electric cooperatives having positive stranded costs as determined by this section may securitize such costs.

(1) For electric cooperatives, the board of directors has the exclusive jurisdiction to reasonably determine the amount of the electric cooperative's stranded investments.

(2) For river authorities, the governing body shall determine the amount of stranded costs using an administrative model or other reasonable methodology.

(d) Demonstration of tangible and quantifiable benefits to ratepayers. A river authority or electric cooperative may not utilize securitization financing to recover stranded costs unless it demonstrates that securitization provides tangible and quantifiable benefits to ratepayers greater than would have been achieved absent the issuance of transition bonds. Such demonstration shall be performed on an asset-by-asset basis.

(e) Limit on amount of qualified costs to be securitized. The amount securitized may not exceed the sum of:

(1) the present value, calculated using a discount rate equal to the proposed interest rate on the transition bonds, of the revenue requirement over the life of the proposed transition bonds associated with the stranded costs sought to be securitized, and

(2) the costs of issuing, supporting, and servicing the transition bonds and any costs of retiring and refunding existing debt of the river authority or electric cooperative.

(f) Use of proceeds. The proceeds of the transition bonds shall be used solely for the purpose of reducing the amount of recoverable stranded costs as determined pursuant to this section, through the refinancing or retirement of debt of the river authority or electric cooperative.

(g) True-up in the event of sale. A river authority or electric cooperative shall not overrecover its stranded costs. If the recovery of an asset has been securitized through a sale of transition bonds, and the asset is subsequently sold in a bona fide third-party transaction, then that asset shall be subject to true-up. To the extent the total net value received from the sale of such asset exceeds its remaining book value, the river authority or electric cooperative shall make refunds of the entire overcollected amounts, with interest, to its ratepayers through an appropriate mechanism.

(h) Recovery of stranded costs. An electric cooperative or river authority may recover its securitized stranded costs and the reasonable costs of issuing, supporting, and servicing the transition bonds through a transition charge.

(1) Electric Cooperatives. An electric cooperative may recover its stranded costs through transition charges from all existing or future customers, including the facilities, premises and loads of those customers taking service from the cooperative as of May 1, 1999. An electric cooperative's board of directors has the exclusive jurisdiction to establish non- discriminatory transition charges reasonably designed to recover the stranded costs over an appropriate period of time consistent with this section.

(2) River Authorities. A river authority may recover its qualified costs, as defined in PURA, Chapter 39, Subchapter G, including its stranded costs as defined herein, through transition charges from those wholesale customers receiving generation service from the river authority as of May 1, 1999. A river authority may implement non-discriminatory transition charges reasonably designed to recover the stranded costs over an appropriate period of time consistent with this section. These charges shall be considered to be included in rates of the wholesale contracts in effect on May 1, 1999.

(3) Transition charges for both electric cooperatives and river authorities.

(A) The transition charge shall be sufficient to recover the stranded costs at the level, up to 100%, deemed appropriate by the electric cooperative or river authority.

(B) Any transition charges adopted in accordance with this section shall constitute property rights, as described in PURA, Chapter 39, Subchapter G, and otherwise conform in all material respects to the transition charges provided by PURA, Chapter 39, Subchapter G.

(C) A river authority or electric cooperative may recover a transition charge notwithstanding the expiration of a wholesale contract.

(i) Financing order. A cooperative or river authority which chooses to adopt and use securitization provisions shall adopt a financing order consistent with this section.

(1) The financing order shall contain a finding that the present value total amount of revenues to be collected under the financing order is less than the present value of the revenue requirement that would be recovered over the remaining life of the stranded costs using conventional financing methods.

(2) The financing order shall have the effects of the provisions provided by PURA, Chapter 39, Subchapter G. The effects shall be detailed in the financing order and shall include, but are not limited to, provisions regarding property rights, set-off, security interests, no bypass, true-up, true sale, and security interests.

(3) The financing order shall detail the stranded costs to be recovered and the period over which the nonbypassable transition charges shall be recovered, which period may not exceed 15 years.

(4) The financing order shall detail how the proceeds from the transition bond are being used to refinance or retire river authority or cooperative debt as prescribed by subsection (f) of this section.

(5) The financing order shall contain findings detailing the tangible and quantifiable benefits as prescribed by subsection (d) of this section.

(6) The financing order shall contain a finding that the amount to be securitized does not exceed the limit on qualified costs as prescribed in subsection (e) of this section.

(7) The financing order shall detail the allocation of the stranded costs to applicable classes and the corresponding design of transition charges.

(8) The financing order shall provide for a structure and pricing of the transition bonds that results in the lowest transition charges consistent with market conditions.

(9) The financing order shall include a mechanism requiring that transition charges be reviewed and adjusted at least annually, within 45 days of the anniversary date of the issuance of the transition bonds, to correct any overcollections or undercollections of the preceding 12 months and to ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the transition bonds.

(10) The financing order shall become effective in accordance with its terms, and the financing order, together with the transition charges, shall thereafter be irrevocable and not subject to reduction, impairment, or adjustment by further action of the cooperative, river authority or the commission, except for periodic true-ups as specified in this section.

(11) Findings made by the governing body of the electric cooperative or river authority under the rules and procedures described in this section shall be conclusive.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907867
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 936-7308

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TITLE 19. EDUCATION

Part 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

Chapter 5. PROGRAM DEVELOPMENT

Subchapter A. GENERAL PROVISIONS

19 TAC §5.9

The Texas Higher Education Coordinating Board proposes amendments to §5.9, concerning General Provisions (Uniform Admission Policy). The proposed amendments to the rule are being made which grants automatic admission to Texas public colleges and universities to Texas high school students graduating in the top 10% of their class. House Bill 1804, 76th Legislative Session, amended the statute to extend automatic admission for the top 10% of students attending high schools operated by the United States Department of Defense, provided they are also Texas residents or entitled to pay tuition fees at the rate provided for Texas residents for the term to which admitted.

Lynn Rodriguez, General Counsel and Director of the Office of Access and Equity has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Ms. Rodriguez also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be greater access to public institutions of higher education. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the amendments to the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas, 78711.

The amendments to the rule are proposed under Texas Education Code, §51.803 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning General Provisions (Uniform Admission Policy).

The amendment affects Texas Education Code §51.803.

§5.9. Uniform Admission Policy.

(a)-(b) (No change.)

(c) All applicants from high schools operated by the United States Department of Defense and who graduate in the top 10% of their high school class shall be admitted to a general academic institution if the student meets the following conditions:

(1) The student graduated from high school within the two years prior to the academic year for which the student is applying;

(2) The student is a Texas resident as defined in Texas Education Code Section 54.052 or is entitled to pay tuition fees at the rate provided for Texas residents for the term or semester to which admitted; and

(3) The student submitted a complete application as defined by the institution before the expiration of the institution's established deadline.

(d) [~~(c)~~] High school rank for students seeking automatic admission to a general academic teaching institution on the basis of their class rank is determined and reported as follows:

(1) Class rank shall be based on the end of the 11th grade, middle of the 12th grade, or at high school graduation, whichever is most recent at the application deadline.

(2) The top 10% of a high school class shall not contain more than 10% of the total class size.

(3) The student's rank shall be reported by the applicant's high school or school district as a specific number out of a specific number total class size.

(4) Class rank shall be determined by the [~~Texas~~] school or school district from which the student graduated or is expected to graduate.

(e) [~~(d)~~] A general academic teaching institution may limit the number of students admitted under Texas Education Code, Chapter 51, Subchapter S if the number of applicants eligible and applying for admission to the institution under Texas Education Code, §51.803 exceeds by more than 10% the average number of first-time freshmen admitted the previous two academic years. The institution may limit the number of students admitted under Texas Education Code, §51.803 if:

(1) At least 97% of first-time freshmen admitted are in the top 10% of their high school class and;

(2) Clear guidelines are established for the selection of students based on one or a specified combination of the following methods:

(A) A lottery in which all students qualified for automatic admission have an equal chance for selection;

(B) Students are selected on a first-come, first-admitted basis following receipt of a complete application; or

(C) At least four or more criteria identified in Texas Education Code §51.805 are used to select students admitted.

(f) [~~(e)~~] Each general academic teaching institution shall annually report to the Board the composition of the entering class of first-time freshmen students admitted under Texas Education Code, §§51.803, 51.804, and 51.805. The report shall include a demographic breakdown of the class including race, ethnicity, and economic status. Each general academic teaching institution shall provide this report to the Board annually on or before a date set by the Board and in a manner prescribed in the "Instructions for Completing Texas Educational Opportunity (TXP)" form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907756
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 28, 2000
For further information, please call: (512) 483-6558

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19 TAC §5.12

(Editor's note: The Texas Higher Education Coordinating Board proposes for permanent adoption the new section it adopts on an emergency basis in this issue. The text of the new section is in the Emergency Rules section of this issue.)

The Texas Higher Education Coordinating Board proposes new §5.12, concerning General Provisions (Expert Witnesses). The proposed new rule will implement the provisions of House Bill 746 which requires the Coordinating Board to report annually to the governor and the presiding officer of the House and Senate on any faculty members or professional staff at public institutions of higher education who serve as expert witnesses in lawsuits in which the state is a party. The new rule will provide guidelines to higher education institutions for reporting on employees who serve as expert witness under the conditions specified in the legislation.

Lynn Rodriguez, General Counsel and Director of the Office of Access and Equity has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Ms. Rodriguez also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the new rule by collecting and providing to the governor and legislature information on whether employees of public higher education institutions have provided expert witness testimony in any cases that have resulted in judgments against or costs to the state. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas, 78711.

The new rule is proposed under Texas Education Code, §61.027 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning General Provisions (Expert Witnesses).

The new rule affects Texas Education Code §61.0815.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

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James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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For further information, please call: (512) 483-6162

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Subchapter T. TOBACCO LAWSUIT SETTLEMENT FUNDS

19 TAC §5.420

The Texas Higher Education Coordinating Board proposes new Subchapter T, §5.420, concerning Tobacco Lawsuit Settlement Funds (Nursing, Allied Health and Other Health-Related Education Grant Program). The new rule creates a grant program to be administered by the Coordinating Board and describes eligibility requirements, application, peer review, and funding processes, awards criteria, and other administrative matters associated with the distribution of these funds.

Dr. Marshall Hill, Assistant Commissioner for Universities and Health-Related Institutions has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Hill also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the implementation of new or expanded academic and training programs in nursing, allied health, and other health-related education. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas, 78711.

The new rule is proposed under Texas Education Code, §63.202 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Tobacco Lawsuit Settlement Funds (Nursing, Allied Health and Other Health-Related Education Grant Program).

The new rule affects Texas Education Code §63.202.

§5.420. Nursing, Allied Health and Other Health-related Education Grant Program.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Board–The Texas Higher Education Coordinating Board.

(2) Commissioner–The Commissioner of Higher Education.

(b) General Information. The program, as it applies to this section:

(1) Name. Nursing, Allied Health and Other Health-related Education Grant Program.

(2) Purpose. To provide funding to eligible institutions of higher education to establish or support academic instruction and

training programs on public health issues specific to nursing, allied health and other health-related education.

(3) Authority. Texas Education Code, §§63.201-63.203.

(4) Eligible institutions. Public institutions of higher education that offer upper-level academic instruction and training in the fields of nursing, allied health, or other health-related education. Institutions or components identified under Texas Education Code, §§63.002 (c), 63.101 and 63.102 are not eligible to receive funding through the grant program.

(5) Eligible programs. Nursing, allied health or other health-related educational initiatives, including those that expand existing degree programs, and develop other new or existing activities and projects, that are not funded by state appropriation during the funding period.

(6) Application requirements. Applications shall be submitted to the Board in the format and at the time specified by the Board.

(7) General Selection Criteria Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based on:

(A) Program quality as determined by peer reviewers;

(B) Impact the grant award shall have on academic instruction and training in public health-related education in the state;

(C) Cost of the proposed program; and

(D) Other factors to be considered by the Board, including financial ability to perform program, state and regional needs and priorities, ability to continue program after grant period, and past performance.

(8) Minimum award. $75,000 per award in any fiscal year.

(9) Maximum award. 15% of the available funding per award in any fiscal year.

(10) Maximum award length. A program is eligible to receive funding for two years within a fiscal biennium. Previously funded programs may reapply for one additional funding biennium.

(c) Peer Review.

(1) The Board shall use peer reviewers to evaluate the quality of applications.

(2) The Commissioner shall select qualified individuals to serve as reviewers. Peer reviewers shall demonstrate appropriate credentials to evaluate grant applications in health education. Reviewers shall not evaluate any applications for which they have a conflict of interest.

(3) The Board staff shall provide written instructions and training for peer reviewers.

(4) The peer reviewers shall score each application according to these award criteria and weights:

(A) Significance of instruction or training program. The reviewers shall consider issues such as: How relevant and timely is this topic to public health issues for the particular discipline? Is the program unique and important or unique and important for a geographic area? Will the program be useful to or later replicated at other institutions in the state? Will the program provide an advancement of knowledge that may result in positive changes in patient care, education or health care policy? How many people will benefit directly from the program? Maximum points: 30

(B) Resources to perform program. The reviewers shall consider issues such as: What new personnel, equipment and facility resources are needed for the program? What existing resources can be used? What are the professional credentials and experience of the program's key personnel? Maximum points: 15

(C) Program design. The reviewers shall consider issues such as: Is the program well defined? Is it a discrete program which can be completed in the grant period? Are the goals and objectives realistic? How well has the proposal described the program development process and the nature of analysis to be carried out? Maximum points: 25

(D) Cost sharing. The reviewers shall consider issues such as: What level of local funding, if any, is available to share in the cost of the program? Maximum points: 5

(E) Cost effectiveness. The reviewers shall consider issues such as: How appropriate are the chosen equipment, staffing and service providers for the program given the cost of the program? Is the budget realistic? Does the proposal make effective use of the grant funds? Maximum points: 25.

(F) Evaluation and expected outcomes. The reviewers shall consider issues such as: How well has the proposal described the methodology to evaluate and estimate the outcomes from the program? Is the evaluation methodology appropriate and effective? Are the outcomes realistic? Maximum points: 30

(d) Application and Review Process.

(1) The Commissioner may solicit recommendations from an advisory committee or other group of qualified individuals on funding priorities for each biennial grant period, and the administration of the application and review process.

(2) The Board staff shall review applications to determine if all requested information is complete. An application must be complete and submitted with proper authorization before or on the day specified by the Board to qualify for further consideration. Qualified applications shall be forwarded to the peer reviewers for evaluation. Board staff shall notify applicants eliminated through the screening process within 30 days of the submission deadline.

(3) Peer reviewers shall evaluate applications and assign scores based on award criteria. All evaluations and scores of the review committee are final.

(4) Board staff shall rank each application based on points assigned by peer reviewers, and recommend a priority ranked list of applications to the Commissioner for approval.

(e) Funding Decisions.

(1) Applications for grant funding shall be evaluated only upon the information provided in the written application.

(2) The Board delegates to the Commissioner the authority to approve grants upon the recommendation of the panel of peer reviewers and Board staff.

(3) Funding recommendations to the Commissioner shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fully fund a proposal after the higher-ranking and recommended applications have been fully funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the ranked list. The process shall be continued until all grant funds are awarded.

(f) Contract. Following approval of grant awards by the Board, the successful applicants must sign a contract issued by Board staff and based on the information contained in the application.

(g) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.

(h) Request for Proposal. The full text of the administrative regulations and budget guidelines for this program are contained in the official Request for Proposal (RFP) available upon request from the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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19 TAC §5.421

The Texas Higher Education Coordinating Board proposes new Subchapter T, §5.421, concerning Tobacco Lawsuit Settlement Funds (Minority Health Research and Education Grant Program). The new rule creates a grant program to be administered by the Coordinating Board and describes eligibility requirements, application, peer review, and funding processes, awards criteria, and other administrative matters associated with the distribution of these funds.

Dr. Marshall Hill, Assistant Commissioner for Universities and Health-Related Institutions has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Hill also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the implementation of new or expanded research and educational programs that address minority health issues. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas, 78711.

The new rule is proposed under Texas Education Code, §63.302 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Tobacco Lawsuit Settlement Funds (Minority Health Research and Education Grant Program).

The new rule affects Texas Education Code §63.302.

§5.421. Minority Health Research and Education Grant Program.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Board–The Texas Higher Education Coordinating Board.

(2) Commissioner–The Commissioner of Higher Education.

(3) Minority–a particular ethnic or racial group that is under-represented in one or more areas of health research or health education.

(b) General Information. The program, as it applies to this section:

(1) Name. Minority Health Research and Education Grant Program.

(2) Purpose. To provide funding to eligible institutions of higher education to conduct research and educational programs on public health issues affecting one or more minority groups in Texas.

(3) Authority. Texas Education Code, §63.301 and §63.302.

(4) Eligible institutions. Public and private accredited general academic and health related institutions, and Centers for Teacher Education, that conduct research or educational programs that address minority health issues or form partnerships with minority organizations, colleges, or universities to conduct research and educational programs that address minority health issues. Two-year institutions, including junior and community colleges, state colleges or technical colleges, and other agencies of higher education as defined by Texas Education Code, §61.003(6) are not eligible to submit an application for program funding but may receive program funding indirectly as a partner to an eligible institution.

(5) Eligible programs. Research and educational initiatives, including those that expand existing research and degree programs, and develop other new or existing activities and projects, that are not funded by state appropriation during the funding period. Proposed programs shall not conflict with current judicial decisions and state interpretation on administering minority programs in higher education.

(6) Application requirements. Applications shall be submitted to the Board in the format and at the time specified by the Board.

(7) General Selection Criteria Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based on:

(A) Program quality as determined by peer reviewers;

(B) Impact the grant award shall have on public health issues affecting one or more minority groups in the state;

(C) Cost of the proposed program; and

(D) Other factors to be considered by the Board, including financial ability to perform program, state and regional needs and priorities, ability to continue program after grant period, and past performance.

(8) Minimum award. $50,000 per award in any fiscal year.

(9) Maximum award. 15% of the available funding per award in any fiscal year.

(10) Maximum award length. A program is eligible to receive funding for two years within a fiscal biennium. Previously funded programs may reapply for one additional funding biennium.

(c) Peer Review.

(1) The Board shall use peer reviewers to evaluate the quality of applications.

(2) The Commissioner shall select qualified individuals to serve as reviewers. Peer reviewers shall demonstrate appropriate credentials to evaluate grant applications in health research and education. Reviewers shall not evaluate any applications for which they have a conflict of interest.

(3) The Board staff shall provide written instructions and training for peer reviewers.

(4) The peer reviewers shall score each application according to these award criteria and weights:

(A) Significance of research or educational program for minority health issues. The reviewers shall consider issues such as: How relevant and timely is this topic to minority public health issues? Is the program unique and important or unique and important for a geographic area? Will the program be useful to or later replicated at other institutions in the state? Will the program provide an advancement of knowledge that may result in positive changes in patient care, education or health care policy for minorities? How many people will benefit directly from the program? Maximum points: 30

(B) Resources to perform program. The reviewers shall consider issues such as: What new personnel, equipment and facility resources are needed for the program? What existing resources can be used? Will the program draw on resources from other institutions and organizations? Do the institution's partners, if any, demonstrate financial stability and effectiveness in conducting similar research or education programs? What are the professional credentials and experience of the program's key personnel? Maximum points: 15

(C) Program design. The reviewers shall consider issues such as: Is the program well defined? Is it a discrete program which can be completed in the grant period? Are the goals and objectives realistic? How well has the proposal described the data collection or program development process and the nature of analysis to be carried out? Maximum points: 25

(D) Cost sharing. The reviewers shall consider issues such as: What level of local funding, if any, is available to share in the cost of the program? Maximum points: 5

(E) Cost effectiveness. The reviewers shall consider issues such as: How appropriate are the chosen equipment, staffing and service providers for the program given the cost of the program? Is the budget realistic? Does the proposal make effective use of the grant funds? Maximum points: 25.

(F) Evaluation and expected outcomes. The reviewers shall consider issues such as: How well has the proposal described the methodology to evaluate and estimate the outcomes from the program? Is the evaluation methodology appropriate and effective? Are the outcomes realistic? Maximum points: 30

(d) Application and Review Process.

(1) The Commissioner may solicit recommendations from an advisory committee or other group of qualified individuals on funding priorities for each biennial grant period, and the administration of the application and review process.

(2) The Board staff shall review applications to determine if all requested information is complete. An application must be complete and submitted with proper authorization before or on the day specified by the Board to qualify for further consideration. Qualified applications shall be forwarded to the peer reviewers for evaluation. Board staff shall notify applicant eliminated through the screening process within 30 days of the submission deadline.

(3) Peer reviewers shall evaluate applications and assign scores based on award criteria. All evaluations and scores of the review committee are final.

(4) Board staff shall rank each application based on points assigned by peer reviewers, and recommend a priority ranked list of applications to the Commissioner for approval.

(e) Funding Decisions.

(1) Applications for grant funding shall be evaluated only upon the information provided in the written application.

(2) The Board delegates to the Commissioner the authority to approve grants upon the recommendation of the panel of peer reviewers and Board staff.

(3) Funding recommendations to the Commissioner shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fully fund a proposal after the higher-ranking and recommended applications have been fully funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the ranked list. The process shall be continued until all grant funds are awarded.

(f) Contract. Following approval of grant awards by the Board, the successful applicants shall sign a contract issued by Board staff and based on the information contained in the application.

(g) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.

(h) Request for Proposal. The full text of the administrative regulations and budget guidelines for this program are contained in the official Request for Proposal (RFP) available upon request from the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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Chapter 8. CREATION, EXPANSION, DISSOLUTION, OR CONSERVATORSHIP OF PUBLIC COMMUNITY/JUNIOR COLLEGE DISTRICTS

Subchapter F. CONSERVATORSHIP OF A PUBLIC COMMUNITY/JUNIOR COLLEGE DISTRICT

19 TAC §8.123

The Texas Higher Education Coordinating Board proposes amendments to §8.123, concerning Conservatorship of a Public Community/Junior College (Mismanagement Finding; Conservatorship Order). The proposed amendments would revise provisions concerning conservatorship of public community/junior colleges found to have a condition of gross fiscal mismanagement. The state conservatorship board has been replaced by a Governor- appointed conservator who is to receive a salary and reimbursement for related expenses from the institution in conservatorship.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there would be fiscal implications to local governments. The community/junior college district found to meet conditions of gross fiscal mismanagement would be obligated to pay the salary and expenses of a Governor-appointed conservator until such time as conservatorship is determined no longer necessary. The estimated cost would be $100,000 per year per conservator.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule would be the protection given the community/junior college district, the local and state taxpayers, and the students of the institution found to have a condition of gross fiscal mismanagement. The appointment of a single conservator rather than oversight by a multiple-member State Conservatorship Board would enhance oversight efficiency and effectiveness. There will be no effect on state government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the amendments to the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rule are proposed under Texas Education Code, §§61.051, 61.061, 61.062(c), 130.001(b)(3), and Government Code, §2104.031 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Conservatorship of a Public Community/Junior College (Mismanagement Finding; Conservatorship Order).

The amendment affects Government Code Chapter 2104.

§8.123. Mismanagement Finding; Conservatorship Order.

(a) (No changes.)

(b) If the Board finds a condition of gross fiscal mismanagement of a public community/junior college, the Governor, by proclamation, may appoint a conservator as defined in the Texas Government Code, Section 2401.001 [~~order the State Conservatorship Board~~] to act as conservator of the college.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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James McWhorter

Assistant Commissioner for Administration

Texas Higher Education Coordinating Board

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For further information, please call: (512) 483-6162

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19 TAC §8.124

The Texas Higher Education Coordinating Board proposes new §8.124, concerning Conservatorship of a Public Community/ Junior College (Compensation of a Conservator). The new rule would revise provisions concerning conservatorship of public community/junior colleges found to have a condition of gross fiscal mismanagement. The state conservatorship board has been replaced by a Governor-appointed conservator who is to receive a salary and reimbursement for related expenses from the institution in conservatorship.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there would be fiscal implications to local governments. The community/junior college district found to meet conditions of gross fiscal mismanagement would be obligated to pay the salary and expenses of a Governor-appointed conservator until such time as conservatorship is determined no longer necessary. The estimated cost would be $100,000 per year per conservator.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule would be the protection given the community/junior college district, the local and state taxpayers, and the students of the institution found to have a condition of gross fiscal mismanagement. The appointment of a single conservator rather than oversight by a multiple-member State Conservatorship Board would enhance oversight efficiency and effectiveness. There will be no effect on state government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new rule is proposed under Texas Education Code, §§61.051, 61.061, 61.062(c), 130.001(b)(3), and Government Code, §2104.031 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Conservatorship of a Public Community/Junior College (Compensation of a Conservator).

The new rule affects Government Code Chapter 2104.

§8.124. Compensation of a Conservator.

(a) A conservator appointed by the Governor to act in this capacity is entitled to receive a salary for performing those duties that is equal to the salary of the chief administrative office of the public community/junior college under conservatorship, as well as reimbursement of other reasonable and necessary expenses incurred by the conservator.

(b) The public community/junior college under conservatorship shall pay the salary and other reasonable and necessary expenses of the conservator from money appropriated or otherwise available to the institution, except to the extent that money to pay the salary is specifically appropriated or made available through the budget execution process for that purpose.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Chapter 9. PROGRAM DEVELOPMENT IN PUBLIC COMMUNITY/JUNIOR COLLEGES DISTRICTS AND TECHNICAL COLLEGES

Subchapter A. DEFINITIONS

19 TAC §9.1

The Texas Higher Education Coordinating Board proposes amendments to §9.1, concerning Public Junior Colleges (Definitions). The proposed amendments would change the definition of distance education to be consistent with the definition of distance education as proposed in July 1999 in Chapter 5, Subchapter H. New definitions would be added to clarify terms found in proposed rules for Tech-Prep Education. As a result of these revisions and additions, renumbering of existing definitions would be necessary.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule would be the consistent use of the term distance education for both two-year and four-year public institutions in Texas and the standardization of terms used to describe certain aspects of Tech-Prep Education. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the amendments to the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rule are proposed under Texas Education Code, §§29.182, 29.184, 61.076(a), 61.851 through 61.855, 130.001(b)(3)-(4), 130.008, 130.090, and 135.06(d), which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Public Junior Colleges (Definitions).

The amendments affects Texas Education Code §§61.851 through 61.855.

§9.1. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(10) (No changes.)

(11) Distance education – Instruction in which the majority of the instruction occurs when the student and instructor are not in the same physical setting. A class is considered a distance education class if students receive more than one-half of the instruction at a distance. Distance education can be delivered synchronously or asynchronously [~~Instruction delivered~~] to any single or multiple location(s):

(A) other than the "main campus of a senior institution (or "on campus"), where the primary office of the chief executive officer of the campus is located;

(B) [~~(A)~~] outside the boundaries of the taxing authority of a community/junior college district; or

(C) [~~(B)~~] via instructional telecommunications to any other distance location, including electronic delivery of all types.

(12) (No change.)

(13) Governing board, tech-prep consortium Consists at a minimum of one representative of each educational entity that participates in a Tech-Prep consortium which determines policies of the Tech-Prep consortium.

(14) [~~(13)~~] Independent institution of higher education – A private or independent college or university that is:

(A) organized under the Texas Non-Profit Corporation Act;

(B) exempt from taxation under Article V, Section 2, of the Texas Constitution and Section 501(c)(3) of the Internal Revenue Code; and

(C) accredited by the Southern Association of Colleges and Schools Commission on Colleges.

(15) [~~(14)~~] Postsecondary institutions – Any public community/junior college; public technical college; public senior college or university offering applied associate degree programs; and proprietary institutions offering applied associate degree programs.

(16) [~~(15)~~] Related-instruction – Relates to Section 9.27, organized off-the-job classroom instruction in theoretical or technical subjects required for the completion of an apprenticeship program.

(17) [~~(16)~~] Remedial and compensatory – All courses designated as developmental or remedial in the Community College Academic Course Guide Manual. These courses are designed to address academic deficiencies and may not be offered for college degree credit.

(18) [~~(17)~~] Remedial courses – Courses for high school students designed to correct academic deficiencies and bring students' skills to an appropriate level for graduation from high school.

(19) [~~(18)~~] SACS/COC – The Southern Association of Colleges and Schools Commission on Colleges.

(20) [~~(19)~~] Technical courses or programs – Workforce education courses or programs for which semester/quarter credit hours are awarded.

(21) Tech-Prep consortium A collaboration of educational entities and others to the extent allowed by the applicable section of the Carl D. Perkins Vocational and Technical Education Act, as amended, which work together to implement a Tech-Prep program.

(22) [~~(20)~~] Unique need academic course – An academic course created by a college to satisfy a unique need and designed to transfer into a baccalaureate program.

(23) [~~(21)~~] Vocational courses or programs – Workforce education courses or programs for which continuing education units (CEUs) are awarded.

(24) [~~(22)~~] Workforce continuing education course – A course offered for continuing education units (CEUs) with an occupationally specific objective and supported by state funding. A workforce continuing education course differs from a community service course offered for recreational or avocational purposes and is not supported by state funding.

(25) [~~(23)~~] Workforce education – Technical courses and programs for which semester/quarter credit hours are awarded, and vocational courses and programs for which continuing education units are awarded. Workforce education courses and programs prepare students for immediate employment or job upgrade within specific occupational categories.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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Subchapter H. PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND PUBLIC TWO-YEAR ASSOCIATE DEGREE-GRANTING INSTITUTIONS

19 TAC §9.142

The Texas Higher Education Coordinating Board proposes amendments to §9.142, concerning Partnerships Between Secondary Schools and Public Two-year Associate Degree-granting Institutions (Authority). The proposed amendments would revise the existing rules on partnerships between secondary and public two-year associate degree-granting institutions to incorporate Tech-Prep Education as a type of secondary-postsecondary partnership.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rules.

Dr. Barron also has determined that for the first five years the rules are in effect the public benefit anticipated as a result of administering the rule would be standardization and codification of Tech-Prep Education. If federal funding of Tech-Prep Education under the Carl D. Perkins Vocational and Applied Technology Education Act were suspended, the state codification of Tech-Prep and the adoption of Board rules would provide the means for the Texas Legislature to appropriate state funds. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the amendments to the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rule are proposed under Texas Education Code, §§29.182, 29.184, 61.076(a), 61.851 through 61.855, 130.001(b)(3)-(4), 130.008, 130.090, and 135.06(d) which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Partnerships Between Secondary Schools and Public Two-year Associate Degree-granting Institutions (Authority).

The amendment affects Texas Education Code §§61.851 through 61.855.

§9.142. Authority.

Texas Education Code, §§29.182, 29.184, 61.076(a), 61.851 through 61.855, 130.001(b)(3)-(4), 130.008, 130.090, and 135.06(d), authorize the Coordinating Board to adopt policies, enact regulations, and establish rules for public two-year associate degree-granting institutions to enter into agreements with secondary schools to offer courses which grant credit toward the student's high school academic requirements and/or college-level credit. In addition, the Carl D. Perkins Vocational and Applied Technology Education Act (hereinafter known as "the Act"), as amended, authorizes the State Board of Education in its capacity as the State Board for Career and Technology Education to designate the Coordinating Board as the administering agency of the Tech-Prep Education Act, or that section, part, or title of the Act referring to Tech-Prep Education.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907751
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 28, 2000
For further information, please call: (512) 483-6162

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19 TAC §9.147

The Texas Higher Education Coordinating Board proposes new §9.147, concerning Partnerships Between Secondary Schools and Public Two-year Associate Degree-granting Institutions (Tech-Prep Education). The new rule would revise the existing rules on partnerships between secondary and public two-year associate degree-granting institutions to incorporate Tech-Prep Education as a type of secondary-postsecondary partnership.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rules.

Dr. Barron also has determined that for the first five years the rules are in effect the public benefit anticipated as a result of administering the rule would be standardization and codification of Tech-Prep Education. If federal funding of Tech-Prep Education under the Carl D. Perkins Vocational and Applied Technology Education Act were suspended, the state codification of Tech-Prep and the adoption of Board rules would

provide the means for the Texas Legislature to appropriate state funds. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new rule is proposed under Texas Education Code, §§29.182, 29.184, 61.076(a), 61.851 through 61.855, 130.001(b)(3)-(4), 130.008, 130.090, and 135.06(d) which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Partnerships Between Secondary Schools and Public Two-year Associate Degree-granting Institutions (Tech-Prep Education).

The new rule affects Texas Education Code §§61.851 through 61.855.

§9.147. Tech-Prep Education.

(a) General Provisions.

(1) The State Board of Education, in its capacity as the Board for Career and Technology Education, is the eligible agency responsible for implementation and evaluation of all programs funded in Texas under the Act, as amended, until such time as the Act amends the provision defining the eligible agency.

(2) The State Board of Education, in its capacity as the eligible agency, has designated the Texas Higher Education Coordinating Board as the administering agency responsible for the operation and supervision of that section, part, or title of the Act referring to Tech-Prep Education.

(b) State Administration of Tech-Prep.

(1) The Board shall annually award Tech-Prep funds to eligible consortia in accordance with the Act, as amended.

(2) Notwithstanding provisions of the Act, annual awards to eligible consortia shall be based upon a formula which shall be adopted by the Board.

(3) To be eligible for an award, a consortium shall submit an application and all supporting documentation on an annual basis and in a manner and time frame determined by Board staff that documents and ensures the progress of local consortium activities addressing the requirements of the Act and enables the state to meet federal evaluation criteria as designated in the Consolidated State Plan.

(4) Board staff shall assist local consortia with the evaluation of local activities and provide technical assistance to consortia that do not meet evaluation criteria standards.

(5) Board staff shall provide oversight of all Tech-Prep activities to ensure that funds provided by the Act for Tech-Prep education are expended according to provisions of the Act and other federal guidelines as may be applicable.

(c) Consortium Responsibilities.

(1) Each consortium shall create, evaluate, and maintain a long-term strategic plan that addresses goals, objectives, activities, and evaluation criteria supporting state and federal goals and evaluation criteria.

(2) Each consortium shall develop and implement local activities and coordinate the expenditure of funds in accordance with guidelines determined by the Act, as well as state and local goals and objectives.

(3) Each consortium shall maintain the records on local activities and budgetary expenditures to support evaluation criteria and participate in a scheduled, systematic, evaluation program.

(4) Each consortium shall provide reports on activities, activity outcomes, and budgetary expenditures in a manner and time as established by Board staff.

(5) Each consortium shall ensure that every student in the consortium service area will have the opportunity to participate in and complete a Tech-Prep program of study as defined by the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907752
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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For further information, please call: (512) 483-6162

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Chapter 11. TEXAS STATE TECHNICAL COLLEGE SYSTEM

Subchapter B. GENERAL PROVISIONS

19 TAC §11.26

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Higher Education Coordinating Board proposes the repeal of §11.26, concerning General Provisions (TSTC-Marshall Prohibitions).

The repeal of the rule would eliminate references to Texas State Technical College at Marshall as an "extension center" now that it is a TSTC System "campus". The specific provision regarding duplication of courses and programs with Panola College, Northeast Texas Community College, and Kilgore College included in §11.26 is also repealed. Provisions concerning duplication by TSTC-Marshall are addressed in already existing sections of the statute and Board rules on the operation of TSTC System campuses.

Dr. Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit anticipated would be the expansion of the higher education services offered by the TSTC System in East Texas. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the repeal of the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The repeal of the rule is proposed under Texas Education Code, § 61.051 and §135.04 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning General Provisions (TSTC-Marshall Prohibitions).

The repeal of the rule affects Texas Education Code §135.02(a), (d), and (e) and §62.021(a).

§11.26. TSTC-Marshall Prohibitions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

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James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
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For further information, please call: (512) 483-6162

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Chapter 13. FINANCIAL PLANNING

Subchapter G. FORMULA FUNDING AND TUITION CHARGED FOR EXCESS CREDIT HOURS OF UNDERGRADUATE STUDENTS

19 TAC §§113.110 - 13.116

The Texas Higher Education Coordinating Board proposes new subchapter G, §§13.110 - 13.116, concerning Formula Funding And Tuition Charged For Excess Credit Hours of Undergraduate Students.

The proposed new rules clarify how the length of the student's degree program is to be determined, describe the reporting and record-keeping requirements of institutions related to the limit, and require that institutions provide affected students with timely and useful information about the limit so that they can take the limit into account as they plan and complete their undergraduate degrees.

Dr. Marshall Hill, Assistant Commissioner for Universities and Health-Related Institutions has determined that for the first five-year period the rules are in effect there will be no fiscal implications as a result of enforcing or administering the rules.

Dr. Hill also has determined that for the first five years the rules are in effect the public benefit anticipated as a result of administering the rules will be that the statutory limitation on undergraduate funding will be consistently and uniformly applied and that affected students will receive timely and useful information about the limit. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the new rules may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new rules are proposed under Texas Education Code, §§ 54.068 and 61.0595, which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Formula Funding And Tuition Charged For Excess Credit Hours of Undergraduate Students.

The new rules affect Texas Education Code Section 54.068 and 61.0595.

§13.110. Purpose.

This subchapter provides financial incentives for institutions to facilitate the progress of undergraduate students through their academic programs and incentives for students to complete their degree programs expeditiously. Rules contained in this subchapter clarify the enabling legislation, define responsibilities of institutions and the Coordinating Board in implementing the statute, and ensure that students are adequately informed.

§13.111. Authority.

These rules relate to the Texas Education Code, §54.068 and §61.0595. Section 54.068 specifies the tuition that may be charged to students with excess hours. Section 61.0595 specifies the fundability of undergraduate credit hours.

§13.112. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Remedial and developmental courses – courses designed to correct academic deficiencies and bring students' skills to an appropriate level for entry into college.

(2) Technical courses – workforce education courses offered for semester or quarter credit hours and associated with applied associate degree or workforce certificate programs.

(3) Workforce education courses – courses offered by two-year institutions for the primary purpose of preparing students to enter the workforce rather than academic transfer. Includes both technical courses and continuing education courses.

(4) Hours quarter credit hours or semester credit hours.

§13.113. Affected Students.

(a) The limitation on funding of excess undergraduate credit hours applies only to hours generated by students who initially enroll as undergraduates in an institution of higher education in the 1999, fall semester or in a subsequent term. If a student has been enrolled as an undergraduate student in any public or private institution of higher education during any term prior to the 1999, fall semester, the student's credit hours are exempt.

(b) Hours generated by non-resident students paying tuition at the rate provided for Texas residents are subject to the same limitations as hours generated by resident students.

§13.114. Limitation on Formula Funding.

Funding of excess undergraduate credit hours is limited as follows:

(1) Universities and health-related institutions may not submit for formula funding hours attempted by an undergraduate student who has previously attempted 45 or more semester credit hours or its quarter hour equivalent beyond the minimum number of hours required for completion of the degree program in which the student is enrolled.

(2) An undergraduate student at a four-year institution who is not enrolled in a degree program is considered to be enrolled in a degree program requiring a minimum of 120 semester credit hours.

(3) Students who enroll on a temporary basis in a university or health-related institution, and are also enrolled in a private or independent institution of higher education or an out-of-state institution of higher education are considered to be enrolled in a degree program requiring a minimum of 120 semester credit hours.

(4) For the purposes of the undergraduate limit, an undergraduate student who has entered into a master's or professional degree program without first completing an undergraduate degree is considered to no longer be an undergraduate student after having completed the equivalent of a bachelor's degree or all of the course work normally taken during the first four years of undergraduate course work in the student's degree program.

(5) For the purposes of the undergraduate limit, students are treated for funding purposes as having whatever major they had on the official census day of the term in question. If a student changes majors during a term, that act does not retroactively change their eligibility under the limit.

(6) The following types of credit hours are exempt and do not count toward the limit:

(A) hours earned by the student before receiving a baccalaureate degree that has been previously awarded to the student;

(B) hours earned through examination or similar method without registering for a course;

(C) hours from remedial and developmental courses, technical courses, workforce education courses, or other courses that would not generate academic credit that could be applied to a degree at the institution;

(D) hours earned by the student at a private institution or an out-of-state institution; and

(E) any hours not eligible for formula funding.

§13.115. Tuition Charged to Affected Students.

An institution of higher education may charge a higher tuition rate, not to exceed the rate charged to nonresident undergraduate students, to an undergraduate student whose hours can no longer be submitted for formula funding because of the funding limit defined in §13.114 of this title (relating to Limitation on Formula Funding).

§13.116. Responsibilities of institutions.

(a) The Coordinating Board will maintain a database indicating the number of hours an eligible undergraduate student has accumulated toward the limit. Institutions are required to report to the Coordinating Board all information required to comply with the Texas Education Code, §54.060 and §61.0595, to check every term on the progress of eligible students toward the limit, and to cooperate with the Coordinating Board in the administration of the limit.

(b) Each community and technical college, Lamar state college, university, and health-related institution shall publish in its catalog information about the limit on undergraduate credit hours. Until this material is included in catalogs, each institution shall inform undergraduate students initially enrolling at the institution in writing of the limit.

(c) Community and technical colleges and the Lamar state colleges shall inform each affected undergraduate student of the individual's progress toward the limit when the student has accumulated 70 or more semester credit hours toward the limit.

(d) Universities and health-related institutions shall inform each affected undergraduate student of the individual's progress toward the limit and of the institution's tuition policy for students who exceed the limit as soon as the student has accumulated 120 or more semester credit hours toward the limit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907754
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 28, 2000
For further information, please call: (512) 483-6162

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Chapter 17. CAMPUS PLANNING

Subchapter B. APPLICATION FOR APPROVAL OF NEW CONSTRUCTION AND MAJOR REPAIR AND REHABILITATION

19 TAC §17.46

The Texas Higher Education Coordinating Board proposes an amendment to §17.46, concerning Application For Approval of New Construction And Major Repair And Rehabilitation (Special Approval Procedure).

The proposed amendment would make the decisions of the Campus Planning Committee final, eliminating a provision in the current rules that allow individual members to refer decisions to the full Board.

Dr. Roger Elliott, Assistant Commissioner for Finance, Campus Planning and Research has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Elliott also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be to improve the efficiency of the approval process. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendment is proposed under the Texas Education Code, §61.0572 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Application For Approval of New Construction And Major Repair And Rehabilitation (Special Approval Procedure).

The amendment affects Texas Education Code §61.0572.

§17.46. Special Approval Procedure.

(a) (No change.)

(b) The Campus Planning Committee shall be guided in its decision in part by its judgment as to whether or not the full Board would approve the project, were the request being brought to the Board at this time. The committee may approve a request or refer the request to the next meeting of the Board. The action by the committee will be final. [~~Moreover, any Board Member can request that a particular project under consideration by the Campus Planning Committee be referred to the full Board for consideration.~~] The committee shall report all actions to the Board at its next meeting.

(c)-(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

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James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 28, 2000
For further information, please call: (512) 483-6162

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Chapter 25. OPTIONAL RETIREMENT PROGRAM

Subchapter A. OPTIONAL RETIREMENT PROGRAM

19 TAC §25.2

The Texas Higher Education Coordinating Board proposes an amendment to §25.2, concerning Optional Retirement Program.

The amendment is being proposed by adding a new paragraph §25.2(d) which defines "ORP retiree" and prohibits the payment of ORP retirement program contributions to ORP retirees who later return to work full-time in what would be considered a benefits-eligible position if the person had not retired. The reason for the new rule was to promote uniformity both among the different institutional ORP plans and between ORP and TRS retirees, which is a goal that institutions have indicated they desire. The proposed amendment would make an exception for ORP participants during their participation in the period of the phased retirement program, allowing them to continue to receive ORP contributions as long as they meet eligibility requirements.

James McWhorter, Assistant Commissioner for Administiration has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Mr. McWhorter also has determined that for the first five years the rule is in effect the public benefit anticipated as a result of administering the rule would be that it would make an exception for ORP participants during their participation in the limited period of the phased retirement program, allowing them to continue to receive ORP contributions as long as they meet eligibility requirements. There will be no effect on state and local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the amendment to the rule may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendment to the rule is proposed under Texas Government Code, §830.101 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning the Optional Retirement Program.

The amendment affects Texas Government Code §830.101.

§25.2. ORP Eligibility Standards.

(a)-(c) (No changes).

(d) An ORP retiree is defined as an individual who participated in the Optional Retirement Program while employed in a public institution of higher education in Texas and who established retiree status by enrolling in retiree health insurance provided by the Employees Retirement System, the University of Texas System, or the Texas A&M University System, regardless of whether currently enrolled.

(1) ORP retirees as defined in this subsection who later return to employment in Texas public institutions of higher education are not eligible to have further ORP contributions made to their ORP account.

(2) ORP retirees as defined in this subsection who enrolled in retiree health insurance on or before June 1, 1997, are exempt from paragraph (1) of this subsection.

(3) ORP retirees as defined by this subsection who enroll in retiree health insurance as part of a phased retirement program are exempt from paragraph (1) of this subsection during the period of their participation in the phased retirement program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907755
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Earliest possible date of adoption: January 28, 2000
For further information, please call: (512) 483-6162

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Part 7. STATE BOARD FOR EDUCATOR CERTIFICATION

Chapter 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION

19 TAC §229.3

The State Board for Educator Certification proposes an amendment to §229.3, concerning the Accreditation Process. The proposal adds new §229.3(e)(1)(E)(i) and (ii), which authorizes the executive director to conduct investigations to ensure the accuracy of an educator preparation entity's ASEP data. The

executive director may sanction entities that are found to have submitted fraudulent data, including a reduction of the entity's accreditation rating.

Barry Alaimo, Director of Administrative and Financial Operations, State Board for Educator Certification (SBEC) has determined that for the first five-year period the rule is in effect there may be fiscal implications for state or local government as a result of enforcing or administering the rule. Potential additional costs for conducting new investigations of this type would depend on the number, nature and extent of such investigations and cannot be determined at this time with no prior history of the costs for such investigations.

Mr. Alaimo also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be authorization for the executive director to conduct investigations to ensure the accuracy of an educator preparation entity's ASEP data. There will be no effect on small businesses. There may be costs to persons who are required to comply with the rule, however they cannot be determined at this time.

Comments on the proposed rule may be submitted to: Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas 78701-2603.

The amendment is proposed under the Texas Education Code (TEC) §21.045, which requires the State Board for Educator Certification to propose rules establishing standards to govern the continuing accountability of all educator preparation programs.

No other statutes, articles or codes are affected by the proposed rules.

§229.3. The Accreditation Process.

(a)-(d) (No change.)

(e) Accreditation of entity

(1) For an entity to be "Accredited" to prepare educators, performance for each demographic group (all students, African American, Hispanic, white, other, male, female) must be as follows:

(A)-(D) (No change.)

(E) The agency shall evaluate the accuracy of an entity's ASEP data, including any demographic and other information provided to the agency by the entity. If there are reasonable grounds to believe that the information provided by the entity has been inaccurately or fraudulently reported, the executive director is authorized to conduct an investigation. The entity shall reasonably cooperate with the investigation and provide the information and documentation requested by the executive director.

(i) If the entity does not reasonably cooperate in the investigation, the executive director may determine the entity's annual accreditation status based on the preponderance of the available evidence as to the accuracy of the data.

(ii) If, upon investigation, it is determined that the ASEP data submitted by the entity are inaccurate or have been fraudulently provided, the executive director is authorized to sanction the educator preparation program, up to and including a reduction in the accreditation rating.

(F) [~~(E)~~] Effective September 1, 2000, if the first-year or cumulative number of examinees within an ethnic or gender demographic group for the current reporting period is less than 30, the following method shall be used for determining the accreditation status of the entity:

(i) If the small group is first-year test takers, the number of first-year test takers from the current academic year shall be combined with the number of first-year takers from the same demographic group for the previous academic year. If the combined number of test takers is 30 or more, the combined pass rate of the group shall be considered under paragraph (1)(A) of this subsection.

(ii) If the combined number of test takers from clause (i) of this subparagraph is less than 30, that number will be added to the number of test takers from the same demographic group for the previous academic year. If the resulting number of test takers is 30 or more, the combined pass rate of the group shall be considered under paragraph (1)(A) of this subsection.

(iii) If the combined number of test takers from clause (ii) of this subparagraph is less than 30 and their combined pass rate would cause the entity's rating to be Accredited-Under Review, the entity may request that the executive director reconsider the Accredited-Under Review status. In considering the entity's request, the executive director shall examine current and historical information relating to the entity's performance in appropriate areas, including but not limited to improved test performance of all groups and increased numbers of ethnic test takers.

(iv) If the small group is cumulative test-takers, the data shall be combined with one or two of the previous academic years' cumulative data using the process described in clauses (i)-(iii) of this subparagraph.

(G) [~~(F)~~] Effective September 1, 1999, if the first-year or cumulative number of test takers within an ethnic or gender demographic group for the current academic year is less than 30, the following method shall be used for determining the accreditation status of the entity:

(i) If the small group is first-year test takers, the number of first-year test takers from the current academic year shall be combined with the number of first-year takers from the same demographic group for the previous academic year. If the resulting number of test takers is 30 or more, the combined pass rate of the group shall be considered under paragraph (1)(A) of this subsection.

(ii) If the combined number of test takers from clause (i) of this subparagraph is less than 30, the performance of that group of test-takers will not be considered under paragraph (1)(A) of this subsection. However, the performance of those test takers is used in calculating the performance of the "all students" group at the entity and, as appropriate, in calculating the performance data for other demographic groups.

(iii) If the small group is cumulative test-takers, the data shall be combined with one or two of the previous years' cumulative data using the process described in clauses (i)-(iii) of this subparagraph and the combined pass rate of the group shall be considered under paragraph (1)(A) of this subsection.

(iv) Subparagraph (F) of this paragraph expires August 31, 2000.

(2)-(7) (No change.)

(f)-(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907980
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 469-3001

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Chapter 232. GENERAL REQUIREMENTS APPLICABLE TO ALL CERTIFICATES ISSUED

Subchapter M. TYPES AND CLASSES OF CERTIFICATES ISSUED

The State Board for Educator Certification (SBEC) proposes amendments to §232.500 and §232.510, concerning the types and classes of educator certificates the Board issues, and proposes new §232.515, concerning standards for the issuance of classroom teaching certificates. The SBEC also propose the repeal of §232.520, concerning effective date.

The amendments and new rules are being proposed to refine the definitions of types and classes of certificates as required by statute and to establish the principles under which the Board will adopt standards for the issuance of classroom teaching certificates, including master teacher certificates.

Elsewhere in this issue of the *Texas Register*, the SBEC is contemporaneously withdrawing the proposed amendment to §232.500 and the proposed repeal of §232.520, which appeared in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8886).

The amendments to §232.500 and the repeal of §232.520, amend various provisions of current rules that conflict with 19 TAC Chapter 227, concerning Admission to an Educator Preparation Program and Chapter 228, concerning Requirements for Educator Preparation Programs, which were adopted by the SBEC at its May 7, 1999 meeting.

Previously, the SBEC proposed amendments to Chapter 230, concerning Professional Educator Preparation and Certification in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8862). The following information pertains to the amendment of Chapter 230 as well as the amendment to §232.500 and the repeal of §232.520:

In its proposed *Framework for Educator Preparation and Certification* the SBEC states as an underlying assumption that "Board rules must identify a single set of standards applicable to all educator preparation programs to enhance flexibility in program delivery and to accommodate multiple routes." Consistent with that assumption, the SBEC has adopted new rules to govern admission to an educator preparation program (Chapter 227) and the operation of educator preparation programs (Chapter 228). The purpose of these new rules is to enhance flexibility and accommodate multiple approaches for the design and delivery of programs leading to certification. The rules reflect the SBEC's belief that its role is to clearly define what the candidate for certification must know and be able to do upon completing a preparation program, and to then assess the success of the program in delivering the required knowledge and skills. Who programs admit and how the expected knowledge and skills are delivered should largely be left to the discretion of each program. This approach is possible because all educator preparation programs are held accountable for their performance through the Accountability System for Educator Preparation (ASEP), which reflects the performance of their students on the examinations required for certification.

As reflected in Chapter 227, the Board has established the minimum components of admissions policies, but does not prescribe the content of the policies. Programs must:

identify procedures to screen applications to determine appropriateness for the certificate sought;

verify college-level skills in reading, oral and written communication, critical thinking, and mathematics (note that neither an assessment nor test is mentioned);

establish academic criteria that are consistently applied to all applicants; and

develop procedures that allow admitted individuals to substitute relevant experience and training for part of the preparation requirements. (For example, a retired chemist seeking certification should be allowed to skip required coursework in chemistry.)

Under the new rules governing educator preparation programs (Chapter 228), all programs will operate under the same set of rules that accommodate different ways of delivering educator preparation to the different types of prospective educators. The elements described below are widely recognized as critical components of successful educator preparation programs and will be required of all SBEC-approved programs. The program must:

design, deliver, and evaluate educator preparation through a collaborative effort involving institutions of higher education, public and private schools, regional education service centers, and business and community interests;

base preparation on the relevant Texas Essential Knowledge and Skills (TEKS) for each certificate;

provide on-going and relevant field-based experiences throughout the entire program in a variety of settings with diverse student populations;

require all students to complete at least 12 weeks of a full-day teaching practicum prior to recommending students for certification;

establish benchmarks and structured assessments to measure throughout the program the progress of candidates for certification; and

continuously evaluate the design and delivery of the program's curriculum based on performance data, research-based promising practices, and internal and external assessments.

It is important to note that the new rule does not explicitly define "on-going and relevant field-based experiences" because the SBEC recognizes that field-based experiences will be provided differently by the various preparation programs. It will be up to each program to determine what this term means for the students being served, and it is entirely possible and appropriate that "ongoing" for a college junior will be different than "ongoing" for a mid-career individual seeking certification. Further, please note that the 12-week full-day teaching practicum can be interpreted in a variety of ways and

should not be thought of exclusively as the "traditional" student teaching block that occurs in the final semester of college.

By deliberately not setting explicit standards for field-based experiences, the SBEC is encouraging flexibility and creativity to allow programs to attract and serve all of the people that might be interested in seeking certification.

The specific repeals and amendments proposed in this item are as follows:

1. All requirements that prescribe a specific amount of collaboration, field-based preparation, or student teaching are proposed for repeal.

2. All provisions that reference the operation of university baccalaureate and post-baccalaureate programs, alternative certification programs (ACP), and Centers for the Professional Development of Teachers (CPDT) are proposed for repeal, except that:

the probationary certificate available to post-baccalaureate and ACP students is moved to Chapter 232, Subchapter M;

the unique teaching certificates available through ACPs are moved to Chapter 230, Subchapter G; and until September 1, 2001, institutions of higher education may apply to the Board for designation as a CPDT. (Funds were not appropriated to support the creation of additional CPDTs, however funds are available to complete the three-year funding cycle for institutions that are eligible for 2nd- and 3rd-year funding).

By repealing and amending current rules, all educator preparation programs will follow the same set of quality program standards that will assure consistency in educator preparation as well as the accountability of those programs through the Accountability System for Educator Preparation (ASEP). While entities are held accountable, the new rules provide for much flexibility and creativity in the design and delivery of educator preparation.

Barry Alaimo, Director of Administrative and Financial Operations, SBEC, has determined that for the first five-year period the rules are in effect there are no foreseeable additional fiscal implications as a result of enforcing or administering the rules. Further, there are no additional anticipated economic costs to persons who are required to comply with the rules as proposed. The proposed rules do not set or change the cost of renewal fees for persons issued a certificate under §§232.500, 232.510 and 232.515.

There will be no effect on small businesses. Under the proposed rules, the State Board of Education would not have to formally review teacher certification standards for which there are related Texas Essential Knowledge and Skills (TEKS) learning standards. Otherwise, neither state nor local government will be affected. Local school districts could be affected in their assignment of certified personnel.

Mary Charley, Director of Credentialing Services, and Pat Porter, Director of Accountability, SBEC, have determined that for the first five years the rules are in effect the public will benefit from the amended and new rules because they will eliminate confusion about the types and classes of certificates the State Board for Educator Certification issues. The public will also benefit from having teacher certification standards aligned with the Texas Essential Knowledge and Skills (TEKS) adopted by the State Board of Education. The TEKS determine the curricula for foundation and enrichment subjects taught to Texas public school students.

Comments on the proposals may be submitted to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas 78701-2603.

19 TAC §§232.500, 232.510, 232.515

The amendments and new rule are proposed under Texas Education Code §21.041(2)-(3), which requires the State Board for Educator Certification to propose rules specifying the classes of certificates and their periods of validity, and §21.048(a), which requires the Board to prescribe comprehensive examinations for each class of certificate.

No other statutes, articles or codes are affected by the proposed amendments and new rule.

§232.500. Types of Certificates.

(a) "Type of certificate" means a designation of the period of validity for a certificate and includes the following certificate designations:

(1) standard;

(2) provisional;

(3) professional;

(4) one-year;

(5) probationary;

(6) temporary; and

(7) emergency.

(b) [~~(a)~~] All provisional and professional lifetime educator certificates issued prior to September 1, 1999, shall be valid for the life of the individual unless suspended or revoked by lawful authority.

(c) Effective September 1, 1999, the standard certificate shall be issued for all classes of certificates as specified in §232.510 of this subchapter (relating to Classes of Certificates) [~~except the emergency certificate~~], and shall be valid for no more than five years, subject to the requirements of Subchapter R of this title (relating to Certificate Renewal and Continuing Professional Education Requirements).

[~~(b) Pursuant to Section 63(d), Senate Bill 1 (74th Texas Legislature), and not later than September 1, 2001, the Board shall issue to persons holding a valid Texas lifetime certificate issued prior to September 1, 1999, the appropriate certificate without requiring the person to pay a fee or meet any additional requirements for the initial reissuance.~~]

(d) A probationary certificate may be issued to an individual admitted into an alternative certification program or post-baccalaureate program approved by the State Board for Educator Certification as those programs existed on September 1, 1999, under Chapter 230, Subchapters H and L of this title (relating to Alternative Certification of Teachers, and Postbaccalaureate Requirements for Persons Seeking Initial Teacher Certification through Approved Texas Colleges and Universities, respectively).

§232.510. Classes of Certificates.

(a) "Class of certificates" means a certificate with the following characteristics:

(1) specific job duties or functions are associated with the certificate;

(2) standards are established by the board for the issuance of the certificate; and

(3) a comprehensive examination is prescribed by the board for the certificate.

(b) Classes [~~The following classes~~] of certificates include the following [~~are listed in paragraphs (1)-(7) of this section~~]:

(1) superintendent;

(2) principal;

(3) classroom teacher;

(4) master teacher, including master reading teacher;

(5) [~~(4)~~] learning resources specialist;

(6) [~~(5)~~] school counselor;

(7) [~~(6)~~] educational diagnostician; and [~~educational aide~~]

(8) [~~(7)~~] educational aide [~~emergency~~].

§232.515. Development, Approval, Implementation, and Evaluation of Teacher Certification Standards.

(a) Purpose. The purpose of the certification standards shall be to ensure the highest level of teacher preparation and practice to achieve student excellence.

(b) Objectives. The objectives of the certification standards are:

(1) to establish the knowledge and skills required of a classroom teacher teaching in a certification field for the first time and of the master teacher;

(2) to guide the design and delivery of teacher preparation programs; and

(3) to direct the development of certification examinations and other requirements for certificate issuance.

(c) Application. This section shall apply to certificates issued within the following classes:

(1) classroom teacher; and

(2) master teacher, including master reading teacher.

(d) Policy. The State Board for Educator Certification (SBEC) shall approve certification standards based on the applicable Texas Essential Knowledge and Skills (TEKS) adopted by the State Board of Education (SBOE).

(e) Development. The SBEC shall develop the certification standards based on information provided by Texas educators, educator preparation program representatives, parents, and lay citizens. Before approving standards for a certificate, the SBEC shall make the proposed standards available for comment from the public, the SBOE, and the commissioner of education.

(f) Implementation. The SBEC's executive director and his or her designees shall be primarily responsible for implementing the certification standards approved by the SBEC by having certification examinations developed on the basis of such standards. The executive director shall provide the SBOE and commissioner of education with timely status reports regarding the implementation of approved certification standards.

(g) Evaluation. The SBEC's executive director shall periodically evaluate approved certification standards based, at a minimum, on any changes to the TEKS or the job functions and duties of the related certificate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907975
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 469-3001

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19 TAC §232.520

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the State Board for Educator Certification or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Education Code (TEC), §21.041(b)(2) and (3) which require the State Board for Educator Certification to specify the classes of educator certificates to be issued and the period of validity for each class of certificate.

No other statutes, articles or codes are affected by the proposed repeal.

§232.520. Effective Date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907976
Pamela B. Tackett
Executive Director
State Board for Educator Certification
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For further information, please call: (512) 469-3001

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Chapter 250. AGENCY ADMINISTRATION

Subchapter C. TRAINING AND EDUCATION FOR EMPLOYEES

19 TAC §§250.30-250.34

The State Board for Educator Certification (SBEC) proposes new §§250.30-250.34, concerning training for agency staff. The new rules are being made to implement Senate Bill 223, passed during the 76th session of the Texas Legislature, which requires the State Board for Educator Certification and other state agencies to adopt rules governing staff training paid for by the agency. The new rules will be used by the executive director and managers of the State Board for Educator Certification to determine appropriate training for agency employees, payment for any such training, and obligations of employees who receive training paid for by the agency.

Barry Alaimo, Director of Administrative and Financial Operations, SBEC, has determined that for the first five-year period the rules are in effect there are no foreseeable additional fiscal implications as a result of enforcing or administering the rules. Persons who are required to comply with the rules as proposed, i.e., agency staff, may incur additional anticipated economic costs in the following circumstances: (1) employees may have to personally pay for training the agency would no longer pay for under the rules; (2) employees who receive three months or more of training or education at agency expense may have to forego other job opportunities because they will be obligated to apply their training or education to their jobs with the State Board for Educator Certification; or (3) employees may have to reimburse the agency for the cost of training if they do not meet such obligations.

Mr. Alaimo also has determined that for the first five years the rules are in effect the public will benefit from the new rules because having a well-trained agency staff will: (1) provide more knowledgeable and efficient service to the public; and (2) reduce public liabilities through safety, anti-discrimination, and other workplace training programs. Further, the new rules will ensure that the State Board for Educator Certification and its clients benefit from agency-paid training by obligating employees to use their newly acquired knowledge and skills in their jobs with the Board. There will be no effect on state and local government or small businesses.

Comments on the proposed new rules may be submitted to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas 78701-2603.

The new rules are proposed under Texas Government Code, Chapter 656, Subchapters C and D, which require the Board to adopt rules governing training and education of employees.

No other statutes, articles or codes are affected by the proposed new rules.

§250.30. Definitions.

The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise:

(1) Agency - the State Board for Educator Certification acting through its executive director and other employees.

(2) Board - the members of the State Board for Educator Certification appointed under section 21.033, Education Code.

(3) Designee - an agency employee in a management role assigned by the executive director to carry out responsibilities under this subchapter.

(4) Executive director - the person employed by the board under §21.039, Education Code.

(5) Training - instruction, teaching, or education received by an employee that is not normally received by other state employees and that is designed to enhance the ability of the employee to perform the employee's job. The term includes a course of study at an institution of higher education or a private or independent institution of education as defined by section 61.003, Education Code, if the agency spends money to assist the employee to meet the expense of the course of study or pays salary to the employee to undertake the course of study as an assigned duty. The term does not include training required either by state or federal law or that is determined necessary by the agency and offered to all employees of the agency performing similar jobs.

§250.31. Findings, Policy, and Applicability.

(a) Programs for the training of agency employees materially aid the effective administration of the board's mission, and the spending of public funds on those programs serves an important public purpose.

(b) In accordance with state law and this subchapter, the agency may use public funds to provide training and education for its employees. The training must be related to the duties or prospective duties of the employee following training.

(c) This subchapter applies to full- and part-time employees who receive training that is paid for by the agency. This subchapter does not apply to contracted or temporary workers.

§250.32. Eligibility.

(a) Subject to approval by the executive director or a designee, the agency may pay for all or part of the training an employee receives under this subchapter. To be eligible, an employee must:

(1) have completed at least six months of continuous employment from the date of beginning or restarting service with the agency;

(2) meet or exceed performance standards on the most current written employee evaluation, if any; and

(3) not be on leave or suspension without pay.

(b) Notwithstanding subsection (a)(2) of this section, the executive director or a designee may approve training that is reasonably expected to help the employee meet or exceed performance standards in the employee's written evaluation.

(c) Board members and the executive director may receive training under this subchapter.

§250.33. Employee Obligations.

(a) During a training period when an employee does not perform the employee's regular duties for three or more months as a result of the training, the employee assumes the following enforceable obligations:

(1) to work for the agency following the training for at least one month for each month of the training period; or

(2) to pay the agency for all the costs associated with the training that were paid during the training period, including any amounts of the employee's salary that were paid and that were not accounted for as paid vacation or compensatory leave.

(b) The executive director may require an employee of the agency to attend, as all or part of the employee's duties, a training or education program if the training is related to the employee's current or prospective duties.

(c) Before an employee receives training that will be paid for by the agency and during which the employee will not be performing the employee's regular duties for three months or more, the executive director shall require the employee to agree in writing, before the training begins, to comply with the requirements of subsection (a) of this section.

(d) By an order adopted in a public meeting, the board may waive the requirements prescribed under subsection (a) of this section and release an employee from the obligation to meet those requirements if the board finds that such action is in the best interest of the agency or is warranted because of an extreme personal hardship suffered by the employee.

(e) If an employee does not provide the services required in accordance with subsection (a) of this section, provides those services for less than the required term, or fails to make payments required by this section, and the board has not released the employee from the obligation to provide the services or to make the payments, the employee is liable to the agency for any costs described by subsection (a)(2) of this section and for the agency's reasonable expenses incurred in obtaining payment, including reasonable attorney's fees.

§250.34. Report.

The executive director or a designee shall prepare and submit an annual report to the Legislative Budget Board detailing the amount of money expended by the agency in the preceding fiscal year for training subject to this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907977
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 469-3001

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TITLE 22. EXAMINING BOARDS

Part 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

Chapter 1. ARCHITECTS

Subchapter A. SCOPE; DEFINITIONS

22 TAC §1.5

The Texas Board of Architectural Examiners proposes an amendment to §1.5 concerning definitions used in Chapter 1. The amendment will add additional terms to the list of terms provided. The definitions have been added in order to clarify rules found in other chapters.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be a clearer understanding of the terms used in carrying out the business of the agency. The agency anticipates that there will be minimal effect on small business. The anticipated economic cost to persons who are required to comply with the section as proposed is minimal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas, 78711-2337.

The amendment is proposed under §3(b) of the Architects' Registration Law, Article 249a, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the proper administration of the Act.

This proposed amendment does not affect any other statutes.

§1.5. Terms Defined Herein.

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(5) (No change.)

(6) Architectural construction documents–Architectural plans, specifications, and related documents issued for the purpose(s) of regulatory or permit approval or construction.

(7) [~~(6)~~] Architectural plans–Graphic floor plans which describe the functional relationships and intended use of space, exitways, and the control of architectural barriers in habitable buildings.

(8) [~~(7)~~] Architecturally related documents–Supplemental instructions; change orders; graphic exterior elevations which describe the form, aesthetics, and appearance of habitable buildings; and construction of details describing the assembly and installation of construction components of habitable buildings, excluding structural, mechanical, and electrical systems.

(9) [~~(8)~~] Architectural specifications–Written descriptions of materials, and construction features in relation to quality, color, pattern, performance characteristics, and workmanship requirements for components involved in the construction of habitable buildings, excluding structural, mechanical, and electrical systems.

(10) [~~(9)~~] ARE–The current architect registration examination, prepared by NCARB.

(11) [~~(10)~~] Candidate–An individual who has qualified for examination.

(12) Construction administration services–Visiting the construction site in intervals appropriate to the stage of construction to determine whether the work, when fully completed, will be generally in accordance with the architectural construction documents and technical submissions submitted to the building official at the time the building permit was issued; and taking appropriate action regarding shop drawings, samples, and other submissions required of the contractor by the terms of the architectural construction documents or technical submissions.

(13) [~~(11)~~] Contract documents–Documents issued for permits, or construction purposes, consisting of architectural plans, specifications, and related documents.

(14) [~~(12)~~] Coordination of consultant's work–Comparative review by the architect of the construction documents as prepared by the architect and by each of his or her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his or her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.

(15) [~~(13)~~] Direct Supervision–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(16) [~~(14)~~] Emeritus Status–An honorary title that allows a retired architect who no longer wishes to actively practice architecture

to retain his or her professional title but does not confer the right to practice as a registered professional.

(17) [~~(15)~~] IDP–Intern development program.

(18) [~~(16)~~] IDP applicant–An individual who is obtaining the IDP diversified experience requirements set forth in the Texas Table of Diversified Experience Requirements for IDP, and has submitted an application for registration to the board.

(19) [~~(17)~~] Institutional residential facility–Any building intended for occupancy of persons on a 24-hour basis who are receiving custodial care from the proprietors or operators of the building.

(20) [~~(18)~~] NAAB–National Architectural Accrediting Board.

(21) [~~(19)~~] NCARB–National Council of Architectural Registration Boards.

(22) [~~(20)~~] Principal–An individual who is an architect, and in charge of an organization's architectural practice, either alone or with other architects.

(23) [~~(21)~~] Registrant–See architect.

(24) [~~(22)~~] Responsible Charge–That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered architects applying the required professional standard of care.

(25) Supervision and control–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work closely with one another and the supervisor has both control over and detailed professional knowledge of the work prepared under the supervisor's supervision; or, that degree of supervision by a person overseeing the work of another whereby the supervisor is in responsible control of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.

(26) [~~(23)~~] Table of equivalents–The table of education and experience qualifications used by the board to qualify candidates for examination.

(27) [~~(24)~~] TBAE–Texas Board of Architectural Examiners.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907929
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas State Board of Architectural Examiners
Proposed date of adoption: January 27, 2000
For further information, please call: (512) 305-8535

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Subchapter F. THE ARCHITECT'S SEAL

22 TAC §1.103

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Architectural Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Architectural Examiners proposes the repeal of §1.103, concerning requirements for use of the registered architect's seal. The section describes the conditions under which the seal must be used by the registered architect. The section is being repealed so that a new version may be proposed which will more clearly set forth the use of the architect's seal. The repeal is being proposed as a result of the agency's statutorily mandated rules review.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the repeal of the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section because the repealed section will be replaced by a new section with similar provisions.

Ms. Hendricks has also determined that for each year of the first five years the repealed section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will not change because the repealed section will be replaced by a new section with similar provisions.

The agency anticipates that there will be no effect on small business. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed under Vernon's Texas Civil Statutes, Article 249a, which provides the Texas Board of Architectural Examiners with authority to promulgate rules.

This proposed repeal does not affect any other statutes.

§1.103. Required Use.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Proposed date of adoption: January 27, 2000
For further information, please call: (512) 305-8535

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Chapter 3. LANDSCAPE ARCHITECTS

Subchapter A. SCOPE; DEFINITIONS

22 TAC §3.5

The Texas Board of Architectural Examiners proposes an amendment to §3.5 concerning definitions used in Chapter 3. The amendment will add additional terms to the list of terms provided. The definitions have been added in order to clarify rules found in other chapters.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years

the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be a clearer understanding of the terms used in carrying out the business of the agency. The agency anticipates that there will be no effect on small business. The anticipated economic cost to persons who are required to comply with the section as proposed is minimal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas, 78711-2337.

The amendment is proposed under §4(a) of the Landscape Architects' Registration Law, Article 249c, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the proper administration of the Act.

This proposed amendment does not affect any other statutes.

§3.5. Terms Defined Herein.

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(4) (No change.)

(5) Construction administration services–Visiting the construction site in intervals appropriate to the stage of construction to determine whether the work, when fully completed, will be generally in accordance with the landscape architectural construction documents and technical submissions submitted to the building official at the time the building permit was issued; and taking appropriate action regarding shop drawings, samples, and other submissions required of the contractor by the terms of the landscape architectural construction documents or technical submissions.

(6) [~~(5)~~] Contract documents–Documents issued for bidding, permit, or contract construction purposes, consisting of drawings, specifications, addenda, or change orders.

(7) [~~(6)~~] Coordination of consultant's work–Comparative review by the landscape architect of the construction documents as prepared by the landscape architect and by each of his/her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his/her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.

(8) [~~(7)~~] Direct Supervision–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(9) [~~(8)~~] Emeritus Status–An honorary title that allows a retired landscape architect who no longer wishes to actively practice landscape architecture to retain his or her professional title but does not confer the right to practice as a registered professional.

(10) [~~(9)~~] LAAB–Landscape Architectural Accreditation Board.

(11) [~~(10)~~] LARE–Landscape Architect Registration Examination, prepared by CLARB.

(12) [~~(11)~~] Landscape architect–An individual currently registered to practice landscape architecture in the State of Texas.

(13) [~~(12)~~] Landscape architect(s)-of-responsibility–The landscape architect(s) through whom a firm is authorized to offer/perform landscape architectural services and/or whose landscape architect(s') seal(s) and signature(s) appears on contract documents issued from that firm.

(14) [~~(13)~~] Landscape Architects' Registration Law–Regulation of the Practice of Landscape Architecture, Texas Civil Statutes, Article 249c.

(15) Landscape architectural construction documents–Landscape architectural plans, specifications, and related documents issued for the purpose(s) of regulatory or permit approval or construction.

(16) [~~(14)~~] Principal–An individual who is a landscape architect and in charge of an organization's landscape architecture practice, either alone or with others.

(17) [~~(15)~~] Registrant–See landscape architect.

(18) [~~(16)~~] Responsible Charge–That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered landscape architects applying the required professional standard of care.

(19) Supervision and control–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work closely with one another and the supervisor has both control over and detailed professional knowledge of the work prepared under the supervisor's supervision; or, that degree of supervision by a person overseeing the work of another whereby the supervisor is in responsible control of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.

(20) [~~(17)~~] TBAE–Texas Board of Architectural Examiners.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

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Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Proposed date of adoption: January 27, 2000
For further information, please call: (512) 305-8535

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Chapter 5. INTERIOR DESIGNERS

Subchapter A. SCOPE; DEFINITIONS

22 TAC §5.5

The Texas Board of Architectural Examiners proposes an amendment to §5.5 concerning definitions used in Chapter 5. The amendment will add additional terms to the list of terms provided. The definitions have been added in order to clarify rules found in other chapters.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section.

Ms. Hendricks has also determined that for each year of the first five years the section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will be a clearer understanding of the terms used in carrying out the business of the agency. The agency anticipates that there will be no effect on small business. The anticipated economic cost to persons who are required to comply with the section as proposed is minimal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas, 78711-2337.

The amendment is proposed under §5(d) of the Interior Designers' Registration Law, Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the proper administration of the Act.

This proposed amendment does not affect any other statutes.

§5.5. Terms Defined Herein.

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(3) (No change.)

(4) Construction administration services–Visiting the construction site in intervals appropriate to the stage of construction to determine whether the work, when fully completed, will be generally in accordance with the interior design construction documents and technical submissions submitted to the building official at the time the building permit was issued; and taking appropriate action regarding shop drawings, samples, and other submissions required of the contractor by the terms of the interior design construction documents or technical submissions.

(5) [~~(4)~~] Contract documents–Documents issued for permits, or construction purposes, consisting of plans, specifications, and related documents.

(6) [~~(5)~~] Coordination of consultant's work–Comparative review by the interior designer of the construction documents as prepared by the interior designer and by each of his or her consultants for the purpose of revealing possible conflicts and omissions and for observing the consultant's proper seal or other certification applied to his or her own work. Revisions necessary for coordination shall remain the responsibility of the consultants.

(7) [~~(6)~~] Direct Supervision–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work in close proximity to one another and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(8) [~~(7)~~] Emeritus Status–An honorary title that allows a retired interior designer who no longer wishes to actively practice interior design to retain his or her professional title but does not confer the right to practice as a registered professional.

(9) [~~(8)~~] FIDER–Foundation for Interior Design Education Research.

(10) Interior design construction documents–Interior design plans, specifications, and related documents issued for the purpose(s) of regulatory or permit approval or construction.

(11) [~~(9)~~] Interior designer–An individual currently registered to use the title "interior designer" and authorized to offer or perform "interior design" services in the State of Texas.

(12) [~~(10)~~] Interior Designers' Registration Law–Regulation of the Practice of Interior Design, Texas Civil Statutes, Article 249e.

(13) [~~(11)~~] NCIDQ–National Council for Interior Design Qualification.

(14) [~~(12)~~] Principal–An individual who is an interior designer, and in charge of an organization's interior design practice, either alone or with other interior designers.

(15) [~~(13)~~] Registrant–See interior designer.

(16) [~~(14)~~] Responsible Charge–That degree of control over and detailed knowledge of the content of technical submissions during their preparation as is ordinarily exercised by registered interior designers applying the required professional standard of care.

(17) Supervision and control–That degree of supervision by a person overseeing the work of another whereby the supervisor and the individual being supervised work closely with one another and the supervisor has both control over and detailed professional knowledge of the work prepared under the supervisor's supervision; or, that degree of supervision by a person overseeing the work of another whereby the supervisor is in responsible control of the work and the person performing the work is employed by the supervisor or by the supervisor's employer.

(18) [~~(15)~~] Table of Equivalents–The latest edition of the document used by the board to qualify candidates for examination, entitled Table of Equivalents for Education and Experience in Interior Design.

(19) [~~(16)~~] TBAE–Texas Board of Architectural Examiners.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907927
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Proposed date of adoption: January 27, 2000
For further information, please call: (512) 305-8535

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Chapter 5. ARCHITECTS

Subchapter B. INTERIOR DESIGNERS

22 TAC §5.31

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Architectural Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Architectural Examiners proposes the repeal of §5.31, concerning requirements for individuals applying for interior design registration. The section sets forth the requirements which must be met before an individual may take the National Council of Interior Design Qualification Examination in the State of Texas. The section is being repealed so that a new version may be proposed.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five years the repeal of the section as proposed is in effect, there will be no fiscal implications as a result of enforcing or administering the section because a new version of this section will be proposed.

Ms. Hendricks has also determined that for each year of the first five years the repealed section as proposed is in effect, the public benefits anticipated as a result of enforcing the section as proposed will not change because a new version this section will be proposed.

The agency anticipates that there will be no effect on small business. The economic cost to persons who are required to comply with the section as proposed will not change because a new version of this section will be proposed.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

The repeal is proposed under §5(d) of the Interior Designers' Registration Law, Article 249e, Vernon's Texas Civil Statutes, which provides the Texas Board of Architectural Examiners with authority to promulgate rules necessary to the proper administration of the Act and implies authority to repeal any rules that are found to be unnecessary to the proper administration of the Act.

This proposed repeal of this section does not affect any other statutes.

§5.31. Eligibility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

TRD-9907832
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Proposed date of adoption: January 27, 2000
For further information, please call: (512) 305-8535

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Part 5. STATE BOARD OF DENTAL EXAMINERS

Chapter 101. DENTAL LICENSURE

22 TAC §101.7

The State Board of Dental Examiners proposes amendments to §101.7, Licensure by Credentials, Dentists.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the rule.

Mr. Hill has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that there the State Board of Dental Examiners will have available an additional source of information concerning licensees in other states who seek Texas licensure by credentials, the Healthcare Integrity and Protection Data Bank, (HIPDB), which will insure that only qualified applicants are granted licensure by credentials.

It is unknown if there will be any fiscal implications for small businesses. Should such costs be incurred, they will not be of such magnitude to impact the economic viability of a small business. Therefore the SBDE has determined that compliance with the proposed amended rule will not have an adverse economic impact on small businesses when compared to large businesses as the cost of compliance, if any, will be minimal.

The anticipated economic costs to persons who are required to comply with the rule as proposed will be contingent upon those applicants who are pursuing licensure by credentials. As part of the requirement for licensure, applicants must submit to the SBDE a background check for criminal or fraudulent activities. The applicant submits a self-query to the National Practitioner Data Bank/Healthcare Integrity and Protection Data Bank, the federal repository for final adverse actions reported by licensing boards on actions taken against dental practitioners. The cost for this self-query is $10.00.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, 512-463-6400. To be considered all comments must be received by the State Board of Dental Examiners on or before January 3, 2000.

The amended rule is proposed under Texas Government Code §2001.021 et. seq.; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act, and §256.101 which provides the Board with the authority to issue a reciprocal license.

The proposed amended rule does not affect other statutes, articles, or codes.

§101.7. Licensure by Credentials - Dentists.

The State Board of Dental Examiners will license applicants by credentials upon payment of a fee, in an amount set by the Board, who meet all SBDE and State of Texas minimum applicant requirements and general licensure qualifications and all of the following criteria:

(1) Has graduated from a dental school accredited by the Commission on Dental Accreditation of the American Dental Association. Dental Schools so accredited are approved by the State Board of Dental Examiners for purposes of licensing their graduates of credentials.

(2) Is currently licensed in good standing in another state, the District of Columbia, or territory of the United States that has licensing requirements that are substantially equivalent to the requirements of the Texas Dental Practice Act.

(3) Has practiced dentistry:

(A) For a minimum of five years immediately prior to applying;

(B) As a dental educator at a dental or dental hygiene school accredited by the Commission on Dental Accreditation of the American Dental Association for a minimum of five years immediately prior to applying.

(4) Is endorsed by the state board of dentistry of the jurisdiction of current practice. Such endorsement is established by providing a copy under seal of the jurisdiction entity of the current dentist's license and by a certified statement that he/she has current good standing in said jurisdiction.

(5) Has not been the subject of final or pending disciplinary action in any jurisdiction in which applicant is or has been licensed;

(6) Has taken and passed the jurisprudence examination administered by the State Board of Dental Examiners within one year immediately prior to application.

(7) Has passed a national written examination relating to dentistry as certified by the American Dental Association Joint Commission on National Dental Examinations or other examination approved by the SBDE.

(8) Has successfully passed background checks for criminal or fraudulent activities to include information from the National Practitioner Data Bank, the Healthcare Integrity and Protection Data Bank and/or the AADE Clearinghouse for Disciplinary Action;

(9) Practice experience described in paragraph (3) of this section must be subsequent to applicant having graduated from a dental school accredited by the Commission on Dental Accreditation of the American Dental Association.

(10) Each candidate for licensure by credentials must submit to the Credentials Review Committee of the Board the required documents and information prescribed in this rule and other documents or information that may be requested to enable the Committee to evaluate appropriately an application and to make a recommendation to the Board for action on the application.

(11) Each applicant must show proof of current CPR certification as required by the Texas Dental Practice Act[, ~~Article 4545a, §1(a)(6)~~].

(12) Applications must be delivered to the office of the State Board of Dental Examiners.

(13) An application for licensure is filed with the State Board of Dental Examiners when it is actually received, date-stamped, and logged-in by the State Board of Dental Examiners along with all required documentation and fees. An incomplete application for licensure and fee will be returned to applicant within three working days with an explanation of additional documentation or information needed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907920

Jeffry R. Hill

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: January 2, 2000

For further information, please call: (512) 463-6400

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Chapter 109. CONDUCT

Subchapter T. AGREEMENTS WITH NON-DENTISTS

22 TAC §109.500

The State Board of Dental Examiners proposes new Subchapter T, Agreements with Non-Dentists, new §109.500, concerning Improper Influence on Professional Judgment.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the rule.

Mr. Hill has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to clarify the types of activities by a non-dentist that could be considered to improperly influence a dentists' independent professional judgment.

It is unknown if there will be any fiscal implications for small businesses. Should such costs be incurred, they will not be of such magnitude to impact the economic viability of a small business. Therefore the SBDE has determined that compliance with the proposed new rule will not have an adverse economic impact on small businesses when compared to large businesses as the cost of compliance, if any, will be minimal.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, 512-463-6400. To be considered all comments and written request for public hearing must be received by the State Board of Dental Examiners on or before January 3, 2000.

The new rule is proposed under Texas Government Code §2001.021 et. seq.; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act, and

The proposed new rule does not affect other statutes, articles, or codes.

§109.500. Improper Influence on Professional Judgment.

(a) For the purposes of this rule, the term dentist shall include the following:

(1) a dentist licensed by the State Board of Dental Examiners;

(2) a professional corporation wholly owned by one or more dentists;

(3) other entities that provide dental services and are owned by one or more dentists.

(b) Any dentist entering into any contract, partnership or other agreement or arrangement which allows any person other than a dentist any one or more of the following rights, powers or authorities shall be presumed to have violated the provisions of the Dental Practice Act, Section 251.003 regarding controlling, attempting to control, influencing, attempting to influence or otherwise interfering with the exercise of a dentist's independent professional judgment

regarding the diagnosis or treatment of any dental disease, disorder or physical condition:

(1) controlling, owning or setting any conditions for access to or the specific contents of dental records of patients of a dentist.

(2) setting a maximum or other standardized time for the performance of specific dental procedures.

(3) placing any limitations or requirements on treatments, referrals, or consultations except those based on the professional judgment of the dentist.

(4) limiting or imposing requirements concerning the type or scope of dental treatment, procedures or services which may be recommended, prescribed, directed or performed, except that a dentist may limit the dentist's practice or the practice of a dentist employed by or contracting with the dentist to certain procedures or the treatment of certain dental diseases.

(5) limiting or imposing requirements concerning the supplies, instruments or equipment deemed reasonably necessary by a dentist to provide diagnoses and treatment of the patients of the dentist.

(6) limiting or imposing requirements for the professional training deemed necessary by the dentist to properly serve the patients of the dentist.

(7) directing or influencing the selection of specific diagnostic examinations and treatment or practices regarding patients without due regard to the recommended diagnostic examinations and treatment agreed upon by the dentist and the patient, except that a dentist having the responsibility for training or supervising another dentist may reasonably limit treatment or practices as a part of the training or supervision of a dentist based upon the training and competency of a dentist to perform certain treatment or practices.

(8) limiting or determining the duties of professional, clinical or other personnel employed to assist a dentist in the practice of dentistry.

(9) establishing professional standards, protocols or practice guidelines which in the professional judgment of the dentist providing dental service to the dentist's patient, conflict with generally accepted standards within the dental profession.

(10) entering into any agreement or arrangement for management services that:

(A) interferes with a dentist's exercise of his/her independent professional judgement;

(B) encourages improper overtreatment or undertreatment by dentists; or

(C) encourages impermissible referrals from unlicensed persons in consideration of a fee

(11) placing limitations or conditions upon communications that are clinical in nature with the dentist's patients.

(12) precluding or restricting a dentist's ability to exercise independent professional judgment over all qualitative and quantitative aspects of the delivery of dental care.

(13) scheduling patients of the dentist in a manner that may have the effect of discouraging new patients from coming into the dentist's practice, or postponing future appointments or that give scheduling preference to an individual, class or group.

(14) penalizing a dentist for reporting violations of a law regulating the practice of dentistry.

(15) conditioning the payment of fees to a dentist or the amount of management fees a dentist must pay, on the referral of patients to other health care providers specified by a non-dentist.

(c) The entry into one or more of the following agreements by a dentist shall not be presumed to have violated the Dental Practice Act, Section 251.003:

(1) leases, mortgages, ownership agreements or other arrangements regarding use of space for dental offices, based on a set, non percentage fee reasonably related to the fair market value of the office space provided at the time the lease or other arrangement is entered into.

(2) agreements regarding the purchase, sale, financing or lease of dental equipment, instruments and supplies so long as the dentist maintains the complete care, custody, and control of the dental instruments and supplies and the lease does not provide for a payment or fee based upon a percentage of the revenue received by the dentist, or the dental practice.

(3) agreements providing for accounting, bookkeeping, investment or similar financial services.

(4) the financing, lease, use or ownership of non-dentist business equipment such as telephones, computers, software, and general office equipment at reasonable, market related fees.

(5) services regarding the pledge, collection or sale of accounts receivable from patients.

(6) agreements regarding billing and collection services.

(7) advertising and marketing services so long as the dentist remains solely responsible for the content of any advertising or marketing services and for ensuring that such conform to all applicable legal requirements.

(8) agreements regarding consulting, professional development, business practices and other advisory agreements which do not limit the dentist's ability to use the dentist's independent professional judgment regarding the diagnosis or treatment of any dental disease, disorder or physical condition.

(9) employment agreements which specify that the dentist shall continue to have the right to use the dentist's independent professional judgment regarding the diagnosis or treatment of any dental disease, disorder or physical condition, provided that in practice the dentist is allowed to use the dentist's professional judgment.

(d) The provisions of subsection (c) of this section herein may be rebutted and the entry into these agreements or other undertakings may be found to be in violation of the Dental Practice Act if it can be shown that the agreements or other undertakings result in the control, attempt to control, influence, attempt to influence or otherwise interfere with the exercise of a dentist's independent professional judgment regarding the diagnosis or treatment of any dental disease, disorder or physical condition.

(e) This rule shall not be applicable to dentists or others covered by the Dental Practice Act, Section 251.004, entitled Exceptions, Section 260.001, regarding administration of an estate and continuation of practice nor Sections 260.002 through 260.004, regarding employment of dentists.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907921
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-6400

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TITLE 25. HEALTH SERVICES

Part 1. TEXAS DEPARTMENT OF HEALTH

Chapter 37. MATERNAL AND INFANT HEALTH SERVICES

Subchapter H. SUDDEN INFANT DEATH SYNDROME

25 TAC §§37.171-37.173

The Texas Department of Health (department) proposes new §§37.171-37.173, concerning sudden infant death syndrome (SIDS) and the establishment of a procedure for reimbursing counties for autopsies performed for children 12 months old or younger, for whom SIDS is the primary cause of death. Specifically, the sections cover the subsection's purpose, definitions, and reimbursement for costs of autopsies.

Family Code, Chapter 264, requires that the medical examiner or justice of the peace of a county in which a child younger than six years of age dies must hold an inquest to determine whether the death was unexpected or the result of abuse or neglect. The investigation must include an autopsy. Health and Safety Code, §673.002, as amended by the 76th Legislature, requires the department to define SIDS and to reimburse counties $500 for the cost of autopsies performed upon children 12 months old or younger, if the primary cause of death is SIDS. Reimbursement by the department is subject to the availability of funds.

Kathleen Hamilton, Chief, Bureau of Children's Health, has determined that for the first five-year period the sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. The effect on state government will be increased expenditures by the department of approximately $132,839 per year through fiscal year 2004. There will be fiscal implications to counties which receive $500 in reimbursement from the department for each of the approximately 250 autopsies performed per year on children 12 months old or younger for whom the cause of death is SIDS.

Ms. Hamilton has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be provision of assistance to local governments which are required by law to include autopsies as part of the death investigations for certain infants. There will be no costs to micro-businesses or small businesses to comply with the sections as proposed because only county governments are responsible for conducting autopsies for which $500 in reimbursement may be paid by the department. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Kathy Clement, RN, MSN, Bureau of Children's Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7700 Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new sections are proposed under the Health and Safety Code, §673.002, which requires the department to adopt rules defining SIDS and establishing a method for obtaining reimbursement for the cost of autopsies for children 12 months old or younger whose primary cause of death is SIDS; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect the Health and Safety Code, Chapter 673.

§37.171. Purpose.

The purpose of these sections is to define sudden infant death syndrome (SIDS) and to establish a payment mechanism for autopsies for children 12 months old or younger who die unexpectedly and whose primary cause of death is SIDS.

§37.172. Definitions.

The following words and terms pertain explicitly to this subchapter and shall have the following meanings, unless the context clearly indicates otherwise.

(1) Autopsy - A post mortem examination of the body of a person, including X-rays and an examination of the internal organs and structures after dissection, to determine the cause of death or the nature of any pathological changes that may have contributed to the death.

(2) Infant - A child who is younger than 12 months of age.

(3) Parent - A natural parent, step parent, adoptive parent, legal guardian, or other legal custodian of a child.

(4) Sudden infant death syndrome (SIDS) - Death of an infant which remains unexplained after all known causes have been ruled out through a complete autopsy, death scene investigation, and medical history of the infant.

§37.173. Reimbursement for Costs of Autopsy.

(a) The department shall reimburse the county in which an infant dies for the cost of an autopsy performed as required by Health and Safety Code §673.002 only if the primary cause of death is SIDS.

(b) Reimbursement by the department of all costs associated with an autopsy performed by any person or entity shall not exceed $500.

(c) The county judge for the county in which the infant died shall sign and submit a Texas Department of Health purchase voucher (voucher) to the Child Health and Safety Division requesting reimbursement for all costs of the autopsy. A county's claim for reimbursement shall also include a copy of the autopsy report.

(d) The department shall process the voucher and shall request the Comptroller of Public Accounts to issue a warrant for

not more than $500 payable to the county in which the infant died, if the primary cause of death stated on the autopsy report is SIDS.

(e) The department shall process no more than one voucher requesting reimbursement of autopsy costs for an infant.

(f) Reimbursements to counties under this section shall be limited by the availability of funds.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907913
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Subchapter S. NEWBORN HEARING SCREENING

25 TAC §§37.501-37.512

Subject to the approval of the State Medicaid Director, the Texas Department of Health (department) proposes new §§37.501-37.512 concerning a statewide newborn hearing screening, tracking, and intervention program. Specifically, the sections cover the purpose of the rules; definitions; newborn hearing screening, tracking, and intervention programs; certification of screening programs; program performance standards and goals; program certification; information concerning screening results and follow-up care; technical assistance by the department; information management, reporting, and tracking system; Texas Department of Health responsibilities; confidentiality and general access to data; and authorized Medicaid newborn hearing services.

These new sections define the department's role in establishing the newborn hearing screening, tracking, and intervention program mandated by Health and Safety Code, Chapter 47, and the department's responsibility for providing screening tests for hearing loss and any necessary follow-up care for children younger than 30 days old who receive medical assistance (Medicaid). Chapter 1347, §6, Acts of the 76th Legislature, 1999 (House Bill 714) requires each birthing facility that operates a program to offer hearing screening during the birth admission in accordance with Health and Safety Code, §47.003 not later than April 1, 2001, and that birthing facilities with at least 1,000 births per year must do so not later than May 1, 2000.

Kathleen Hamilton, Chief, Bureau of Children's Health, has determined that for the first five-year period the sections are in effect, there will be fiscal implications as a result of enforcing or administering the sections as proposed. The effect on state government will be an estimated increase in expenditures of approximately $4,100,000 in Fiscal Year (FY) 2000, $3,500,000 in FY 2001, and $1,900,000 per year in FY 2002-FY 2004 for administration of the statewide hearing screening program and for reimbursement to individual Medicaid providers of hearing screens and necessary diagnostic follow-up care. There will be fiscal implications to only those local governments which operate birthing facilities covered by Health and Safety Code, Chapter 47. The estimated impact on those local governments will be $4,000-$20,000 during FY 2000 for purchase of hearing screening equipment, plus increased costs of approximately $8 per newborn screened during FY 2000-FY 2004.

Ms. Hamilton has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be earlier identification of newborns with hearing loss and earlier, more effective treatment, which will help decrease or prevent the impact of hearing loss on affected newborns' ability to learn and communicate. The anticipated cost for each hospital or birthing center classified as a micro- business or a small business will be approximately $4,000-$10,000 for the purchase of hearing screening equipment plus approximately $8 per newborn screened. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Joy O'Neal, M.F.A., Director, Audiology Services, Bureau of Children's Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7724. Comments will be accepted for 60 days following publication of the proposal in the *Texas Register*. Also, a public hearing will be held to receive comments at 9:00 a.m., Thursday, January 20, 2000, at the Texas Department of Health, Room E-100 (auditorium), 1100 West 49th Street, Austin, Texas.

The new sections are proposed under Human Resources Code, §32.021 and Government Code §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991). The new sections are proposed under Health and Safety Code, §47.008(c); Human Resources Code, §32.024(v); and Chapter 1347, §7, Acts of the 76th Legislature, 1999 (HB 714) which authorize the Texas Board of Health (board) to adopt rules to implement the state's newborn hearing screening program. The new sections are also proposed under Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect the Health and Safety Code, Chapter 47; Human Resources Code, §32.024; and Insurance Code, Article 21.53F.

§37.501. Purpose.

The purpose of these sections is to establish the rules for the implementation of a statewide newborn hearing screening, tracking, and intervention program.

§37.502. Definitions.

The following words and terms pertain explicitly to this chapter and shall have the following meanings, unless the context clearly indicates otherwise.

(1) Birth admission - The time after birth that a newborn remains in the birthing facility before the newborn is discharged. If a newborn is transferred to an intensive care nursery, the hearing screen

must be done after the newborn is medically stable, but before the newborn or infant is released from the hospital.

(2) Birthing facility -

(A) a hospital licensed under Health and Safety Code, Chapter 241 that offers obstetrical services and is located in a county with a population of more than 50,000;

(B) a birthing center licensed under Health and Safety Code, Chapter 244 that is located in a county with a population of more than 50,000 and that has 100 or more births per year; or

(C) a hospital that offers obstetrical services or a birthing center licensed under Health and Safety Code, Chapter 244:

(i) that participates in the State's medical assistance program; and

(ii) is not otherwise included in subsections (2)(A) or (2)(B) of this section.

(3) Department - The Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(4) Health care provider - A registered nurse recognized as an advanced practice nurse by the Board of Nurse Examiners or a physician assistant licensed by the Texas State Board of Physician Assistant Examiners.

(5) Hearing loss - A hearing loss of 30 dB HL or greater in the frequency region important for speech recognition and comprehension in one or both ears, approximately 500 through 4000 Hz.

(6) Infant - A child who is at least 30 days but who is younger than 24 months old.

(7) Newborn - A child younger than 30 days old.

(8) Parent - A natural parent, stepparent, adoptive parent, legal guardian, or other legal custodian of a child.

(9) Physician - A person licensed to practice medicine by the Texas State Board of Medical Examiners.

(10) Intervention or follow-up care - The early intervention services described in the Individuals with Disabilities Education Act, 20 U.S.C. §§1431-1445.

(11) Program - A newborn hearing screening, tracking, and intervention program certified by the department or the department's designee.

(12) State - The State of Texas.

(13) Consent - A statement signed by a parent, as defined in §37.502(8) of this title (relating to Definitions) agreeing that individually identified newborn information may be disclosed to the department.

(14) Individually identifying information includes:

(A) the name of the child or the child's parent;

(B) the address of the child; and

(C) a personal identifier, such as the child's social security number or Medicaid number.

(15) Protocols - The guidelines given to the birthing facility by the department or the department's designee for conducting its certified newborn hearing screening program.

§37.503. Newborn Hearing Screening, Tracking, and Intervention Program.

(a) A birthing facility, through a program certified by the department under this subchapter, shall offer the parents of a newborn a hearing screening for the newborn for the identification of hearing loss. A birthing facility as defined at §37.502(2)(C) of this title (relating to Definitions) shall be required to offer a hearing screening only to the parents of newborns who receive medical assistance (Medicaid).

(b) The hearing screening shall be provided during the birth admission.

(c) The parents of a newborn who is transferred to a neonatal intensive care unit for medical care shall be offered a hearing screening prior to discharge.

(d) The parents shall be informed that, upon their written consent, individually identifying information shall be disclosed by the birthing facility to the department.

(e) The department or the department's designee shall approve program protocols.

(f) The department may maintain data and information on each newborn who receives services under a program.

(g) Program protocols shall require appropriate referrals to the Interagency Council on Early Childhood Intervention as required by §621.45 of this title (relating to Primary Referral Requirements).

§37.504. Certification of Screening Programs.

Program certification criteria shall include the following:

(1) procedures for maintaining and reporting data electronically to the department;

(2) obtaining parental consent according to §37.511 of this title (relating to Confidentiality and General Access to Data);

(3) assuring that screening staff, including managers and screeners, successfully complete training provided by the department;

(4) provide hearing screening using equipment that meets department criteria, including but not limited to the following:

(A) a demonstrated ability to link electronically to the department's newborn hearing screening information system; and

(B) approval by the Food & Drug Administration, with pass-refer criteria that utilize either a statistically-based methodology or empirical criteria which are based on data published in peer-reviewed journals;

(5) procedures for communication to parents, physicians, the department, and the Interagency Council on Early Childhood Intervention with appropriate follow-up proceedings for reporting screening results and follow-up services;

(6) procedures for distribution of standardized educational materials to parents, health care providers, and physicians; and

(7) performance of program services in compliance with §37.505 of this title (relating to Program Performance Standards and Goals).

§37.505. Program Performance Standards and Goals.

(a) Minimum acceptable levels of performance include:

(1) 95% of newborns shall be screened during the birth admission;

(2) 98% of newborns shall be screened during the first month of life;

(3) 90% of newborns shall pass the birth admission screen; and

(4) 70% of newborns or infants who require follow-up services shall receive the services within the first three months of life.

(b) Goals for program performance include:

(1) 98% of newborns shall be screened during the birth admission;

(2) 99% of newborns shall be screened during the first month of life;

(3) 95% of newborns shall pass the birth admission screen; and

(4) 75% of newborns or infants who require follow-up services shall receive the services within the first three months of life.

§37.506. Program Certification.

(a) The department shall certify programs in the following classifications.

(1) Preliminary.

(A) Preliminary certification may be awarded for a period of not more than six months to a program which has never been previously certified and has met the criteria described in §37.504 of this title (relating to Certification of Screening Programs) and §37.505(a) of this title (relating to Program Performance Standards and Goals).

(B) A program holding preliminary certification may seek recertification based on performance data for the three months immediately preceding the program certification review.

(C) A program holding preliminary certification may be awarded Provisional or Standard status, or may be decertified.

(2) Standard.

(A) Standard certification may be awarded for a period of not more than 12 months to a program that has met the criteria described in §37.504 and §37.505(a) of this title.

(B) A program holding standard certification may seek recertification based on performance data for the 12 months immediately preceding the program certification review.

(C) A program holding standard certification may be awarded Provisional, Standard, or Distinguished status, or may be decertified.

(3) Distinguished.

(A) Distinguished certification may be awarded for a period of not more than 24 months to a program that has met the criteria described in §37.504 and §37.505(b) of this title.

(B) A program holding distinguished certification may seek recertification based on performance data for the 24 months immediately preceding the program certification review.

(C) A program holding distinguished certification may be awarded Provisional, Standard, or Distinguished status, or may be decertified.

(4) Provisional.

(A) Provisional certification shall be valid for no more than six months.

(B) Provisional certification shall be given to a program which fails to meet one or more of the criteria described in §37.504 or §37.505(a) of this title upon recertification review.

(C) A program holding provisional certification may seek recertification review based on performance data for the six months immediately preceding the program certification review.

(D) A program holding provisional certification may be awarded Standard status, or may be decertified.

(b) Decertification.

(1) A program holding a Preliminary, Provisional, Standard, or Distinguished certification may be decertified if the department or department's designee determines that the program has submitted fraudulent data.

(2) A program holding a Provisional certification may be decertified if it fails to meet one or more of the certification criteria or performance standards in §37.504 or §37.505(a) of this title.

(c) Recertification Following Decertification.

(1) A program may apply for recertification following decertification based on performance data for the six months immediately preceding the review.

(2) A program applying for recertification after decertification may receive Standard status or may remain decertified.

(d) Certification For Sounds of Texas Project Hospitals. A program that participated in the Sounds of Texas Project shall be awarded Standard or Distinguished certification based upon compliance with §37.505(a) or §37.505(b) of this title.

(e) Display of Certification or Notice of Decertification. A current certification certificate or notice of decertification must be displayed in a public area accessible to and visible to families whose newborns are receiving program services.

(f) Notice of Failure to Meet Performance Standards. The department or the department's designee shall notify in writing any certified program which fails to meet applicable performance standards during any two-month period.

(1) A program notified of failure to meet performance standards shall provide to the department or the department's designee within 30 days of receipt of the notice a corrective action plan and the time frame needed to return the program to compliance.

(2) Failure by the program to provide a written corrective action plan within 30 days may result in an immediate certification review.

(g) Fees. No fees shall be charged for certification or recertification.

§37.507. Information Concerning Screening Results and Follow-up Care.

(a) Birthing facilities shall provide information regarding the results of the birth admission hearing screen to the parents, attending physician or health care provider, and to the department or the department's designee upon consent of the parents.

(b) Birthing facilities must provide information approved by the department to the parents regarding available follow-up services for newborns and infants with abnormal screening results.

(c) Birthing facilities shall coordinate follow-up care for a newborn or infant identified with abnormal screening results with the physician or health care provider.

§37.508. Technical Assistance by Department.

The department or its designee may provide technical assistance associated with the implementation or maintenance of a certified program.

§37.509. Information Management, Reporting, and Tracking System.

(a) The department shall provide appropriate information management, reporting, and tracking software to birthing facilities that provide newborn hearing screening under the State's medical assistance program provided under Human Resources Code, Chapter 32.

(b) Birthing facilities participating in the medical assistance program shall use the software provided by the department for the newborn hearing screening program and must report the resulting information to the department on a periodic basis as defined in the program protocols.

(c) Birthing facilities which do not participate in the medical assistance program must utilize information management, reporting, and tracking software format compatible with hardware and software utilized by the department.

(d) Hospitals, audiologists, qualified hearing screening providers, intervention specialists, educators, and others who receive referrals from programs under this chapter shall either provide the needed services or refer the children to another provider of the needed services, and shall provide the following information to the department or its designee:

(1) results of follow-up care;

(2) results of audiologic testing of infants identified with hearing loss;

(3) reports on initiation of intervention services; and

(4) results of follow-up and testing on children served under the state's medical assistance program under Human Resources Code, Chapter 32, who are eligible for services and hearing aids through the department's Program for Amplification for Children of Texas.

§37.510. Texas Department of Health Responsibilities.

(a) The department shall use the information provided under §37.509 of this title (relating to Information Management, Reporting, and Tracking System) to plan, monitor and evaluate programs or providers, including the screening, follow-up, diagnostic, and intervention components.

(b) The department may use the collected information to monitor for health events of epidemiological importance.

§37.511. Confidentiality and General Access to Data.

(a) The birthing facility shall obtain a statement of consent from the parent, guardian, or managing conservator if individually identifying information for newborns tested under this chapter is disclosed to the department or its designee.

(b) All primary referral sources identified in §621.45 of this title (relating to Primary Referral Requirements) shall provide information concerning children diagnosed with hearing loss to the Interagency Council on Early Childhood Intervention.

(c) The department shall prepare appropriate language for consent forms for disclosing individually identifying information and shall make samples available to birthing facilities.

(d) At any time a parent may request in writing that individually identifying information concerning his or her child be removed from the department's newborn hearing screening system by contacting the Texas Department of Health, Audiology Services Program, 1100 West 49th Street, Austin, Texas, 78756. The department shall act on any request in a timely manner.

(e) All information which identifies individuals shall be protected as confidential medical information in accordance with the Medical Practice Act, Occupations Code, Chapter 159.

(f) A birthing facility which discloses individually identifying information regarding newborn hearing screening results to the department in good faith pursuant to this section is not subject to civil or criminal liability, as provided by Health and Safety Code, §49.009.

(g) If consent to disclose individually identifying information to the department is obtained, the facility obtaining consent shall maintain the consent in the patient's medical record.

§37.512. Authorized Medicaid Newborn Hearing Services.

(a) A newborn hearing screening test performed by a birthing facility in accordance with Health and Safety Code, Chapter 47 and the requirements of this subchapter for a newborn who receives medical assistance or who is Medicaid-eligible is a covered service of the Texas Medical Assistance (Medicaid) Program.

(b) Any necessary diagnostic follow-up care related to the newborn hearing screening test provided to a newborn who receives medical assistance or who is Medicaid-eligible is a covered service of the Texas Medical Assistance Program.

(c) The reimbursement rates and methodology for covered services described in this section shall be established by the Texas Health and Human Services Commission.

(d) A Medicaid birthing facility described in §37.502(2)(A) or (B) of this title (relating to Definitions) shall implement its newborn hearing screening program by the dates required by Chapter 1347, §6, Acts of the 76th Legislature, 1999 (HB 714).

(e) A Medicaid birthing facility described in §37.502(2)(C) of this title (relating to Definitions) shall implement its newborn hearing screening program on or before August 31, 2001.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Chapter 97. COMMUNICABLE DISEASES

The Texas Department of Health (department) proposes amendments to §§97.2, 97.3, 97.5, and 97.135, concerning perinatal hepatitis B screening and the reporting of positive test results obtained through perinatal hepatitis B screening.

Specifically, the amendments to §97.2 and §97.5 include persons who attend a pregnant woman during gestation or delivery among those persons who are required to report communicable diseases. The amendment to §97.3 adds confirmed or suspected chronic hepatitis B infection in a pregnant woman to the list of reportable diseases and specifies the minimum informa-

tion which must be reported. The amendment to §97.135 adds hepatitis B to the list of diseases for which a pregnant woman must be screened at her first prenatal visit and upon admission for delivery. These amendments will implement Senate Bill 519 (Chapter 573, 76th Legislative Session), which amends Health and Safety Code §81.090 and will assure that physicians, birthing centers, hospitals and midwives are aware of their responsibility to assure that all pregnant women are tested for infection with the hepatitis B virus (HBV) at the first prenatal visit and at delivery. Amendments to §97.135 also incorporate the instruction of Senate Bill 519 that a blood sample drawn from the mother at admission for delivery be used for the syphilis and human immunodeficiency virus (HIV) tests already required by law.

Robert D. Crider, Director, Immunization Division, has determined that for each year of the first five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of administering the sections as proposed.

Mr. Crider has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of these sections will be decreased transmission of hepatitis B virus from mother to infant at birth. Perinatal hepatitis B infection can be prevented by administration of hepatitis B immune globulin (HBIG), 3 doses of hepatitis B vaccine, and post-immunization testing, at a cost of $200 to $300 per child. In the absence of screening, an estimated 765 to 1,138 babies would be expected to acquire hepatitis B infection at birth each year in Texas. Later in life, 15% to 25% of these persons will develop either liver cancer or liver disease which may require a liver transplant. It is estimated that $20,000 will be saved for each chronic case of hepatitis B that is prevented. There will be an impact to micro-businesses and small businesses that provide uncompensated pre-natal and obstetric services to women. Similar cost will accrue to private-pay patients, regardless of where they are treated. The cost of a HBsAg test is estimated at $116. This cost may be incurred directly or through higher health care premiums. The price of this test through the department's lab is $10.27. Pre-natal hepatitis B testing has been a medical recommendation since 1988 and has been covered under the Medicaid standard of care since 1994. The number of women subject to hepatitis B serologic testing in each of the first five years these rules are in effect will equal the number of live births and fetal deaths recorded in Texas each year. There were 335,798 live births and fetal deaths in Texas in 1997. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Mr. Robert D. Crider, M.S., M.P.A., Director, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7284 or (800) 252-9152. Comments will also be accepted by fax, (512) 458-7544, or by email to Bob.Crider@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

Subchapter A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §§97.2, 97.3, 97.5

These amendments are proposed under Health and Safety Code, §81.090, which requires the Texas Board of Health (board) to approve standard serologic tests for specified diseases to be administered during gestation and delivery, §81.004 which allows the board to adopt rules necessary for the effective administration of Health and Safety Code, Chapter 81, and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

These amendments affect the Health and Safety Code §81.090.

§97.2. Who Shall Report.

(a) A physician, dentist, veterinarian, [~~or~~] chiropractor, or other person permitted by law to attend a pregnant woman during gestation or at the delivery of an infant shall report, as required by these sections, each patient or animal he or she shall examine and who has or is suspected of having any reportable disease or health condition, and shall report any outbreak, exotic disease, or unusual group expression of illness of any kind whether or not the disease is known to be communicable or reportable. An employee from the clinic or office staff may be designated to serve as the reporting officer. A physician, dentist, veterinarian, or chiropractor who can assure that a designated or appointed person from the clinic or office is regularly reporting every occurrence of these diseases or health conditions in their clinic or office does not have to submit a duplicate report.

(b)-(g) (No change.)

§97.3. What Condition To Report and What Isolates To Report or Submit.

(a) (No change.)

(b) Reportable conditions or isolates.

(1) Confirmed and suspected cases of the following diseases are reportable: acquired immune deficiency syndrome (AIDS); amebiasis; anthrax; botulism–adult and infant; brucellosis; campylobacteriosis; chancroid; chickenpox; Chlamydia trachomatis infection; cholera; Creutzfeldt-Jakob disease (CJD); cryptosporidiosis; dengue; diphtheria; ehrlichiosis; encephalitis (specify etiology); Escherichia coli O157:H7 infection; gonorrhea; Hansen's disease (leprosy); Haemophilus influenzae type b infection, invasive; hantavirus infection; hemolytic uremic syndrome (HUS); hepatitis, acute viral (specify type); hepatitis B, (chronic) identified prenatally or at delivery as described in §97.135 of this title (relating to Serologic Testing during Pregnancy and Delivery; human immunodeficiency virus (HIV) infection; legionellosis; listeriosis; Lyme disease; malaria; measles (rubeola); meningitis (specify type); meningococcal infection, invasive; mumps; pertussis; plague; poliomyelitis, acute paralytic; rabies in man; relapsing fever; rubella (including congenital); salmonellosis, including typhoid fever; shigellosis; spotted fever group rickettsioses (such as Rocky Mountain spotted fever); streptococcal disease, invasive; syphilis; tetanus; trichinosis; tuberculosis; typhus; Vibrio infection (specify species); viral hemorrhagic fevers; yellow fever; and yersiniosis.

(2)-(3) (No change.)

(c) Minimal reportable information requirements. The minimal information that shall be reported for each disease is as follows:

(1)-(3) (No change.)

(4) for hepatitis B, (chronic and acute) identified prenatally or at delivery - name, present address, present telephone number, age, date of birth, sex, race and ethnicity, estimated delivery date (for prenatal diagnoses), name of baby and location of delivery (for diagnoses made at delivery), physician or other person in attendance, disease, type of diagnosis, date of onset, address, telephone number;

(5) [~~(4)~~] for all other reportable conditions listed in subsection (b)(1) of this section - name, present address, present telephone number, age, date of birth, sex, race and ethnicity, physician, disease, type of diagnosis, date of onset, address, and telephone number;

(6) [~~(5)~~] for all isolates of Enterococcus species and all isolates of Streptococcus pneumoniae regardless of resistance patterns - numeric totals at least quarterly; and

(7) [~~(6)~~] for vancomycin resistant Enterococcus species; penicillin resistant Streptococcus pneumoniae; vancomycin resistant Staphylococcus aureus; vancomycin resistant coagulase negative Staphylococcus species, - name, city of submitter, date of birth or age, sex, anatomic site of culture, and date of culture.

(d) (No change.)

§97.5. Where To Report a Condition or Isolate; Where To Submit an Isolate.

(a) A physician, dentist, veterinarian, chiropractor, reporting officer of a hospital and a person in charge of a hospital laboratory (if the laboratory reports independently), or person permitted by law to attend a pregnant woman during gestation or at the delivery of an infant, or school authority shall report to the local health authority where the office, clinic, hospital, or school is located. If there is no local health authority appointed for the jurisdiction where the office, clinic, hospital, or school is located, the report shall be made to the Texas Department of Health (department) regional director. Public health emergencies shall be reported to the department's central office if the local health authority or the department's regional director is not immediately accessible.

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Subchapter F. SEXUALLY TRANSMITTED DISEASES INCLUDING ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS) AND HUMAN IMMUNODEFICIENCY VIRUS (HIV)

25 TAC §97.135

This amendment is proposed under Health and Safety Code, §81.090, which requires the Texas Board of Health (board) to approve standard serologic tests for specified diseases to be administered during gestation and delivery, §81.004 which allows the board to adopt rules necessary for the effective administration of Health and Safety Code, Chapter 81, and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

This amendment affects the Health and Safety Code §81.090.

§97.135. Serological Testing [~~for Syphilis and HIV~~] during Pregnancy and Delivery.

(a) At the time of first examination and visit, every physician or other person permitted by law to attend a pregnant woman during gestation or at the delivery of the infant resulting from such pregnancy shall for every woman so attended:

(1) distribute to the woman printed materials about HIV, AIDS, hepatitis B, and syphilis which shall be provided by the Texas Department of Health and note on the woman's medical chart or health care record that the distribution was made;

(2) (No change.)

(3) verbally notify the woman that a hepatitis B test will be performed and note on the medical chart or health care record that verbal notification was given;

(4) [~~(3)~~] advise the woman that the result of the test taken under this section is not anonymous, and explain the difference between an anonymous and confidential test; and

(5) [~~(4)~~] take or cause to be taken a sample of the blood of the woman and submit such sample to a laboratory certified by the Clinical Laboratory Improvement Amendments of 1988 (CLIA-88; 42 United States Code §263a), for:

(A) a Standard Serological test for syphilis; and

(B) a standard serological test for HIV infection in accordance with §97.131 of this title (relating to Definitions); and [~~.~~]

(C) a standard serological test for hepatitis B infection.

(b) Upon admission for [~~Within 24 hours of~~] delivery, the physician or other person in attendance shall take or cause to be taken a sample of blood from the mother of the infant and submit the sample to a laboratory certified by the Clinical Laboratory Improvement Amendments of 1988 (CLIA-88) for HIV and syphilis testing.

(c) (No change.)

[~~(d) A specimen of blood may be taken from the umbilical cord after it has been cut only if the person attending the delivery of an infant or fetus is not authorized by law or regulation to draw a specimen of blood from the mother. If a specimen of umbilical cord blood cannot be obtained by this person, he/she will arrange for a collection of a blood sample from the mother or the infant within 24 hours of delivery by a person authorized to do so. Consent for testing must be obtained in accordance with subsection (a)(2) of this section.~~]

(d) [~~(e)~~] Every physician or other person required to report births or fetal deaths shall state on each birth or fetal death certificate whether a blood test for syphilis was performed during the pregnancy.

(e) [~~(f)~~] If the serologic screening and confirmatory test for HIV conducted under subsection (a)(4)(B) of this section shows that the woman is or may be infected with HIV, the physician or other person who submitted the sample for the test shall:

(1) provide or make available to the woman information relating to treatment of HIV infection and acquired immune deficiency syndrome, or refer the woman to an entity that provides treatment for individuals infected with HIV or acquired immune deficiency syndrome; and

(2) provide or make available to the woman post-test counseling which includes:

(A) the meaning of the test result;

(B) the possible need for additional testing;

(C) measures to prevent the transmission of HIV, especially the reduction of perinatal transmission;

(D) the availability of appropriate health services;

(E) the benefits of partner notification and the availability of partner notification programs;

(F) increased understanding of HIV infection;

(G) explanation of potential need for confirmatory testing;

(H) explanation of behavior changes to decrease the potential of HIV transmission;

(I) encouragement to seek appropriate medical care; and

(J) encouragement to notify persons with whom there has been contact capable of transmitting HIV.

(f) Upon admission for delivery, the physician or other person in attendance shall take or cause to be taken a sample of blood from the mother of the infant and submit the sample to a laboratory certified by the Clinical Laboratory Improvement Amendments of 1988 (CLIA-88) for hepatitis B testing. Each woman shall be given printed materials about hepatitis B infection provided by the Texas Department of Health and a note made on the woman's medical chart or health care record that the distribution was made. The material shall include information on:

(1) the incidence and mode of transmission of the hepatitis B virus;

(2) how being infected with the hepatitis B virus could affect the health of the infant;

(3) the available treatment for maternal infection and treatment and prophylaxis for perinatal infection; and

(4) methods to prevent the transmission of hepatitis B.

(g) If the hepatitis B testing conducted under subsection (a)(5)(C) of this section shows that the woman is or may be infected with hepatitis B, the physician or other person who submitted the sample for the test shall provide or make available to the woman disease-specific information, including information on how to prevent hepatitis B transmission in adults and prophylactic treatment for the newborn which will prevent hepatitis B infection. Hepatitis B shall be reported in accordance with sections §§97.2-97.5 of this title (relating to Control of Communicable Diseases).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg

General Counsel

Texas Department of Health

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Chapter 102. DISTRIBUTION OF TOBACCO SETTLEMENT PROCEEDS TO POLITICAL SUBDIVISIONS

25 TAC §§102.1-102.5

The Texas Department of Health (department) proposes new §§102.1-102.5, relating to the distribution of tobacco settlement proceeds to political subdivisions.

These rules are proposed to implement a portion of Acts 1999, 76th Legislature, Chapter 753, Article 2 (House Bill (HB) 1161), which designates the department's responsibilities under the Agreement Regarding Disposition of Tobacco Settlement Proceeds (agreement) filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91. The department will collect information and certify amounts of the tobacco settlement proceeds for annual distribution to political subdivisions. The term "political subdivision" means a hospital district, another local political subdivision owning or maintaining a public hospital, or a county of the State of Texas responsible for providing indigent health care to the general public. The Texas Health and Safety Code, Chapter 61 defines which entities are responsible for providing indigent health care to the general public.

The sections are needed to accomplish the following: state the purpose of the legislation and define terms, provide the distribution schedule and amounts, describe the annual claims process, describe regular audits, and describe the dispute process.

Concerning §102.3, the department would like comments, in particular, on the list of typical unreimbursed health care expenditures for counties and the list of expenditures which will not count toward reimbursement. Neither of these is an exclusive list, but the department would like to address as many situations as possible so that political subdivisions will have advance guidance on countable expenditures.

The Tobacco Settlement Permanent Trust Account Administration Advisory Committee (committee), created by HB 1161, collaborated with the department in the development of these proposed rules. The final rules will require approval by the committee before they can become effective.

Joe Walton, Program Administrator, Bureau of State Health Data and Policy Analysis, has determined that for the first five year period the sections are in effect, there will be no impact to state government as a result of administering the sections as proposed.

Mr. Walton has determined that for the first five year period the sections are in effect, there will be positive fiscal implications to local governments as a result of administering the sections as proposed. Local governments may qualify to receive a pro rata share of $100 million in 2000 and $50 million in 2001 from the lump sum trust account established under the agreement, based on their unreimbursed health care expenditures. The 2001 lump sum distribution will be combined with the distribution of the first year's earnings from the permanent trust account. The department will certify to the comptroller the percentage of the annual distribution that each political subdivision is eligible to receive. The comptroller is responsible for transmitting the payments to the eligible political subdivisions.

The income earned through investment of the permanent trust account established under the agreement will be distributed for the first time in April 2001 and in April of each succeeding year. Only the earnings of the account will be distributed. The corpus of the fund will remain in the permanent trust account. Payments into the permanent trust account are scheduled in the agreement as follows: January 3, 2000 - $501.5 million; January 2, 2001 - $551.5 million; January 2, 2002 - $551.5 million; and January 2, 2003 - $201.4 million.

A political subdivision that receives a pro rata share of the annual distribution has sole authority over the expenditure of those funds. The agreement does not require a political subdivision to expend any portion of the distribution for a specified purpose. However, any portion of the distribution expended for unreimbursed health care expenditures in a calendar year may be counted toward the political subdivision's pro rata share of the annual distribution in the subsequent year.

Mr. Walton has determined that for each of the first five years the new sections are in effect, there will be a public benefit in the expenditure of the distributed funds by local governments for health care services to the general public. There is no anticipated cost to small businesses or micro-businesses of these sections, because the sections only affect state or local government. The new sections have no impact on local employment.

Comments on the proposal may be submitted to Joe Walton, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7261. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The new sections are proposed under the Health and Safety Code, Chapter 12, Subchapter J, which provides the Texas Board of Health (board) with the authority to adopt rules concerning the tobacco settlement proceeds; HB 1161, §2.04, which provides the board with the authority to adopt rules relating to the tobacco settlement proceeds in the lump sum trust account; and Health and Safety Code §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

These new sections affect the Health and Safety Code, Chapter 12, Subchapter J, and HB 1161, §2.04.

§102.1. General.

(a) This chapter implements Acts 1999, 76th Legislature, Chapter 753, Article 2 (House Bill 1161) and the responsibilities of the Texas Department of Health (department) under the Agreement Regarding Disposition of Tobacco Settlement Proceeds (agreement) filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled The State of Texas v. The American Tobacco Co., et al., No. 5-96CV-91. The term "agreement" includes the subsequent Clarification of Agreement Regarding Disposition of Settlement Proceeds filed on July 24, 1998, in that litigation.

(b) The term "political subdivision" means a hospital district, another local political subdivision owning or maintaining a public hospital, or a county of the State of Texas responsible for providing indigent health care to the general public. The Texas Health and Safety Code, Chapter 61 defines which entities are responsible for providing indigent health care to the general public.

§102.2. Distributions.

(a) A political subdivision may receive a pro rata share of the annual distribution by the Comptroller of Public Accounts (comptroller) under the agreement. The Texas Department of Health (department) will certify to the comptroller the percentage of the annual distribution that each political subdivision is eligible to receive. The comptroller is responsible for transmitting the payments to the eligible political subdivisions.

(b) The income earned through investment of the permanent trust account established under the agreement will be distributed for the first time in April 2001 and in April of each succeeding year.

(1) Only the earnings of the account will be distributed. The corpus of the fund will remain in the permanent trust account.

(2) Payments into the permanent trust account are scheduled in the agreement as follows:

(A) January 3, 2000 - $501.5 million;

(B) January 2, 2001 - $551.5 million;

(C) January 2, 2002 - $551.5 million; and

(D) January 2, 2003 - $201.4 million.

(c) The corpus of the lump sum trust account established under the agreement will be distributed in April 2000 and April 2001.

(1) The April 2001 lump sum distribution will be combined with the distribution of the first year's earnings from the permanent trust account.

(2) Payments into the lump sum trust account are scheduled in the agreement as follows:

(A) January 3, 2000 - $100 million; and

(B) January 2, 2001 - $50 million.

(d) A political subdivision that receives a pro rata share of the annual distribution has sole authority over the expenditure of those funds. The agreement does not require a political subdivision to expend any portion of the distribution for a specified purpose; however, any portion of the distribution expended for unreimbursed health care expenditures in a calendar year may be counted toward the political subdivision's pro rata share of the annual distribution in the subsequent year.

§102.3. Annual Claims.

(a) General. Beginning in calendar year 2000, a political subdivision may claim a pro rata share of the annual distribution based on its "unreimbursed health care expenditures" in the previous calendar year. These expenditures are defined in the agreement as "those actual expenditures made by a Political Subdivision which are directly attributable to the provision of health care services to the general public, either directly or by contract or agreement with a third party provider, and for which no reimbursement is made by or expected from any third party source or fund. (Lump Sum Trust Account or Permanent Trust Account payments shall not count as reimbursement.)"

(b) Counties not wholly within a hospital district. For a county not wholly within a hospital district, the agreement further states that unreimbursed expenditures are to be calculated as "all unreimbursed amounts, including unreimbursed jail health care, expended by such county for health care services to the general public during that year, plus 15% of that total."

(1) The following are examples for which expenditures, if unreimbursed, may be counted:

(A) services within the scope of services that hospital districts are authorized by law to provide. These will typically be diagnostic and treatment services for individuals;

(B) health care screening, laboratory, and health care case management services:

(C) oral health care services;

(D) expenditures made from funds in a trust or reserve account for the provision of health care services;

(E) health care outreach and prevention efforts, including but not limited to media campaigns, education, counseling, and production and distribution of promotional literature. Typical target areas for these efforts include teenage smoking, child safety, and health hazards affecting the general public;

(F) medical transportation, including transportation to and from medical appointments;

(G) behavioral health care services;

(H) capital expenditures for direct health care services, such as construction of ambulance facilities or clinics;

(I) overhead costs for a health care facility;

(J) first responder services provided under medical direction;

(K) employee salary and benefits to the extent the employee is engaged in patient health care or other health care services such as the activities described in subparagraph (E) of this paragraph;

(L) emergency medical services; and

(M) medical supplies or equipment.

(2) The following are examples for which expenditures may not be counted:

(A) general administrative or overhead costs of the county not directly related to the provision of health care services such as costs of the county auditor, the county attorney or county commissioner meetings. These general administrative costs are considered to be included within the 15% added to the unreimbursed expenditures;

(B) administrative supplies such as computer paper;

(C) amounts deposited in a trust or reserve account for the provision of health care services;

(D) environmental services such as mosquito control, water testing, and septic tank inspection;

(E) rental assistance for mental health patients;

(F) the amount of a tax abatement given in exchange for an agreement to provide health care services;

(G) regulatory activities such as restaurant inspection;

(H) 911 services;

(I) first responder services not provided under medical direction; and

(J) services to the extent to which the county has received reimbursement or funds through federal or state programs including, but not limited to, county indigent health care, tertiary medical care, emergency medical services grants, permanent fund for children and public health grants, public health block grants, Title XVIII of the Social Security Act (Medicare), Title XIX of the Social Security Act (Medicaid), or crime victims compensation fund.

(3) If the county expects to receive reimbursement or funds through federal or state programs, such as those listed in paragraph (2)(J) of this subsection, but has not received reimbursement or funds at the time the county files its annual expenditure statement with the department:

(A) the county may include those expenditures which qualify as unreimbursed expenditures under this subsection in its annual expenditure statement filed with the department; and

(B) once the county receives reimbursement or funds for the expenditures or any portion of the expenditures described in subparagraph (A) of this paragraph, the county shall subtract the amount of the reimbursement or funds from the amount of unreimbursed expenditures claimable on its next expenditure statement filed with the department.

(c) Hospital districts. For a hospital district, the agreement further states that unreimbursed expenditures are to be calculated as "the total amount of taxes collected by the hospital district, together with the unreimbursed amounts expended by a county coterminous with such hospital district for jail health care."

(1) The expenditures are the amount of taxes collected in the year for which the annual expenditure statement is filed, not the amount of taxes assessed. A hospital district may count taxes that are owed from previous years if those taxes are collected in the year for which the annual expenditure statement is filed.

(2) A hospital district is entitled to claim the amount of its tax collections as unreimbursed expenditures, even if it does not own or operate a hospital.

(d) Non-hospital district public hospitals. For a non-hospital district public hospital owned by a political subdivision, the agreement further states that unreimbursed expenditures are to be calculated as "the total unreimbursed amount of political subdivision funds paid to such public hospital by any political subdivision during that year."

(1) A payment for unreimbursed expenditures of a non-hospital district public hospital shall be made to the political subdivision(s) which owns the hospital, not to the hospital itself.

(2) A county eligible for a pro rata share of the annual distribution under both subsection (b) and this subsection shall file an expenditure statement for each. Such a county may receive a single warrant from the comptroller.

(3) If a county or city handles the financial transactions of its public hospital, rather than the public hospital handling those transactions directly, the county or city may count the unreimbursed expenditures it makes on behalf of the public hospital as funds paid to that hospital.

(e) Political subdivisions that have sold or leased a public health care facility.

(1) When a political subdivision has sold or leased its public health care facility(s) and accepted an agreement from the new owner of the facility to provide indigent health care services, the political subdivision is receiving contracted services in lieu of cash as consideration for the sale or lease of the facility.

(A) In submitting its expenditure statement for the distribution, the political subdivision may claim the value of the health care services for indigent residents of the political subdivision performed by the purchaser or lessee of the facility as if they had

been reimbursed using either the Medicaid Diagnosis Related Group (DRG) for the individual patients or the Medicaid interim rate for the facility.

(B) For unreimbursed expenditures related to individuals who are not indigent residents of the political subdivision, the value need not be determined at the Medicaid rates.

(2) When a political subdivision has sold or leased its public health care facility(s) and accepted profits or payments in consideration of the sale or lease, additional non-tax operating funds may result from the profits or payments attributable to the sale or lease. These profits or payments may be used to fund ongoing operations, indigent care obligations, or other statutorily authorized expenditures not otherwise funded by taxes. The profits or payments from the sale or lease that are expended on operations, indigent care, or other statutorily authorized expenditures in any given calendar year are countable, in addition to tax collections, as unreimbursed expenditures under the agreement. As a result, the expenditures claimable by a political subdivision are increased by the amount of non-tax funding the political subdivision has spent from its accounts containing the profits or payments attributable to the sale or lease of the political subdivision's public health care facility(s).

(f) Procedures.

(1) A political subdivision must deliver an annual expenditure statement to the department by March 31 of each year, documenting its eligible expenditures for the preceding calendar year. A political subdivision may deliver a copy of the statement by fax or electronic mail with the original mailed and postmarked by March 31.

(2) If a statement is not delivered to the department by March 31, the political subdivision shall not receive a pro rata share of the annual distribution.

(3) The department will designate the required format for the documentation. There will be a separate format for hospital districts, counties not wholly in a hospital district, and public hospitals not in a hospital district.

(4) To calculate the percentage of the annual distribution to be paid to each political subdivision, the department will combine the eligible expenditures from all statements received, thus obtaining a statewide total. The department will then divide the statewide total into the amount in the expenditure statement submitted by each political subdivision.

(5) By April 15 of each year, the department will certify to the comptroller the percentage of the annual distribution to be paid to each eligible political subdivision, based on the expenditure statements.

§102.4. Regular audits.

(a) Regular audits of randomly selected political subdivisions may be performed if the necessary funds and personnel are available to the department.

(b) The department has the discretion to decide how and when to select political subdivisions for regular audits. Regular audits may be performed for any year for which a distribution was made under the agreement.

(c) At the department's discretion, the department may perform the regular audits, contract with outside auditors to perform the regular audits, or contract with another state agency to perform the regular audits.

(d) A regular audit may include a review of any audit of the political subdivision performed by persons other than the department. A political subdivision being audited by the department shall make available to the department or its contractor such an audit at the department's or its contractor's request.

§102.5. Disputes.

(a) A political subdivision or agency of this state may dispute information submitted by another political subdivision. A dispute shall be initiated by filing written notice with the department of the issue(s) disputed.

(b) A dispute may concern a political subdivision's calculation of unreimbursed expenditures, not whether a political subdivision is entitled to a share of the annual distribution.

(c) A dispute must be filed by December 31 of the year in which the disputed information was submitted.

(d) An audit of the political subdivision that submitted the disputed information may be performed.

(1) The audit shall be initiated by the department or the comptroller. The department or the comptroller shall choose the auditor which may be the department, the comptroller, an outside auditor, or another state agency.

(2) The political subdivision shall fully cooperate in the audit. The audit may include a review of any audit of the political subdivision.

(e) The filing of a dispute will not affect the percentage of the annual distribution to be paid to the political subdivision for the year for which the information that is the subject of the dispute was submitted.

(f) A political subdivision for which an audit indicates an overstatement may request in writing a hearing on the matter within 20 days of receiving written notice from the department of the audit findings. The notice shall state whether a monetary penalty is proposed. A monetary penalty may be in the amount of ten% of the overstated unreimbursed health care costs.

(g) If a hearing is requested, the hearing shall be a contested case under the Administrative Procedure Act, Government Code, Chapter 2001, and the department's formal hearing rules in Chapter 1 of this title (relating to the Texas Board of Health).

(h) If a political subdivision fails to timely request a hearing or to appear at a scheduled hearing, the findings of the audit and any penalty amount shall be considered final and reported to the comptroller.

(i) If after a hearing the department's hearing examiner, on behalf of the Board of Health, finds an overstatement, the findings shall be considered final and reported to the comptroller.

(j) The costs of the audit shall be paid by the party to the dispute (the entity which originally invoked the dispute process or the political subdivision on which the audit was performed) which does not prevail in the dispute.

(k) After a final decision following an audit and the opportunity for a hearing, if a political subdivision has overstated unreimbursed health care expenditures in the information submitted for any year, the department shall report that fact to the comptroller and shall reduce that political subdivision's percentage of the subsequent annual distribution appropriately.

(l) If a monetary penalty is applied, the department shall also reduce the political subdivision's percentage of the subsequent annual distribution appropriately.

(m) If a political subdivision is assessed the cost of an audit, the department shall report the amount assessed to the comptroller, and the comptroller may withhold that amount from the political subdivision's subsequent annual distribution. The comptroller may use the amount withheld to reimburse the general revenue fund for the cost of the audit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907896
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Chapter 123. RESPIRATORY CARE PRACTITIONER CERTIFICATION

25 TAC §§123.4, 123.7, 123.9, 123.10, 123.12

The Texas Department of Health (department) proposes amendments to §§123.4, 123.7, 123.9, 123.10, and 123.12, concerning the regulation of respiratory care practitioners. The amendments cover fees; types of certificates and temporary permits and applicant eligibility; certificate renewal; continuing education requirements; and professional and ethical standards.

The amendments delete the reinstatement and reactivation fees and add a fee for a written verification of certification. The amendments extend the time period for which an initial certificate may be issued. The amendments reduce the informational items required on renewal applications and allow the department to require additional information if requested. The amendments correct a typographical error and update the language throughout the section regarding certificate renewals. The amendments change the name of the reinstatement procedures and add conforming standard Sunset language, reducing the time period for filing a late renewal application. The amendments specify the amount of the late renewal fee, based on either one and one-half or two times the renewal fee, determined by how late the payment is postmarked. The amendments add new requirements for late renewals if the applicant held a license in another state and practiced respiratory care prior to applying for late renewal in Texas. The amendments change the fee for reactivating a certificate. The amendments establish a 12 hour continuing education (CE) requirement regardless of how long the certificate was expired or was inactive. The amendments clarify and update the CE requirements and will allow a practitioner to earn up to four hours of credit by completing certain self-directed Internet or computer-based studies. The amendments increase the number of hours of credit for completing advanced life-support courses and set out the criteria for accepting credit for recertification courses. The amendments allow CE credits to be earned for passing another specialty exam in the field of respiratory care and add a requirement that each practitioner must report the number of CE hours completed during the renewal period. The amendments change the mandatory requirement for submitting CE certificates and other proof of CE credits to a procedure requiring that the documentation be submitted upon request. The amendments relocate the language regarding hardships and add a rule allowing the department to conduct a compliance audit of a practitioner's CE credits. The amendments add language clarifying that excess hours may not be applied to a subsequent CE period unless the hours were earned during an extension. The amendments update, clarify and reorganize the section regarding CE. The amendments relating to professional and ethical standards will authorize the department to take disciplinary action for submitting any false, deceptive or misleading information to the department, rather than limiting the violation to only information and materials pertaining to an application.

Jann Melton-Kissel, Director of Budgets, Bureau of Licensing and Compliance, has determined that for each of the first five years the sections will be in effect, there will be fiscal implications as a result of enforcing or administering the sections as proposed. The effect on state government will be an estimated increase in revenue to the state of approximately $540 per year. There will be no fiscal implication on local government.

Ms. Melton-Kissel has determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcing the sections as proposed will be to assure the appropriate regulation of respiratory care practitioners and continue to identify competent practitioners. There will be no effect on small businesses or microbusinesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Donna Flippin, Respiratory Care Certification Program, Professional Licensing and Certification Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3183, (512) 834-6632; FAX (512) 834-6677. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under the Respiratory Care Practitioner Certification Act, Texas Civil Statutes, Article 4512l §3(a) and (e) which provides the Texas Board of Health (board) with the authority to adopt rules necessary to implement the Act; and the Texas Health and Safety Code §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

These proposed amendments implement the Respiratory Care Practitioner Certification Act, Texas Civil Statutes, 4512l; and Health and Safety Code, §12.001.

§123.4. Fees.

The following fees are prescribed by the board and are required to be paid to the department before any certificate or permit is issued. All fees shall be submitted in the form of a check or money order and are nonrefundable. The department may direct examination applicants to submit examination fees to the National Board for Respiratory Care, Inc. (NBRC).

(1) Schedule of fees for certification as a respiratory care practitioner [~~effective September 1, 1997~~]:

(A)-(B) (No change.)

[~~(C) reinstatement fee–$60;~~]

[~~(D) reactivation fee–$45;~~]

(C) [~~(E)~~] certificate and/or identification card replacement fee–$20;

(D) [~~(F)~~] NBRC examination fee–the fee designated by the NBRC at the time of examination or reexamination; [~~and~~]

(E) [~~(G)~~] certificate fee for upgrade of temporary permit–$30; and[~~.~~]

(F) written verification of certification status– $10.

(2) Schedule of fees for a temporary permit as a respiratory care practitioner [~~effective September 1, 1997~~]:

(A)-(C) (No change.)

(D) written verification of certification status–$10.

(3)-(8) (No change.)

§123.7. Types of Certificates and Temporary Permits and Applicant Eligibility.

(a) (No change.)

(b) Issuance of certificates and permits.

(1) (No change.)

(2) Certificates issued within six [~~three~~] months of the practitioner's birth month shall be issued for that period of time plus the next full year. Certificates shall expire on the last day of the practitioner's birth month.

(c)-(d) (No change.)

§123.9. Certificate Renewal.

(a) (No change.)

(b) General.

(1) When issued, a certificate is valid until the practitioner's next birth month except as provided by subsection (c)[~~(2)~~] of this section.

(2)-(6) (No change.)

(c) Staggered renewals. The department shall use a staggered system for certificate renewals. Certificates issued within six [~~three~~] months of a practitioner's birth month shall be issued for that period of time plus the next full year.

(d) Certificate renewal.

(1) At least 30 days prior to the expiration date of a person's certificate, the department shall send notice to the practitioner of the expiration date of the [~~p73~~] certificate, the amount of the renewal fee due, and a renewal form which the practitioner must complete and return to the department with the required renewal fee.

(2) The renewal form for all practitioners shall require the provision of the preferred mailing address, primary employment address and telephone number, and category of employment, misdemeanor and felony convictions, statement concerning status with The National Board for Respiratory Care, Inc., and continuing education completed. If the applicant is practicing as a respiratory care practitioner at the time of renewal the name, signature and license number of the physician directing the provision of respiratory care and the physician's institutional affiliation(s), if any, shall be provided on the renewal form, if requested by the department.

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

(e) Late renewal [~~Reinstatement~~] or reapplication.

(1) A person whose certificate has expired may renew [~~reinstate~~] the certificate by submitting to the department the renewal form, continuing education as set out in §123.10 of this title (relating to Continuing Education Requirements) completed since the last renewal [~~expiration date, the required reinstatement fee~~], and if respiratory care procedures were performed after the certificate expired, a notarized statement indicating how the person complied [~~to show compliance~~] with §9 of the Act.

(A) If renewal is requested from one day up to 90 days after expiration, the applicant shall submit a fee that is equal to one and one half times the renewal fee, as set out in §123.4 of this title (relating to Fees) [~~reinstatement is requested during the first renewal year after expiration, 12 hours of continuing education completed since the expiration date must be documented~~].

(B) If renewal is requested more than 90 days after expiration but less than one year after expiration, the applicant shall submit a fee that is equal to two times the renewal fee, as set out in §123.4 of this title [~~reinstatement is requested on the first renewal date or during the second year after expiration, 24 hours of continuing education completed since the expiration date must be documented~~].

[~~(C) If reinstatement is requested on the second renewal date after expiration, 36 hours of continuing education completed since the expiration date must be documented.~~]

(C) [~~(D)~~] If the person received a 90-day extension of the person's certificate pursuant to §123.10(i) of this title (relating to Continuing Education Requirements), the expiration date under subparagraphs (A)-(B) [~~C~~)] of this paragraph is the expiration date of the person's last annual certificate.

(D) [~~(E)~~] After [~~Once~~] the certificate is renewed [~~reinstated~~], the next continuing education reporting period starts on the date the certificate is renewed [~~reinstated~~] and continues until the next renewal date.

(2) The department shall inform a person who has not renewed a certificate by [~~prior to~~] the expiration date of the amount of the fee required for renewal [~~reinstatement~~], the continuing education required for renewal [~~reinstatement~~], and the date the certificate expired.

(3) A person whose certificate has been expired for one year or more [~~who fails to reinstate a certificate on or within two years of its expiration date~~] may apply for a new certificate by complying with the then-current requirements for obtaining a certificate.

(4) After [~~Once~~] a certificate is expired and until a person has renewed [~~reinstated~~] the certificate, a person may not practice as a respiratory care practitioner in violation of the Act.

(5) A person who fails to renew a certificate within one year may obtain a new certificate without examination if the person:

(A) pays a fee that is equal to two times the renewal fee;

(B) is currently certified as a respiratory care practitioner in another state;

(C) has been practicing respiratory care in the state where the certification is held for the two years preceding the date of application for renewal; and

(D) submits proof of completion of the continuing education requirements as set out in §123.10 of this title within the 12 month period preceding the date of application for a new certificate.

(f) (No change.)

(g) Military duty. If a practitioner fails to timely renew his or her permit or certificate on or after August 1, 1990, because the practitioner is or was on active duty with the armed forces of the United States of America, serving outside the State of Texas, the practitioner may renew the permit or certificate pursuant to this subsection.

(1)-(4) (No change.)

(5) A practitioner renewing under this subsection shall pay the [~~applicable~~] renewal fee [~~, but not the reinstatement fee~~].

(6) (No change.)

(h) Inactive status. A respiratory care practitioner who holds a certificate under the Act and who is not actively engaged in the practice of respiratory care may make application to the department in writing on a form prescribed by the department to be placed on an inactive status list maintained by the department. The application for inactive status must be postmarked prior to the expiration of the practitioner's annual certificate. No refund will be made of any fees paid prior to application for inactive status.

(1)-(3) (No change.)

(4) If a person on inactive status desires to reenter active practice, the person shall:

(A)-(B) (No change.)

(C) pay a renewal fee for the current renewal period plus a [~~reactivation~~] reinstatement fee equal to one-half the renewal fee; and

(D) submit to the department proof of successful completion, within the 12-month period prior to reentering active status, of the [~~following~~] continuing education hours as set out in §123.10 of this title. [~~(relating to Continuing Education Requirements):~~]

~~*[(i)* persons inactive for three years or less shall complete not less than 12 clock hours;~~]

~~*[(ii)* persons inactive for more than three years but less than six years shall complete not less than 24 clock hours; and~~]

~~*[(iii)* persons inactive for six or more years shall complete not less than 36 clock hours.~~]

(5) (No change.)

(i) (No change.)

§123.10. Continuing Education Requirements.

(a) (No change.)

(b) General [~~Deadlines~~]. Continuing education requirements for renewal shall be fulfilled each renewal year.

(1) The initial period shall begin with the date the department issues the [~~receives the prorated~~] certificate [~~fee~~] and end on the last day of the [~~second~~] birth month at the time of the second renewal [~~occurring after issuance of the certificate~~].

(2) (No change.)

(3) [~~(c) Hour requirements for continuing education.~~] A practitioner must complete 12 clock hours of continuing education acceptable to the department during each renewal year [~~as described in subsection (b) of this section~~].

(4) [~~(1)~~] A clock hour shall be 50 minutes of attendance and participation in an acceptable continuing education experience.

[~~(2) Continuing education experiences acceptable to the department shall be those set forth in subsection (d) of this section.~~]

(c) [~~(d)~~] Types of acceptable continuing education. Continuing education must be in skills relevant to the practice of respiratory care and must have a direct benefit to patients and clients and [~~undertaken by a practitioner for renewal~~] shall be acceptable if the experience falls in one or more of the following categories:

(1) respiratory care course work seminars, workshops, review sessions, or other organized educational programs completed at or through any respiratory care education program;

(2) participation in any program (e.g., in-service educational training programs, institutes, seminars, workshops and conferences) which is:

(A) directly related to the profession of respiratory care;

(B) instructor directed; and

(C) approved, recognized, accepted, or assigned continuing education credits by professional organizations or associations or offered by a federal, state, or local governmental entity. A list approved by the advisory committee is available from the department upon request; [~~or~~]

(3) instruction or teaching in programs set out in paragraphs (1) and (2) of this subsection, provided that such instruction or teaching is not a part of, or required as a part of, one's employment, or;

(4) up to four credit hours during each renewal period of self-directed Internet-based or computer-based studies, including a post-test, approved by the American Association of Respiratory Care.

[~~(e) Acceptable criteria for continuing education. Continuing education experiences should include the following criteria:~~]

[~~(1) relevance of the subject matter to increase or support the development of skill and competence in respiratory care;~~]

[~~(2) objectives of specific information and/or skill to be learned;~~]

[~~(3) subject matter, educational methods, materials, and facilities utilized, including the frequency and duration of sessions and the adequacy to implement learner objectives; and~~]

[~~(4) sponsorship and leadership of programs, including the name of the sponsoring individual or organization(s), and program leaders/faculty if different from sponsors and contact person.~~]

(d) [~~(f)~~] Determination of clock hours. The department shall credit continuing education experiences as follows.

(1) Completion of course work at or through a respiratory care educational program as set out in subsection (c) [~~(d)~~](1) of this section [~~(relating to types of acceptable continuing education)~~] shall be credited on the basis of 15 clock hours for each semester hour successfully completed for credit or audit, evidenced by a certificate of successful completion or official transcript.

(2) Parts of programs, activities, workshops, seminars, sessions, etc., which meet the criteria of subsections (c) [~~(d)~~](1) or (2) of this section shall be credited on a one-for-one basis with one clock hour for each clock hour spent in the continuing education activity.

(3) Teaching in programs which meet the department's criteria as set out in subsection (c) [~~(d)~~](3) of this section shall be credited on the basis of two clock hours for each hour actually taught.

(4) Passing the certified respiratory therapy technician recredentialing examination shall be credited on the basis of nine clock hours.

(5) Passing the written registry examination for advanced respiratory therapy practitioners for credentialing or recredentialing shall be credited on the basis of nine clock hours.

(6) Passing the registered respiratory therapist clinical simulation examination for credentialing or recredentialing shall be credited on the basis of nine clock hours.

(7) Passing the National Board for Respiratory Care, Inc. (NBRC) pediatric specialty examination shall be credited on the basis of nine clock hours.

(8) Successful completion of the initial course in [~~Passing the~~] advanced cardiac life-support, pediatric advanced life-support, the neonatal advanced life-support course, basic trauma life-support or pre-hospital trauma life-support [~~, issued by or through the American Heart Association~~] shall be credited on the basis of 12 [~~eight~~] clock hours. Recertification courses shall be credited for the number of hours actually completed during the recertification course, but shall not count for more than 12 hours.

(9) Passing the certification examination for entry level pulmonary function technologists or the registry examination for advanced pulmonary function technologists for credentialing shall be credited on the basis of nine clock hours.

(10) Passing the registration examination offered by the Board of Registered Polysomnographic Technologists shall be credited on the basis of nine clock hours.

(e) [~~(g)~~] Reporting of continuing education. Each practitioner shall be responsible for reporting to the department the continuing education activities completed [~~complete and file with the department each continuing education activity for which credit is claimed~~].

(1) A practitioner shall report the number of hours of continuing education completed during the renewal period. If requested by the department, each practitioner shall submit proof of completion of the required continuing education activity to the department at the time of certificate renewal, or at other times as directed by the department. However, if an extension has been granted in accordance with subsection (g) [~~(i)~~] of this section, the practitioner shall file the continuing education hours immediately following completion of the activity.

(2) Each continuing education activity filed by a practitioner must be accompanied by appropriate documentation of the continuing education claimed as follows:

(A) for a program attended, signed certification by a program leader or instructor of the practitioner's participation in the program by certificate, or letter on letterhead of the sponsoring agency, or official continuing education validation form or official transcript of the sponsoring agency accompanied by a brochure, agenda, program, or other applicable information, indicating content of the program;

(B) for teaching or instruction in approved programs, a letter on sponsoring agency's letterhead giving name of program, location, dates, and subjects taught, and giving total clock hours of teaching or instruction;

(C) for completion of course work at or through respiratory care education programs, a certificate of successful completion or an official transcript.

(f) [~~(h)~~] Activities unacceptable as continuing education. The department may not grant continuing education credit to any practitioner for:

(1) education incidental to the regular professional activities of a practitioner such as learning occurring from experience or research;

(2) organization activity such as serving on committees or councils or as an officer in a professional organization;

(3) any program or activity which is not approved in accordance with subsection (c) [~~(d)~~](2) of this section;

(4) any experience which does not fit the types of acceptable continuing education in subsection (c) [~~(d)~~] of this section;

(5) any continuing education activity completed before or after the renewal year for which the continuing education credit is submitted except as allowed under subsection (g) [~~(i)~~](1) of this section;

(6) self-study continuing education programs or activities except those set out in subsection (c)(4) of this section; or

(7) activities [~~in accordance with subsection (f)(4)-(7) of this section~~] which have been completed more than once during the continuing education period.

(g) [~~(i)~~] Failure to complete required continuing education.

(1) A practitioner who has failed to complete the requirements for continuing education as specified in subsection (b) [~~(c)~~] of this section may be granted up to a 90-day extension to a reporting period if the renewal fee is paid on or prior to the expiration date. The 90-day extension is the maximum that may be granted and there will be no exceptions.

(A) Following the receipt of the current renewal form and fee, the department shall issue identification cards which are certificates valid for a 90-day period beginning with the day following the expiration date of the practitioner's annual certificate and a written notice that the continuing education period has been extended.

(B) If the deficiency is made up prior to the end of the extension, the department will notify the practitioner that the next reporting period commences on the day following the completion of the credits to correct the deficiency. The new reporting period shall end on the next renewal date. In other words, whenever an extension is granted, the time is borrowed from the next reporting period.

(C) If an excess number of credits were earned during an extension, the excess will be credited toward the new reporting period.

(D) A practitioner may not receive another extension at the end of the 90-day extension.

(2) A practitioner who has failed to complete the requirements for continuing education as specified in subsection (b) [~~(c)~~] of this section and who has not completed the continuing education requirement during the 90-day extension shall return the certificate and identification cards to the department and shall not advertise or represent himself or herself as a respiratory care practitioner in any manner. The person may renew [~~reinstate~~] the certificate or reapply for a new certificate in accordance with §123.9(e) of this title (relating to Certificate Renewal).

[~~(j) Hardships. The board has considered hardship situations in formulating these sections.~~]

(h) [~~(k)~~] Other miscellaneous provisions.

(1) Audiovisual programs may be accepted by the department if such a program represents one of the instructional methods or strategies rather than constituting the entire program and provided the program meets the criteria as set out in subsection (c) [~~(d)~~] of this section.

(2) A practitioner who also holds a current license, registration, or certification in another health care profession or a current license, registration, or certification as a respiratory care practitioner in another state, territory, or country may satisfy the continuing education requirements for renewal in Texas with hours counted toward renewal of another license, registration, or certification as long as all of the hours meet all of the requirements of this section.

(3) Hardships will be considered and granted by the department on a case by case basis.

(4) The department may conduct random audits of continuing education completed by practitioners to determine compliance with this section.

(5) No continuing education hours may be carried over from one renewal period to another renewal period unless the hours were earned during a continuing education extension as set out in subsection (g) of this section.

§123.12. Professional and Ethical Standards.

The purpose of this section shall be to establish the standards of professional and ethical conduct required of a practitioner pursuant to the Act, §11(b)(4).

(1) Professional representation and responsibilities.

(A) A practitioner shall not misrepresent any professional qualifications or credentials or provide any information that is false, deceptive, or misleading to the department [~~in connection with one's own application for certification~~], for employment or work assignment as a respiratory care practitioner, or fail to disclose any information that could affect the decision to employ or assign a task as a respiratory care practitioner.

(B)-(P) (No change.)

(2)-(6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Chapter 157. EMERGENCY MEDICAL CARE

Subchapter C. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

25 TAC §157.41

The Texas Department of Health (department) proposes new §157.41 concerning the minimum training required to use an automated external defibrillator (AED), an electronic medical device which is capable of recognizing the presence or absence of cardioventricular fibrillation and is capable of determining whether defibrillation should be performed.

In accordance with Health and Safety Code, §779.002(b), 76th Legislature, 1999, the department is required to adopt rules concerning minimum training standards for AED.

Gene Weatherall, Bureau Chief, has determined that for the first five years the proposed rule is in effect there will be no fiscal impact on the state or local governments.

Gene Weatherall has also determined that for the first five-year period the rule is in effect, the public will benefit from the greater availability of the use of AED by the public. The economic effect on small businesses or micro-businesses or persons will be somewhat affected due to fees for required Cardiopulmonary Resuscitation training, at a cost of between $50 and $100, before authorized use of an AED. There will be no impact on local employment.

Written comments on the proposed rule may be submitted to Gene Weatherall, Chief, Bureau of Emergency Management, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6700, Fax (512) 834-6736. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

The new section is proposed under the Health and Safety Code, Chapter 779, which requires the department to adopt rules concerning training standards for AED; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new section will affect the Health and Safety Code, Chapter 779 and Chapter 12.

§157.41. Automated External Defibrillators

(a) Purpose. The purpose of this rule is to establish minimum standards and requirements for training of persons using automated external defibrillators.

(b) Exemption. This section shall not apply to persons who are licensed, certified or registered under the Texas Health and Safety Code, Chapter 773.

(c) Definitions.

(1) Automated External Defibrillator (AED) - An electronic medical device approved by the United States Food and Drug Administration which is capable of recognizing the presence or absence of cardioventricular fibrillation or rapid cardioventricular tachycardia; is capable of determining, without interpretation of cardiac rhythm by an operator, whether defibrillation should be performed and, on determining that defibrillation should be performed, automatically charges and delivers an electrical impulse to an individual's heart.

(2) Semi Automated External Defibrillator (SAED) - An electronic medical device equivalent to that described in subsection (c)(1) of this section except that on determining that defibrillation should be performed, requests the operator deliver an electrical impulse to an individual's heart.

(3) Cardiopulmonary Resuscitation (CPR) - A life saving procedure involving closed chest compressions and artificial respiration to an individual who is pulseless and apneic or who is experiencing agonal respiration.

(d) Training required. A person acquiring and/or using an AED or SAED shall successfully complete a training course in CPR and AED or SAED operation as provided by an instructor approved by a nationally recognized CPR training association. The person shall maintain that training in accordance with the guidelines established by the training association.

(e) Notification required. A person or entity who acquires an AED or SAED shall immediately notify all local emergency medical service providers of the existence, physical location and type of device.

(f) Guidelines and procedures for use. Use of an AED or SAED shall be in accordance with the guidelines established as nationally recognized standards and shall be in accordance with the manufacturer's operating procedures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg

General Counsel

Texas Department of Health

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For further information, please call: (512) 458-7236

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Chapter 181. VITAL STATISTICS

The Texas Department of Health (department) proposes amendments to §§181.10, 181.21, and 181.23 concerning vital records.

The proposed amendments to §181.10 and §181.23 implement Government Code §552.115, as amended by the 76th Legislature, regarding exceptions to access by the public to birth and death records under the Texas Open Records Act. The amendments to §181.21 are proposed in response to Government Code §2003.021, which requires the State Office of Administrative Hearings to conduct all the department's hearings in contested cases under Government Code, Chapter 2001. Specifically, the sections cover confidentiality of birth records covering adoption placement; refusal to issue certified copies of records of birth, death, or fetal death; and indexes for vital records.

The amendments to §181.10 and §181.23 clarify that birth records become public information 50 years from the date on the record, and death records become public information 25 years from the date on the record, rather than the date the record was filed by the bureau of vital statistics. The sections as amended also require that local registration officials as well as the bureau of vital statistics must make summary birth and death indexes and general birth and death indexes available as public information in conformity with the Texas Open Records Act unless the records would reveal the fact of an adoption or a paternity determination. The amendments to §181.23 also list additional data which must be included in birth and death indexes maintained by the bureau of vital statistics or by local registration officials.

Health and Safety Code §191.057(c) provides that if the state registrar refuses to issue a certified copy of a birth, death, or fetal death record, the department shall afford the applicant an opportunity for a hearing, but the statute does not specify the nature of the hearing required. Effective September 1, 1999, all department hearings in contested cases under Government Code, Chapter 2001 shall be conducted by the State Office of Administrative Hearings. The amendment to §181.21 will allow the department to offer applicants a fair hearing by a department hearing examiner rather than a more formal procedure conducted by the State Office of Administrative Hearings, resulting in substantial cost savings by the department and by some applicants.

Geraldine Harris, Acting Chief, Bureau of Vital Statistics, has determined that for the first five years the sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. The effect on state government will be a decrease in expenditures of approximately $69,264 per year during FY 2000-2004 for departmental hearings arising under 25 Texas Administrative Code, Chapter 181 which would otherwise be conducted by the State Office of Administrative Hearings, based on an average cost savings of $1,872 for each of approximately 37 hearings. There will be no impact on local government.

Ms. Harris has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be clarification of the circumstances under which birth and death records and birth and death indexes are available as public information. In addition, both the department and applicants who request hearings in response to the department's refusal to issue certified copies of birth, death, or fetal death records will benefit by access to comparatively less costly and complex hearings conducted by the department. There will be no costs to micro-businesses or small businesses to comply with the sections as proposed. This was determined by interpretation of the rules, which address only access of individual persons rather than micro-businesses or small businesses to vital records, and which afford applicants for hearings the practical options of obtaining less costly legal services than might be required in a contested case hearing before the State Office of Administrative Hearings, or electing to proceed without counsel. Further, the amendments to §181.10 and §181.23 require no actions for compliance by micro-businesses or small businesses. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Geraldine R. Harris, Acting State Registrar, Bureau of Vital Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3191 or faxed to her attention at (512) 458-7130. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

Subchapter A. MISCELLANEOUS PROVISIONS

25 TAC §181.10

The amendment is proposed under the Health and Safety Code, §191.003(a), which authorizes the Texas Board of Health (board) to adopt necessary rules for collecting, recording, transcribing, compiling, and preserving vital statistics; and the

Health and Safety Code, §12.001, which authorizes the board to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, Chapter 191, and the Government Code, Chapter 552 and Chapter 2003.

§181.10. Confidentiality of Birth Records Covering Adoption Placement.

(a) (No change.)

(b) Availability of birth records generally.

(1) Copies of birth [~~Birth~~] records [~~less than 50 years old~~] are [~~not~~] available to the public for searching or inspection on or after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or the local registration official. Original birth records [~~Records over 25-50 years old, actual books, volumes of original records, or records themselves~~] shall not be made available to the public in the interest of preservation of the records.

(2) The local registration official, upon receipt of a record of birth based on adoption must either forward the original record filed at the time of the event to the state registrar for enclosure in a sealed file, or delete or expunge such record.

(c) Availability of indexes or listings of birth records.

(1) General birth indexes, summary birth indexes, [~~The indexes~~] or listings of birth records are not available to the public for searching or inspection[~~,~~] if the fact of adoption or paternity determination can be revealed or broken or if the index contains specific identifying information relating to the parents of the child who is the subject of an adoption placement.

(2) The bureau of vital statistics and local registration officials shall expunge or delete any state or local file numbers included in any general birth index made available to the public because such file numbers may be used to discover information concerning specific adoptions, paternity determinations, or the identity of the parents of children who are the subjects of adoption placements [~~The local registration official must delete or expunge the identifying information relating to the original birth record filed at the time of the event, from the indexes maintained in that office and made available to the public~~].

(3) A [~~local registration official may prepare a~~] summary birth [~~or death index for public use. The~~] index shall be in alphabetical order by surname of the registrant. The index shall consist of the last, first, and middle name, if any, of the registrant, the date of the event, the county in which the event occurred, and the sex of the registrant [~~the file number of the record~~].

(4) If the record falls into the open record category, a general index may be made available for public use. This index shall include the last, first, and middle name, if any, of the registrant; date of birth; county of birth; the parents' names; and the sex of the registrant. [~~This index shall be alphabetical by surname of the registrant. In addition to the previously mentioned information, names of the parents may also be listed. The fact of adoption or paternity determination must not be disclosed nor be able to be broken by any such indexes.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
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Texas Department of Health
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Subchapter B. VITAL RECORDS

25 TAC §181.21, §181.23

The amendments are proposed under the Health and Safety Code, §191.003(a), which authorizes the Texas Board of Health (board) to adopt necessary rules for collecting, recording, transcribing, compiling, and preserving vital statistics; and the Health and Safety Code, §12.001, which authorizes the board to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect the Health and Safety Code, Chapter 191, and the Government Code, Chapter 552 and Chapter 2003.

§181.21. Refusal To Issue Certified Copies of Records of Birth, Death, or Fetal Death.

(a)-(c) (No change.)

(d) Hearing procedures.

(1)-(2) (No change.)

(3) The state registrar, upon receiving the written request for hearing, shall request the department's office of general counsel to initiate a hearing procedure as soon as possible in accordance with the department's fair [~~formal~~] hearing procedures, §§1.51-1.55 [~~§§1.21-1.32~~] of this title (relating to Fair [~~Formal~~] Hearing Procedures).

(4) The state registrar shall notify the applicant in writing that the hearing request has been sent to the office of general counsel. The notice shall include a copy of the department's fair [~~formal~~] hearing procedures.

§181.23. Indexes for Vital Records.

(a) (No change.)

(b) Birth indexes.

(1) General birth indexes maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, the state or local file number, the name of the father, [~~and~~] the maiden name of the mother, and sex of the registrant.

(2) A general birth index is public information and available to the public to the extent the index relates to a birth record that is public on or after the 50th anniversary of the date of birth as shown on the record unless the fact of an adoption or paternity determination can be revealed or broken or if the index contains specific identifying information relating to the parents of the child who is the subject of an adoption placement. The bureau of vital statistics and local registration officials shall expunge or delete any state or local file numbers included in any general birth index made available to the public because such file numbers may be

used to discover information concerning specific adoptions, paternity determinations, or the identity of the parents of children who are the subjects of adoption placements.

(3) A summary birth index maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, and sex of the registrant.

(c) Death indexes.

(1) A general death index maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials;[,] the date of the event;[,] the county of occurrence;[,] the registrant's social security number, sex, and marital status; the name of the registrant's spouse, if applicable; and the state or local file number.

(2) A general death index is public information and available to the public to the extent the index relates to a death record that is public on or after the 25th anniversary of the date of death as shown on the record.

(3) A summary death index maintained or established by the bureau of vital statistics or a local registration official shall be prepared by event year, in alphabetical order by surname of the registrant, followed by any given names or initials, the date of the event, the county of occurrence, and sex of the registrant.

(d)-(e) (No change.)

(f) Please refer to §181.10(c) of this title (relating to Confidentiality of Birth Records Covering Adoption Placement) for additional information relating to general indexes including information concerning adoptions, paternity determinations, or the parents of a child who is the subject of an adoption placement and summary indexes of births and deaths.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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Chapter 229. FOOD AND DRUG

Subchapter U. PERMITTING RETAIL FOOD ESTABLISHMENTS

The Texas Department of Health (department) proposes the repeal of existing §§229.370-229.374 and proposal of new §§229.370-229.374 concerning permitting of food establishments. Specifically, these sections are the basic permitting requirements for all food establishments within the department's permitting authority and concern definitions; permitting fees and procedures; minimum standards for permitting and operation; and refusal, revocation or suspension of a permit and administrative penalties. The new rules will provide a much needed update which reflects needed consistency with the Texas Food Establishment Rules (TFER), §§229.161-229.171 and §§229.173-229.175, which were adopted by the Texas Board of Health (board) in September 1998 and became effective October 6, 1998.

The proposed new rules will repeal the existing rules for permitting retail food stores, food service establishments, mobile food units, roadside food vendors and temporary food service establishments. The proposed new rules for permitting these facilities will make the language consistent with the TFER, which are based on the U.S. Food and Drug Administration 1997 Model Food Code.

The existing rules were adopted under the Health and Safety Code, Chapter 437, Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Food Vendors. The department is required to permit those establishments which are not permitted and inspected by a city or county health department or public health district.

New §229.370 is the purpose and will remain the same stating that the department will establish a permitting system for the regulation of food establishments.

In new §229.371, the definitions are amended to be consistent with the TFER.

New §229.372 contains permitting fees and procedures. This section outlines the fee categories per type of establishment. Some establishments are exempt from the fees as specified in the statute. Those establishments required to permit with the department are described and specific administrative procedures are outlined for permit application, renewal and issuance.

New §229.373 is for minimum standards for permitting and operation. This section is amended making the references consistent with the recently adopted TFER.

New §229.374 is for administrative penalty provisions. This section amends the statutory references for the levying of administrative penalties that were adopted under Health and Safety Code, Chapter 431, Texas Food, Drug and Cosmetic Act, §431.054 and 431.056. The proposed rules are consistent with the more specific act, Health and Safety Code, Chapter 437, Regulation of Food Service Establishments, Retail Food Stores, Mobile Food Units, and Roadside Food Vendors, §437.018.

Steven C. McAndrew, Director, Retail Foods Division, has determined that for the first five year period the rules are in effect, there will be fiscal implications as a result of administering the rules as proposed. The effect on state government will be an estimated increase in revenue to the state of approximately $433,000 per year as a result of the proposed fee increase. This revenue will allow the Retail Foods Division to conduct at least one food establishment inspection of each facility per year. This will meet the industry expectation of providing annual inspections since food establishments pay an annual permit fee for this service. There will be no effect on local government.

Mr. McAndrew has determined that for each of the first five years the sections are in effect, the public benefit will be increased oversight of public food establishments which will result in a reduction in the potential for foodborne illness in consumers. The anticipated cost to small businesses and to micro-businesses will be a graduated fee increase of $25 to $75 per year per establishment category. Fee increases are

commensurate with the size of the food establishment. Other than the fee increase, there will be no additional costs to persons or businesses required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Steven C. McAndrew, Director, Retail Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0232. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. A public hearing to receive comments on the proposed rules will be held on December 14, 1999 at the Texas Department of Health, 2115 Kramer Lane, Austin, Texas 78758, in Room E-10 at 9:00 a.m.

25 TAC §§229.370-229.374

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Health and Safety Code, §437.0056, and §12.001 which provides the Texas Board of Health with authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the Commissioner of health.

The repeals affect the Health and Safety Code, Chapter 437 and 12.

§229.370. Purpose.
§229.371. Definitions.
§229.372. Permitting Fees and Procedures.
§229.373. Minimum Standards for Permitting and Operation.
§229.374. Refusal, Revocation, or Suspension of a Permit; Administrative Penalties.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan K. Steeg
General Counsel
Texas Department of Health
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25 TAC §§229.370-229.374

The new sections are proposed under Health and Safety Code, §437.0056, and §12.001 which provides the Texas Board of Health with authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the Commissioner of health.

The new sections affect the Health and Safety Code, Chapter 437 and 12.

§229.370. Purpose.

The purpose of these sections is to implement Texas Health and Safety Code, Chapter 437, which requires the Texas Department of Health to establish a permitting system for the regulation of food establishments and to ensure uniform requirements for retail food operations.

§229.371. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bed and breakfast extended means:

(A) an establishment with more than seven rooms for rent; or

(B) that provides for food service other than breakfast to overnight guests; and

(C) for the purposes of these rules, such facilities are classified as food establishments.

(2) Bed and breakfast food establishment means:

(A) an establishment that provides food service other than to its overnight guests;

(B) the establishment must meet the rules and regulations applicable to retail food establishments; and

(C) for the purposes of these rules, such facilities are classified as food establishments.

(3) Child care center - Any facility licensed by the regulatory authority to receive 13 or more children for child care which prepares food for on-site consumption. A child care center is classified as a food establishment.

(4) Department - The Texas Department of Health.

(5) Food - A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(6) Food establishment - An operation that stores, prepares, packages, serves, or otherwise provides food for human consumption such as: a food service establishment; retail food store; satellite or catered feeding location; catering operation; if the operation provides food directly to a consumer or to a conveyance used to transport people; market; remote catered operations; conveyance used to transport people, institution; or food bank; and that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(A) The term includes an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; a restaurant; a grocery store; an operation that is conducted in a mobile, roadside, stationary, temporary, or permanent facility or location; group residence; outfitter operations; bed and breakfast extended and bed and breakfast food establishments; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(B) The term does not include; an establishment that offers only prepackaged foods that are not potentially hazardous; a produce stand that only offers whole, uncut fresh fruits and vegetables; a food processing plant; a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function, such as a religious or charitable organization's bake sale; a Bed and Breakfast Limited facility as defined in these rules; or a private home.

(C) All definitions found in §229.162 of this title (relating to Definitions) under the Texas Food Establishment rules

are applicable to these sections except that, for purposes of obtaining a permit and payment of fees only, the term "food establishment" does not include:

(i) food establishments permitted and inspected under authority granted to Home-Rule or Type A General-Law Municipalities;

(ii) federally inspected food establishments on federal property;

(iii) correction facilities under the inspection of the Texas Department of Criminal Justice;

(iv) nursing homes under the inspection of Long Term Care Regulatory in the Texas Department of Human Services;

(v) hospitals under the inspection of the Health Facility Licensure Division in the department and which do not serve food to the general public;

(vi) food establishments on state campuses inspected by state college or university personnel in accordance with the requirements of §229.373 of this title (relating to Minimum Standards for Permitting and Operation);

(vii) food establishments licensed under the Health and Safety Code, Chapter 431, as manufacturers of food, provided the fee for licensure exceeds the permit fee required under §229.372 of this title (relating to Permitting Fees and Procedures);

(viii) food establishments under the inspection of the Texas Department of Mental Health and Mental Retardation;

(ix) nonprofit organizations as defined in these rules. Nonprofit organizations which meet the definition of "manufacturers of food" under Health and Safety Code, Chapter 431, or the definition of "food salvage establishments" under Health and Safety Code, Chapter 432, are not exempt from licensure in those categories;

(x) food and beverage vending machines; and

(xi) mobile food units permitted and inspected under the authority granted to Home-Rule or Type A General-Law Municipalities and which operate only within their respective jurisdictions. Except for units which handle only pre-packaged nonpotentially hazardous foods, a mobile food unit is classified as a food establishment, regardless of whether or not a food preparation occurs on the unit.

(7) Food Service Establishment - A food establishment as defined in these rules.

(8) Mobile food unit - A vehicle-mounted mobile food establishment designed to be readily moveable.

(9) Nonprofit organization - A civic or fraternal organization, charity, lodge, association, proprietorship or corporation possessing a 501(C) exemption under the Internal Revenue Code; or religious organizations meeting the definition of "church" under the Internal Revenue Code, §170(b)(1)(A)(I).

(10) Outfitter operation - Any operations such as trail rides or river raft trips where food is offered to patrons and which operates out of a central preparation location or food establishment. An outfitter operation is classified as a food establishment.

(11) Permit holder - The person that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person; and who possesses a valid permit to operate a food establishment.

(12) Person - An association, corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

(13) Potentially hazardous food - A food that is natural or synthetic and that requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of *Clostridium botulinum*; or in raw shell eggs, the growth of *Salmonella enteritidis*.

(14) Pushcart - A non self-propelled mobile food unit limited to serving nonpotentially hazardous food or potentially hazardous foods requiring a limited amount of preparation as authorized by the regulatory authority. A pushcart is classified as a mobile food unit.

(15) Retail food store - A food establishment or section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include establishments which handle only prepackaged, nonpotentially hazardous foods; roadside markets that offer only unprocessed fresh fruits and fresh vegetables for sale; or farmers markets; except that, for the purposes of obtaining a permit and payment of fees only, the term "retail food store" does not include establishments permitted and inspected under authority granted to Home- Rule and Type A General-Law Municipalities.

(16) Roadside food vendor - A person who operates a mobile retail food store from a temporary location adjacent to a public roadway or highway. Potentially hazardous foods shall not be prepared or processed by roadside food vendors. A roadside vendor is classified as a food establishment.

(17) School food establishment - A food service establishment where food is prepared and intended for service primarily to students in institutions of learning including, but not limited to, public and private schools, including kindergarten, preschool and elementary schools, junior high schools, high schools, colleges, and universities. A school food establishment is classified as a food establishment.

(18) Temporary food establishment - A food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

§229.372. Permitting Fees and Procedures.

(a) Permitting fees.

(1) A person who operates a food establishment as defined in these rules shall obtain a permit annually from the department and pay a permit fee for each establishment unless specifically exempted under subsections (b) or (c) of this section. Permit fees shall be nonrefundable.

(2) Except as required in subsection (a)(3) - (7) of this section, the permit fee for a food establishment shall be based on the gross annual volume of food sales as follows:

(A) $100 per establishment having a gross annual volume of $0.00 to $49,999.99;

(B) $200 per establishment having a gross annual volume of $50,000 to $149,999.99; and

(C) $325 per establishment having a gross annual volume of $150,000 or more.

(3) The permit fee for a school food establishment operated on a for profit basis by a private contractor is $100 for each school food establishment.

(4) The permit fee for each mobile food unit is $100. Mobile food units shall be inspected for compliance with §229.169 of this title (relating to Mobile Food Establishments) prior to issuance of a permit. If a request for inspection is not received within one year of fee submission, or if the mobile food unit does not meet the minimum standards as required in §229.169 of this title within one year of fee submission, a new permit fee will be required.

(5) The permit fee for each roadside food vendor is $100.

(6) The permit fee for child care centers shall be $100.

(7) The permit fee for a temporary food establishment shall be $35. The permit fee shall be valid for the duration of a single event not to exceed 14 consecutive days from the initial effective date specified in the permit application. An organizer of an event at which a temporary food establishment is operated shall assure a permit from the department is obtained for each temporary food establishment. The application for a temporary food establishment must be submitted to the department at least 30 days prior to the event.

(8) If the license or permit category changes during the license or permit period, the license or permit shall be renewed in the proper category at the time of the renewal.

(9) An establishment required to be licensed as a food manufacturer under the Health and Safety Code, Chapter 431, and also required to be permitted under this Chapter, will be issued only one license or permit. The license or permit fee to be paid will be the higher fee of the two applicable fees.

(10) Gross annual volume of food sales may be verified by data from the Texas Comptroller of Public Accounts.

(b) Exemptions from permit and fees. Food establishments permitted and inspected by a county or public health district under the Texas Health and Safety Code, Chapter 437, provided the inspections are based on the requirements of §229.373 of this title (relating to Minimum Standards for Permitting and Operation) are exempted from obtaining a permit and from paying a fee.

(c) Nonprofit fee exemption. Nonprofit organizations as defined in §229.371(9) of this title (relating to Definitions) are exempt from payment of the permit fee. Nonprofit organizations shall comply with the requirements of §229.373 of this title. The department shall provide guidelines for the safe handling of foods prepared by nonprofit organizations. Any civic or fraternal organization, charity, lodge, association, proprietorship, corporation or church not meeting the definition of "nonprofit organization" must obtain a permit, pay the required fee, and comply with the requirements.

(d) Application for permit. The permit application shall be completed on a form furnished by the department and shall contain the following information:

(1) the name under which the business is operated;

(2) the mailing address and street address of the establishment;

(3) if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the date and place of incorporation and the name and address of its registered agent in the State; or if any other type of association, the names of the principals of such association;

(4) the names of those individuals in an actual administrative capacity which, in the case of a sole proprietorship, shall be the managing proprietor; in a partnership, the managing partner; in a corporation, the officers and directors; in any other association, those in a managerial capacity; and

(5) the signature of the owner, operator, or other authorized person.

(e) Nonprofit organizations. A nonprofit organization shall submit documentation from the Internal Revenue Service to qualify the establishment for the exemption from the permit fee. Churches need only supply documentation upon request by the department.

(f) Temporary food establishments. A permit application for a temporary food establishment shall specify the name and physical location of the event for which the permit is requested, the permanent address of the applicant, the initial effective date of the permit, and the foods to be prepared.

(g) Two or more establishments. If a person owns or operates two or more establishments, each establishment shall be permitted separately by listing the name and address of each establishment on separate application forms.

(h) Pre-permit inspection. The department may conduct a pre-permit inspection for the purpose of determining compliance with these rules.

(i) Issuance of a permit. The department shall issue a permit for an establishment based on compliance specified in §229.161 - §229.171 and §229.173 - §229.175 of this title (relating to Texas Food Establishments). Copies may be obtained from the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182.

(1) Except for temporary food establishment permits, the permit shall be valid for one year from the date of issue, which becomes the anniversary date. Temporary permits shall be valid for 14 days from the effective date as indicated on the permit.

(2) The renewal permit shall be valid for one year from the anniversary date, with the exception of temporary permits as stated under paragraph (1) of this subsection.

(3) Permit application forms may be obtained from the Texas Department of Health, Retail Foods Division, 1100 West 49th Street, Austin, Texas 78756-3182.

(4) The permit shall be posted in a location in the food establishment that is conspicuous to consumers.

(5) Permits for mobile food units, including pushcarts and roadside food vendors, shall be displayed on the units at all times.

(j) Renewal of a permit.

(1) The permit holder shall renew their permit annually based on compliance specified in §229.161 - §229.171 and §229.173 - §229.175 of this title.

(2) A person holding a permit issued by the department, and whose establishment is in compliance with paragraph (1) of this subsection, shall be billed by the department and shall have their permit renewed by the department upon payment of the appropriate fee.

(3) The permit holder shall submit the annual permit fee for renewal prior to the expiration date of the current permit. A person who files a renewal application after the expiration date shall pay an additional $75 as a delinquency fee.

(4) Failure to submit the renewal fee annually may subject the permit holder to the offense provisions under the Health and Safety Code, Chapter 437, and also to the provisions of §229.374 of this title (relating to Refusal, Revocation, or Suspension of a Permit; Administrative Penalties).

(k) Amendment of permit.

(1) Fee. A permit that is amended, including a change of name, ownership, or a notification of a change in location of a permitted food establishment required under Health and Safety Code, §437.0125, will require submission of fees as outlined in subsection (a) of this section.

(2) Change of location. A permit is not transferrable upon change of location with the exception of a permit issued to an operator of a mobile food unit or roadside food vendor.

§229.373. Minimum Standards for Permitting and Operation.

All food establishments shall be operated in accordance with the requirements specified in §229.161 - §229.171 and §229.173 - §229.175 of this title (relating to Texas Food Establishments). Copies may be obtained from the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182.

§229.374. Refusal, Revocation, or Suspension of a Permit; Administrative Penalties.

(a) Basis. The department may refuse an application for a permit or may revoke or suspend a permit for violations of the requirements of §229.372 of this title (relating to Permitting Fees and Procedures) or §229.373 of this title (relating to Minimum Standards for Permitting and Operation), or for interference with a department representative in the performance of their duties under these sections.

(b) Hearings. Any hearings for the refusal, revocation, suspension of a permit will be conducted pursuant to §§1.21 - 1.32 of this title (relating to Formal Hearing Procedures) and the Administrative Procedure Act, Government Code, Chapter 2001.

(c) Reinstatement. A former permit holder may apply for reinstatement of a suspended permit by demonstrating that corrections and controls have been implemented to prevent recurrence of violative conditions. The department may reinstate the permit after the department has determined that the food establishment no longer poses a risk to public health and safety. The department may also require employees of a food establishment to successfully complete a department accredited training course on food safety principles prior to the reinstatement of the permit.

(d) Administrative penalties. Administrative penalties, as provided in the Health and Safety Code, §437.018, and in §229.261 of this title (relating to assessment of Administrative or Civil Penalties), may be assessed for violation of these sections.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907919
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Chapter 229. FOOD AND DRUG

The Texas Department of Health (department) proposes the repeal of existing §§229.401 - 229.412, and the adoption of new §§229.401 - 229.412, concerning minimum standards for licensure of tattoo and certain body piercing studios. New §§229.401 - 229.412 cover general provisions; definitions; licensing fees, procedures, and exemptions; physical facilities; personnel responsibilities; client qualifications, disclosure, and records; sterilization; care of the new tattoo and body piercing; tattooing and body piercing instruments and jewelry; report of infection or allergic reactions; disposal of infectious waste; and refusal, revocation, or suspension of license and enforcement provisions.

The new sections contain new language and incorporate language presently located in existing §§229.401 - 229.412, which are being proposed for repeal. Existing §§229.401 - 229.412 are being repealed for the purpose of reorganization and implementing Senate Bills (SB) 61 and 932 which were enacted during the 76th Texas Legislature, Regular Session, 1999. SB 61 and 932 became effective September 1, 1999. The new sections contain new language to clarify existing requirements for tattoo studios and includes new language for certain body piercing studios. The new sections establish new licensure fees for certain body piercing studios, and studios which perform tattooing and body piercing and clarify existing licensure requirements for tattoo studios. The new sections provide for standards of sterilization, sanitation, record keeping, and aseptic technique. In addition, the new sections will address requirements for those persons under the age of 18 wishing to receive a tattoo or body piercing. Finally, the new sections clarify the department's inspection authority and enforcement options available under Health and Safety Code, Chapter 146, (Tattoo and Certain Body Piercing Studios), and Chapter 431, (Texas Food, Drug, and Cosmetic Act).

Cynthia T. Culmo, R.Ph., Director, Drugs and Medical Devices Division, Bureau of Food and Drug Safety, has determined that for the first five-year period the sections are in effect there will be fiscal implications as a result of enforcing or administering those sections which apply to certain body piercing studios. Senate Bill 61, which requires certain body piercers to license with the department, will significantly affect state government. Fiscal implications to state government will be increased fee revenues of $570,000 in Fiscal Year 2000, and $2,095,000 in Fiscal Years 2001 - 2004; as well as increased costs of $98,900 for Fiscal Year 2000, and $95,000 for Fiscal Years 2001 - 2004. However, there will be no fiscal implications as a result of enforcing or administering those sections which apply to tattoo studios. There are no anticipated fiscal implications for local government.

Ms. Culmo also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing these sections will be to minimize the transmission of communicable diseases and injuries to consumers from tattoo and certain body piercing. There will be a significant fiscal impact, approximately $20,000 per studio, for those businesses who are currently piercing the outer perimeter of the ear by using an ear piercing gun. Because SB 61 only exempts from licensure those studios which pierce the ear lobe, the majority of the ear piercing studios in Texas will be required to license and comply with these rules. In addition, the anticipated economic cost to micro, small, or large businesses is an additional $150 annually for studios who tattoo and body

pierce and $200 annually for studios who only perform body piercing. Because of the significant fiscal impact on micro, small, and large business, this may impact local employment, in that these existing ear piercing facilities may elect to cease operations. The impact on local employment was submitted to the Texas Workforce Commission and the commission has no basis for disagreeing with the department's conclusions.

Comments on the proposal may be submitted in writing to Julee Magness, Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0237. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Friday, December 10, 1999, in the Texas Department of Health Auditorium, Room K-100, 1100 West 49th Street, Austin, Texas.

Subchapter V. MINIMUM STANDARDS FOR LICENSURE OF TATTOO STUDIES

25 TAC §§229.401-229.412

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Health and Safety Code, §146.010(a) and §146.015(a), which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of this Chapter; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 146.

§229.401. General Provisions.

§229.402. Definitions.

§229.403. Licensing Fee, Procedures, and Exemptions.

§229.404. Physical Facilities.

§229.405. Personnel Responsibilities.

§229.406. Client Qualifications, Disclosure, and Records.

§229.407. Sterilization.

§229.408. Care of the Tattoo.

§229.409. Tattooing Equipment.

§229.410. Report of Infection or Allergic Reactions.

§229.411. Disposal of Infectious Waste.

§229.412. Refusal, Revocation, or Suspension of License and Enforcement Provisions .

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907916
Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Subchapter V. MINIMUM STANDARDS FOR LICENSURE OF TATTOO AND CERTAIN BODY PIERCING STUDIOS

25 TAC §§229.401-229.412

The new sections are proposed under the Health and Safety Code, §146.010(a) and §146.015(a), which provide the department with the authority to adopt necessary regulations pursuant to the enforcement of this Chapter; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect Health and Safety Code, Chapter 146.

§229.401. General Provisions.

(a) These sections provide for the licensing and regulation of tattoo and certain body piercing studios and temporary locations.

(b) The "Tattoo and Certain Body Piercing Studio Act," Texas Health and Safety Code, Chapter 146, requires the Texas Board of Health to adopt rules regulating tattoo and certain body piercing studios and temporary locations.

(c) No person may cause, suffer or allow the operation, management, or maintenance of a tattoo and certain body piercing studio and temporary location without a license issued in accordance with these sections.

(d) All tattoo and certain body piercing studios and temporary locations shall comply with the minimum standards specified in these sections in addition to the existing standards contained in the Tattoo and Certain Body Piercing Studio Act and the Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act, relating to drugs, devices, and cosmetics, including adulteration and misbranding.

(e) All tattoo and certain body piercing studios and temporary locations should comply with applicable provisions of the Americans With Disabilities Act.

§229.402. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act - The Tattoo and Certain Body Piercing Studio Act, Texas Health and Safety Code, Chapter 146.

(2) Antiseptic - An agent that kills disease-causing microorganisms on human skin or mucosa.

(3) Artist - A person who performs tattooing, intradermal cosmetics, and or certain body piercing, and who is responsible for complying with the provisions of these sections.

(4) Aseptic technique - A hygienic practice which prevents and hinders the direct transfer of microorganisms, regardless of pathogenicity, from one person or place to another person or place.

(5) Authorized agent - An employee of the department designated by the commissioner to enforce the Act.

(6) Body piercer - A person who performs body piercing and who is responsible for adherence to the provisions of these sections; hereafter referred to as artist.

(7) Body piercing - The creation of an opening in an individual's body, other than in an individual's earlobe, to insert jewelry or another decoration.

(8) Body piercing studio - A permanent, nondwelling building or portion of a building, designated by a license holder and located in accordance with applicable local zoning codes where body piercing is performed, completely separated from living quarters; hereafter referred to as studio.

(9) Client - A person requesting the application of a tattoo or certain body piercing.

(10) Commissioner - Commissioner of the Texas Department of Health.

(11) Contaminated waste - Any liquid or semi-liquid blood or other potentially infectious materials; contaminated items that would release blood or other potentially infectious materials in a liquid or semi-liquid state if compressed; items that are caked with dried blood or other potentially infectious materials and are capable of releasing these materials during handling; contaminated sharps and pathological and microbiological wastes containing blood and other potentially infectious material, as defined in 29 Code of Federal Regulations, Part 1910.1030, known as "Occupational Exposure to Bloodborne Pathogens." Copies of this provision are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours.

(12) Cosmetic - An article or substance intended to be rubbed, poured, sprinkled, or sprayed on or introduced into or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness or altering appearances; or an article or substance for use as a component of such an article, except that the term does not include soap.

(13) Department - The Texas Department of Health.

(14) Disinfectant - An agent that kills disease-causing microorganisms on inanimate objects or surfaces.

(15) Ear piercing - The creation of an opening in an individual's ear lobe with an ear piercing gun to insert jewelry or other decoration.

(16) Ear piercing gun - A device that pierces an individual's ear using a single-use stud and clasp ear piercing system. An ear piercing gun shall not be used to pierce any other part of the body besides the ear.

(17) Germicidal solution - An agent that kills disease-causing microorganisms on hard surfaces; a disinfectant or sanitizer registered with the Environmental Protection Agency and or an approximate 1:100 dilution of household chlorine bleach (1/4 cup bleach and 1 gallon of water).

(18) Germicidal soap - An agent designed for use on the skin that kills disease-causing microorganisms, including but not limited to, products containing povidone-iodine, chloroxylenol, triclosan, and chlorhexidine gluconate.

(19) Hand washing facility - Sink equipped with hot and cold or tempered running water under pressure, used for washing hands, arms, or other portions of the body.

(20) Health care practitioner - A person licensed by the state to practice medicine.

(21) Instruments - Hand pieces, needles, needle bars, hemostats, forceps, pliers, and other items that may come in contact with a client's body or possible exposure to bodily fluids during the tattoo and body piercing procedures.

(22) Jewelry - Any personal ornament inserted into a pierced area, which must be made of surgical implant grade stainless steel (minimum of 316L or 316LVM), solid 14k or 18k gold, niobium, titanium (minimum of 6A14V), or platinum, which is free of nicks, scratches, or irregular surfaces and has been properly sterilized prior to use.

(23) License holder - A person who owns, operates, or maintains a tattoo studio, tattoo and body piercing studio, body piercing studio or temporary location in compliance with these sections.

(24) Managing conservator - A person, licensed child-placing agency, or authorized agency designated by a court as having the right to possession of the child, and the right to consent to medical, surgical, dental, and psychological treatment of the child.

(25) Sanitize - To treat a clean surface and kill pathogenic microorganisms.

(26) Sharps - Any object (sterile or contaminated) that may purposefully or accidentally cut or penetrate the skin or mucosa including, but not limited to, needles, scalpel blades, and razor blades.

(27) Sharps container - A puncture-resistant, leak-proof container that can be closed for handling, storage, transportation, and disposal and that is labeled with the International Biohazard Symbol.

(28) Single-use - Articles intended for one-time, one-person use and which are to be discarded after such use.

(29) Sterilization area - A separate room or area separate from workstations with restricted client access in which tattoo and body piercing instruments are cleaned, disinfected, and sterilized.

(30) Tattoo/tattooing - The practice of producing an indelible mark or figure on the human body by scarring or inserting a pigment under the skin using needles, scalpels, or other related devices including intradermal cosmetics.

(31) Tattoo and body piercing area - The portion of the tattoo or body piercing studio used for applying tattoos or performing body piercing, including all surrounding areas which are likely to come into contact with contaminated waste.

(32) Tattooist - A person who performs tattooing or applies intradermal cosmetics and who is responsible for adherence to the provisions of these sections; hereafter referred to as artist.

(33) Tattoo studio - A permanent, nondwelling building or portion of a building, designated by a license holder and located in accordance with applicable local zoning codes where tattooing or intradermal cosmetic application is performed, completely separated from living quarters; hereafter referred to as studio.

(34) Temporary location - A fixed location at which tattooing or body piercing is performed for a specified length of time of not more than seven days in conjunction with a single event or celebration, where the primary function of the event or celebration is tattooing or body piercing.

(35) Universal precautions - A method of infection control in which employees treat all blood and body fluids as to contain

all bloodborne pathogens and taking proper precautions to prevent the spread of any bloodborne pathogens. Precautions include hand washing, gloving, personal protective equipment, injury prevention, and proper handling and disposal of needles, other sharp instruments, and blood and body fluid contaminated products.

§229.403. Licensing Fees, Procedures, and Exemptions.

(a) License fees. All tattoo and body piercing studios shall obtain a license annually except as indicated below from the Texas Department of Health (department) and shall pay an annual, non-refundable license fee for each place of business operated as follows:

(1) $450 per tattoo studio;

(2) $600 per tattoo and body piercing studio;

(3) $200 per body piercing studio; and

(4) $450 for each temporary location license for a specified length of time not to exceed seven days.

(b) License forms. License forms may be obtained from the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3182.

(c) License application. The initial license application for each studio or temporary location shall be signed and verified, shall be made on the license application furnished by the department, and shall contain the following information:

(1) the full or legal name under which the studio or temporary location is conducted;

(2) the address of the studio or temporary location that is to be licensed. Sufficient descriptive information must be included if the studio or temporary location is located in a portion of the building with other license holders;

(3) if a proprietorship, the name and residence address of the proprietor; if a partnership, the names and residence addresses of all partners; if a corporation, the date and place of incorporation and name and address of its registered agent in the state; or if any other type of association, then the names of the principals of such association;

(4) for each studio or temporary location, the name(s) and residence address(es) of the responsible individual(s) thereof;

(5) the name(s) of the studio's or temporary location's artist(s);

(6) the usual days and hours of operation of each studio or temporary location; and

(7) a description of all services to be provided at the studio or temporary location.

(d) Issuance of license. The department may issue a license to the owner of a studio or temporary location after determining that the studio or temporary location is in compliance with applicable statutes, rules, and zoning codes.

(1) The initial studio license shall be valid for one year from the date of issuance which becomes the anniversary date. The temporary location license is valid for a specified period not to exceed seven days.

(2) The renewal studio license shall be valid for one year from the anniversary date.

(3) The license shall be displayed in a prominent place in the studio or temporary location.

(e) Renewal of license - applicable to studios only.

(1) Each year, the license holder shall renew its license in accordance with the requirements of this section.

(2) The license holder shall renew the license by filing an application for renewal on the form prescribed by the department accompanied by the required licensure fee. A licensee must file for renewal before the expiration date of the current license. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(3) Failure to submit the renewal application annually shall subject the studio to the enforcement provisions of the Tattoo and Certain Body Piercing Studio Act and also to the provision of §229.412 of this title (relating to Refusal, Revocation or Suspension of License and Enforcement Provisions).

(A) Amendment of license. A license must be amended when the name, ownership, or location of the licensed studio is changed. Such changes require submission of the fees as outlined in subsection (a) of this section.

(B) Notification of change of location of studio.

(i) Not fewer than 30 days in advance of the change, the licensee shall notify the commissioner or the commissioner's designee in writing of the licensee's intent to change the location of a licensed studio. The notice shall include the address of the new location, and the name and residence address of the individual in charge of the studio at the new location.

(ii) Notice will be deemed adequate if the licensee provides the intent and verification notices to the commissioner or the commissioner's designee within the established time frames of clause (i) of this subparagraph by certified mail, return receipt requested, mailed to the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756.

(iii) Not later than the tenth day after the change of location is complete, the license holder shall notify the department in writing and shall verify the information submitted under clause (i) of this subparagraph.

(f) Exemption from licensure. Persons who engage only in the following are exempt from the licensing requirements of this section:

(1) a studio or temporary location located within a medical facility which is licensed under other law, or an office or clinic of a person licensed by the Texas State Board of Medical Examiners;

(2) a person who performs only ear piercing; or

(3) a facility in which only ear piercing is performed.

§229.404. Physical Facilities.

(a) A studio must be in a permanent, nondwelling building or portion of a building which must be in a location which is permissible under local zoning codes, if any. The studio shall be separated from living quarters by complete floor to ceiling partitioning and shall contain no access to living quarters.

(b) The studio or temporary location shall be maintained in a sanitary condition.

(1) Work surfaces shall be cleaned and sanitized with a germicide solution.

(2) Other environmental surfaces shall be cleaned with an all-purpose detergent disinfectant.

(c) The walls, ceilings, and floors shall be kept in good repair. The tattoo and body piercing area shall be constructed of smooth, hard, surfaces that are non-porous, free of open holes or cracks, light colored, and easily cleaned. New studios shall not include dark-colored surfaces in the tattoo and body piercing area. Existing studios with dark-colored surfaces in the tattoo and body piercing area shall replace the dark-colored surfaces with light-colored surfaces whenever the facilities are extensively remodeled.

(d) Studios or temporary locations shall have adequate lighting of at least 50 foot candles of illumination in the tattooing, body piercing, and sterilization area.

(e) Adequate mechanical ventilation shall be provided in the studio.

(f) Each studio or temporary location shall be equipped with hand-washing facilities for its personnel with unobstructed access to the tattoo and body piercing area such that artists can return to the area without having to touch anything with their hands. Hand-washing facilities shall be equipped with hot and cold or tempered running water under pressure; liquid germicidal soap; single-use towels or other approved hand-drying devices; and a covered refuse container. Such facilities shall be kept clean and in good repair.

(g) Animals are not permitted in the studios or temporary locations, except for guide or service animals accompanying persons with disabilities, or nonmammalian animals in enclosed glass containers such as fish aquariums, which shall be outside the tattooing, body piercing, and sterilization area.

(h) Use of tobacco products shall be prohibited in the tattoo, body piercing, and sterilization area. Consumption of alcoholic beverages shall be prohibited in the studio or temporary location.

(i) The studio or temporary location shall be kept free of rodents and vermin and protected from infestation by insects.

(j) If tattooing or body piercing is performed where cosmetology services are provided, it shall be performed in an area that is separate and enclosed.

§229.405. Personnel Responsibilities.

(a) All artists while tattooing or body piercing shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(b) All artists shall wash their hands thoroughly using hot or tempered water with a liquid germicidal soap before and after tattooing or body piercing and as often as necessary to remove contaminants.

(c) All artists must wear single-use examination gloves while assembling tattooing and body piercing instruments and while tattooing and body piercing.

(d) When a session is interrupted or immediately after gloves are torn or perforated:

(1) gloves shall be removed and discarded; and

(2) hands shall be washed and a fresh pair of gloves used.

(e) Artists shall use universal precautions while tattooing or body piercing. An artist diagnosed with a communicable disease shall provide to the department a written statement from a health care practitioner that the artist's condition no longer poses a threat to public health.

(f) The area of the client's skin to be tattooed shall be cleaned with an approved germicidal soap according to label directions.

(g) The external skin of the client to be pierced shall be cleaned with an approved germicidal soap according to label directions. In the case of oral piercings, the operator shall provide the individual with antiseptic mouthwash in a single-use cup and shall ensure that the individual utilizes the mouthwash provided. In the case of a lip, labret, or cheek piercing, procedures described in this paragraph for both skin and oral piercings shall be followed.

(h) If shaving is required, razors shall be single-use.

(i) Each artist performing any tattoo or body piercing procedure in the studio or temporary location, shall have the education, training and experience, or any combination thereof, to practice aseptic technique and prevent the transmission of bloodborne pathogens. All procedures shall be performed using aseptic technique.

§229.406. Client Qualifications, Disclosure, and Records.

(a) Except as permitted in subsections (c) and (d) of this section, a client must be a minimum of 18 years of age and shall present at the time of tattooing or body piercing a valid, government issued, positive identification card including, but not limited to, a driver's license, passport, or military identification. The identification must contain a photograph of the individual and a printed date of birth.

(b) The artist shall verify and document in the permanent client record the client's age, date of birth, and the type of identification provided.

(c) An artist may not tattoo a person younger than 18 years of age without consent from the individual's parent or guardian, who determines it to be in the best interest of the minor child to cover an existing tattoo.

(1) The existing tattoo must contain:

(A) obscene or offensive language or symbols;

(B) gang-related names, symbols, or markings;

(C) drug-related names, symbols, or pictures; or

(D) some other type of words, symbols or markings that the court considers would be in the best interest of the minor to cover.

(2) The consent required by subsection (c) can be satisfied by:

(A) a written and notarized consent by the individual's parent or guardian which shall contain:

(i) the full name, address, and telephone number of the client;

(ii) the full name, address, and telephone number of the parent or guardian;

(iii) a detailed description or photograph of the tattoo to be covered;

(iv) the location on the body of the tattoo to be covered; and

(v) the signatures of minor and parent or guardian; or

(B) the individual's parent or guardian:

(i) being physically present at the time the tattooing is being performed;

(ii) executing an affidavit stating that the person is the parent or guardian of the individual on whom the tattooing is being performed;

(iii) presenting evidence of the minor's identity to the artist; and

(iv) presenting evidence of the status as parent or guardian of the individual who will receive the tattoo to the artist.

(3) If a parent or guardian of the minor child and the minor child agree to the covering of the tattoo as described in subsection (c)(1) of this section, the artist may request the issuance of an order from a justice court.

(4) If the parent or guardian and the minor child do not agree to the covering of a tattoo by a artist, then an order must be issued by a district court or other court with jurisdiction of a suit affecting the parent-child relationship or a civil proceeding brought under Title 3 or 4 of the Texas Family Code before an artist may cover the minor child's tattoo.

(d) An artist may not perform body piercing on a person younger than 18 years of age without the consent of a parent, managing conservator, or guardian of the individual. The consent can be satisfied by:

(1) a written and notarized consent by the individual's parent, managing conservator, or guardian which shall contain:

(A) the full name, address, and telephone number of the client;

(B) the full name, address, and telephone number of the parent, managing conservator, or guardian;

(C) the location on the body that may be pierced; and

(D) the signatures of the minor and parent, managing conservator, or guardian; or

(2) the individual's parent, managing conservator, or guardian:

(A) being physically present at the time the body piercing is being performed;

(B) executing an affidavit stating that the person is the parent, managing conservator, or guardian of the individual on whom the body piercing is being performed;

(C) presenting evidence of the minor's identity to the artist; and

(D) presenting evidence of the status as parent, managing conservator, or guardian of the individual who will receive the body piercing to the artist.

(e) No person may be tattooed or body pierced who appears to be under the influence of alcohol or drugs.

(f) Tattooing and body piercing shall not be performed on any skin surface which manifests any evidence of unhealthy conditions such as rashes, boils, infections, or abrasions.

(g) Before receiving a tattoo, each client shall be informed verbally and in writing about the possible risk and dangers associated with the application of each tattoo. These shall include, but are not limited to, at least the following: the possibility of discomfort or pain; the permanence of the markings; the risk of infection; and the possibility of allergic reaction to the pigments or other materials used.

(h) Before receiving a body piercing, each client (and if applicable, the parent, managing conservator, or guardian) shall be informed verbally and in writing about the possible risks and dangers associated with receiving a body piercing. These shall include, but are not limited to, at least the following: the possibility of discomfort or pain; the possibility of scarring; the possibility of bleeding; the possibility of swelling; the risk of infection; the possibility of nerve damage; and the increased risk for adolescents during certain stages of development.

(i) The studio or temporary location shall maintain proper records of each client. The information shall be permanently recorded and made available for examination by the authorized agent. Records shall be maintained at the studio for at least two years following the date of the last entry. The temporary location client records shall be maintained by the license holder. These permanent records shall include the following:

(1) the name, address, and telephone number of the client;

(2) the date tattooing or body piercing was performed;

(3) the client's age, date of birth, and type of positive identification provided to the artist (this information is to be recorded by the artist as described in subsection (b) of this section);

(4) the specific color or colors of the tattoo or type of jewelry used for the piercing and, when available, the manufacturer's catalogue or identification number of each color or type of jewelry used;

(5) the location on the body where the tattoo or body piercing was performed;

(6) the name of the artist;

(7) a statement that the client has received a copy of applicable written care instructions, and that the client has read and understands the instructions; and

(8) the signature of the client.

§229.407. Sterilization.

(a) A studio or temporary location is required to utilize instruments that have been prepared as described in §§229.409 (a) - (c) of this title (relating to Tattooing and Body Piercing Instruments and Jewelry). The studio or temporary location shall use sterilization equipment that is approved by the United States Food and Drug Administration for the purpose of sterilization, and adequate in size to accommodate necessary utensils and instruments. A copy of the manufacturer's recommended procedures for operation of the sterilization unit(s) must be available for inspection by an authorized agent.

(b) Each person responsible for the sterilization of instruments shall be able to demonstrate to the department's authorized agent the correct sterilization procedures and the proper operation of autoclave and/or dry heat sterilization equipment.

(c) After each use, the reusable instruments shall be cleansed to remove blood and tissue residue before sterilization as described in §229.409(n) of this title.

(d) Instruments requiring sterilization shall be packed in packages approved for the sterilization unit. Instruments shall be packed individually, or as a set provided such set is intended to be used for a single procedure. Each package shall be labeled with the date of sterilization and the initials of the person sterilizing the instruments. Packaged sterilized instruments shall be kept in a sterile condition and stored in a clean dust-tight container when not in use.

(e) Each package of instruments sterilized shall be monitored for sterilization by the use of chemical/heat sensitive indicators.

(f) Each studio or temporary location shall maintain sterilization records. The information shall be permanently recorded and made available for examination by an authorized agent in the studio for at least two years from the date of the last entry. These permanent records shall be maintained at the studio and shall include the following:

(1) date of sterilization;

(2) quantity and type of instruments to be sterilized; and

(3) name or initials of the individual sterilizing the instruments.

(g) Sterilized instruments stored in an approved manner and not used within 30 days after sterilization shall no longer be considered sterile and shall be resterilized before use, unless the studio or temporary location utilizes presterilized instruments sterilized by the manufacturer. If presterilized instruments are used, the artist shall obtain documentation from the manufacturer that describes the method of sterilization utilized by the manufacturer and the manufacturer's recommendations for storage and maintenance of sterility. This documentation shall be available for inspection by an authorized agent. The artist shall follow the manufacturer's instructions for storage and maintenance of sterility.

(h) One of the following methods of sterilization shall be used.

(1) Autoclave - steam under pressure:

(A) 121 degrees Celsius (250 degrees Fahrenheit) and a pressure of at least 15 pounds per square inch for not less than 30 minutes after the chamber of the autoclave has reached the required temperature and pressure; or

(B) as specified in the manufacturer's operator's manual.

(2) Dry heat sterilization:

(A) 160 degrees Celsius (320 degrees Fahrenheit) for not less than one hour under atmospheric pressure after the sterilizer has reached the required temperature; or

(B) as specified in the manufacturer's operator's manual.

§229.408. Care of the New Tattoo and/or Body Piercing.

(a) Each time tattooing or body piercing is performed the client (and if applicable, the parent, managing conservator, or guardian) shall receive oral and written instructions on the care of the area tattooed or pierced. The client shall sign a written statement in the permanent client record acknowledging that the client has received a copy of the written care instructions, and that the client has read and understands the instructions.

(b) The written care instructions for tattooing shall contain at least the following items:

(1) for at least two weeks, the need to minimize exposure to the sun, and to discourage swimming in fresh, salt, or chlorinated water;

(2) the need to properly cleanse the tattooed area;

(3) the need to apply antibiotic ointment or cream;

(4) the need to use sterile bandage(s) or other sterile dressing(s) when necessary;

(5) the name of the artist, and the name, address, and telephone number of the studio or temporary location; and

(6) the instructions for the client to consult a health care practitioner at the first sign of infection or an allergic reaction, and to report any diagnosed infection, allergic reaction, or adverse reaction resulting from the application of the tattoo to the artist and to the Texas Department of Health, Drugs and Medical Devices Division, at 1-888-839-6676.

(c) The written care instructions for body piercing shall contain at least the following items:

(1) the need to properly cleanse the pierced area by using antibacterial soap for the external skin and or an antiseptic or carbamide peroxide mouthwash for the oral cavity;

(2) for at least the first two to six weeks, the need to minimize exposure to the sun, and to discourage swimming in fresh, salt, or chlorinated water;

(3) the need to use sterile bandage(s) or other sterile dressing(s) when necessary;

(4) the name of the artist, and the name, address, and telephone number of the studio or temporary location; and

(5) the instructions for the client to consult a health care practitioner at the first sign of infection or an allergic reaction, and to report any diagnosed infection, allergic reaction, or adverse reaction resulting from the body piercing to the artist and to the Texas Department of Health, Drugs and Medical Devices Division, at 1-888-839-6676.

§229.409. Tattooing and Body Piercing Instruments and Jewelry.

(a) Instruments and jewelry used during tattooing and piercing procedures which may contact blood or other bodily fluids, or which come in direct contact with skin which is not intact shall be sterilized after each use or disposed of. These devices include, but are not limited to, needles, bars, tubes, forceps, receiving tubes, and tapers. This does not include ear piercing guns or tattoo machines/devices.

(b) Instruments and jewelry used during tattooing and body piercing which do not come in contact with broken skin but may come in contact with mucous membranes and oral tissue should be sterilized after each use. If, however, sterilization is not feasible because the instrument or jewelry will be damaged, the instrument or jewelry shall be treated with a germicidal solution prior to use. These devices include, but are not limited to, calipers and gauge wheels.

(c) Instruments that come into contact only with intact skin shall be treated with a germicidal solution prior to use. These devices include, but are not limited to, hand mirrors.

(d) Reusable instruments shall be constructed in a manner that permits easy cleaning and sterilization.

(e) Needles used to perform body piercing shall be single-use and disposed of in a sharps container.

(f) Single-use disposable instruments shall be maintained in clean condition and dispensed in a manner to prevent contamination to the unused instruments. These devices include, but are not limited to, cups, cotton swabs, corks, rubber bands, and toothpicks.

(g) Use of styptic pens or alum solids to control blood flow is prohibited.

(h) All dyes or pigments used in tattooing and piercing shall be non-toxic, free from adulteration, and made from materials

generally regarded as safe. Marking instruments shall be single-use or sanitized by design, such as alcohol based ink pens, and shall be used only on intact skin that has been treated with a germicidal soap. Any marking instrument that comes in contact with mucous membranes or broken skin shall be single-use.

(i) Only single-use pigment or dye containers shall be used for each client. Pigments and dyes shall be dispensed from containers in a manner to prevent contamination to the unused portion. Individual containers of dye or pigment shall be discarded after use.

(j) In order to minimize transmission of body fluids and disease, single-use plastic covers shall be used to cover spray bottles or other reusable accessories for multiple client use that are handled by the artist during tattooing and body piercing.

(k) All stencils shall be single-use. Petroleum jellies, soaps, and other products used in the application of stencils shall be dispensed and applied using aseptic technique and in a manner to prevent contamination of the original container and its contents. The applicator shall be single-use.

(l) Contaminated reusable instruments shall be placed in a labeled covered container which may contain a disinfectant solution such as 2.0% alkaline glutaraldehyde (not to be construed as all inclusive) until it can be cleaned and sterilized.

(m) All containers holding contaminated instruments and container lids shall be emptied of contaminated solution and cleaned and sanitized daily or more often if needed.

(n) Reusable instruments shall be cleaned by gloved personnel prior to sterilization by one of the following methods:

(1) mechanically pre-clean the items by using a clean cotton ball or swab moistened with a solution of low-residue detergent and cool water, with care taken to ensure the removal of any pigment or body substances not visible to the eye, thoroughly rinse with warm water and then drain, and clean by soaking in a protein dissolving detergent-enzyme cleaner used according to manufacturer's instructions; or

(2) clean the items in an ultrasonic cleaning unit used according to manufacturer's instruction. A copy of the manufacturer's recommended procedures for operation of the ultrasonic cleaning unit must be available for inspection by an authorized agent; and

(3) rinse and dry the items prior to packaging for sterilization.

§229.410. Report of Infection or Allergic Reactions.

(a) The studio shall provide a written report of any infection or allergic reaction resulting from a body piercing or the application of a tattoo to the Texas Department of Health (department) within five working days of its occurrence or knowledge thereof. The report shall include:

(1) the name of the affected client;

(2) the name and address of the studio or temporary location where the tattoo or body piercing was performed;

(3) the name of the artist;

(4) the date the tattoo or piercing was performed;

(5) the specific color or colors of the tattoo or type of jewelry used for the piercing and, when available, the manufacturer's catalogue or identification number of each color or type of jewelry used;

(6) the location of the infection and the location on the body where the tattoo or piercing was applied;

(7) the name and address of the health care practitioner, if any; and

(8) any other information considered relevant to the situation.

(b) The department shall use these reports in their efforts to identify the source of the adverse reaction(s) and to take action to prevent its recurrence.

§229.411. Disposal of Infectious Waste.

(a) Sharps shall be subjected to the methods of treatment and disposal as described in Chapter 1, Subchapter K, §1.136 of this title (relating to Approved Methods of Treatment and Disposition) and Title 30, Texas Administrative Code, Chapter 330, Subchapter Y.

(b) Other studio waste generated during the tattooing and body piercing process, i.e., cotton balls, cotton tip applicators, corks, toothpicks, tissues, paper towels, gloves, and pigment containers (not to be construed as all-inclusive) shall be disposed of in accordance with Chapter 1, Subchapter K, §1.136(a)(2) of this title or Title 30, Texas Administrative Code, Chapter 330. Copies of these provisions are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, 1-888-839- 6676, and are available weekdays for inspection between the hours of 8:00 a.m. and 5:00 p.m.

§229.412. Refusal, Revocation, or Suspension of License and Enforcement Provisions.

(a) Basis. The Texas Department of Health (department) may, after providing notice and opportunity for hearing, refuse to license a studio or temporary location, or may revoke or suspend the license for violations of the requirements in these sections or for any reasons described in the Tattoo and Certain Body Piercing Studio Act, or in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(b) Hearing. All hearings for the refusal, revocation or suspension of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Board of Health), the Administrative Procedure Act, Government Code, Chapter 2001, and the hearing rules adopted by the State Office of Administrative Hearings.

(c) Enforcement and penalties.

(1) Administrative penalty. The department may, after providing notice and opportunity for hearing, assess an administrative penalty as provided in §146.019 of the Tattoo and Certain Body Piercing Studio Act, the Health and Safety Code, Chapter 431, and §229.261 of this title (relating to Assessment of Administrative or Civil Penalties), for violations of these sections. All hearings for the assessment of an administrative penalty are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Board of Health) and the hearing rules adopted by the State Office of Administrative Hearings.

(2) Civil penalty; Injunction. If it appears that a person has violated or is violating Health and Safety Code, Chapter 146, or an order issued or a rule adopted under Health and Safety Code, Chapter 146, the commissioner may request the attorney general or the district attorney, county attorney, or municipal attorney in the jurisdiction where the violation is alleged to have occurred, is occurring, or may occur to institute a civil suit for:

(A) an order enjoining the violation;

(B) a permanent or temporary injunction, a temporary restraining order, or other appropriate remedy, if the department shows that the person has engaged in or is engaging in a violation;

(C) the assessment and recovery of a civil penalty; or

(D) both injunctive relief and a civil penalty.

(3) Criminal penalty. A person commits an offense if the person violates the Act or rules adopted under the Act. An offense under the Act is a Class A misdemeanor.

(d) Re-issuance of a license. If a license issued under these sections has been revoked or denied for violation of these rules, the license holder named in the revocation or denial is not eligible for licensing under these sections for a period of two years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907917
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Chapter 265. GENERAL SANITATION

Subchapter K. REGISTRATION OF SANITARIANS

25 TAC §§265.141-265.158

The Texas Department of Health (department) proposes new §§265.141- 265.158 concerning the registration of sanitarians.

These rules are proposed to implement House Bill (HB)1838, 76th Legislature (1999). This legislation requires the Texas Board of Health (board) to set the fee for the registration of sanitarians. HB 1838 also requires any person applying for registration to have had not less than two years of full-time experience in the field of sanitation; to have graduated from an accredited college or university with at least a bachelor's degree that includes at least 30 semester hours in basic or applied science; to pay an examination fee prescribed by the board; to pay a renewal fee prescribed by the board; and to provide proof of completion of continuing education units as established by the board. The new provisions became effective on September 1, 1999, except the change to the educational requirements. The change in law made to the educational requirements takes effect on September 1, 2001. Specifically, the new sections cover the purpose of the rules; scope; transition; definitions; fees; application procedures; qualifications for registration as a sanitarian or sanitarian-in-training; educational requirements; continuing education; examinations; application approval or disapproval; sanitarians-in-training preceptorship; sanitarian registration procedures; sanitarian license renewal; grounds for suspension or revocation; registration of persons with criminal backgrounds; violations, complaints, investigations, and disciplinary actions; processing applications; exemptions; and advertising. The existing rules for registration of sanitarians found in Chapter 337 on Water Hygiene are being repealed and proposed as new rules in Chapter 265 on General Sanitation which is the more appropriate place.

Mr. Elías Briseño, R.S., Director, General Sanitation Division, has determined that for the first five years that the sections are in effect, there will be fiscal implications to the state and local government as a result of administering the rules as proposed. The effect on state government will be an estimated increase in revenue to the state of approximately $21,780 per year. It is estimated the costs to the department to administer the new provision will equal the estimated revenue increases. There will be fiscal implications to those state agencies and local governments paying application, examination, license, renewal, and reinstatement fees for their employees and/or paying costs associated with obtaining continuing education units. The cost to those state agencies and local governments will depend on the number of licensed sanitarians employed by them and the number of new sanitarians they may hire. The cost for each licensed sanitarian is estimated to be $250 per year. The cost for each sanitarian-in-training is estimated to be $175 to $200 per year.

Mr. Briseño has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to further protect the public health through better educated, trained and skilled persons practicing the field of sanitation in Texas. The anticipated cost to micro-businesses and/or small businesses and persons who may be required to comply with the new sections is the cost of paying application, examination, license, and renewal fees and/or paying costs associated with obtaining continuing education units. The cost to micro-businesses and/or small businesses will depend on the number of licensed sanitarians employed by them and the number of new sanitarians they may hire. The cost for each licensed sanitarian is estimated to be $250 per year. The cost for each sanitarian-in-training is estimated to be $175 to $200 per year. No impact on local employment is anticipated.

Comments on the proposal may be sent to El¡as Briseño, R.S., Director, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 834-6635. Comments will be accepted for 30 days following publication of these rules in the *Texas Register*.

The new sections are proposed under the Sanitarian Registration Act, Texas Civil Statutes, Article 4477-3, which provides the Texas Board of Health (board) with authority to adopt rules concerning the registration of sanitarians; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The new sections affect Texas Civil Statutes, Article 4477-3, and the Health and Safety Code, Chapter 12.

§265.141. Purpose and Scope.

(a) Purpose. This subchapter implements the Sanitarian Registration Act, Article 4477-3, Vernon's Texas Civil Statutes, which requires the Texas Department of Health to adopt rules to implement a program for the registration of sanitarians under the authority of the Texas Board of Health.

(b) Scope. These sections apply to persons whose duties in consumer health require the application of scientific knowledge to recognize, evaluate, and control hazards associated with the distribution of contaminated, adulterated, unsafe and misbranded foods,

drugs, medical devices, and cosmetics and to persons whose duties in environmental health or sanitation require the application of scientific knowledge to recognize, evaluate, and control environmental hazards and to preserve and improve environmental factors for the achievement of the health, safety, comfort, and well-being of humans. The sections cover purpose, scope and transition; definitions; fees; application procedures; qualifications for registration as a sanitarian or sanitarian-in-training; educational requirements; continuing education; examinations; application approval or disapproval; sanitarians-in-training preceptorship; sanitarian registration procedures; sanitarian license renewal; grounds for suspension or revocation; registration of persons with criminal backgrounds; violations, complaints, investigations, and disciplinary actions; processing applications; exemptions; and advertising.

(c) Transition.

(1) Effective September 1, 1999, registered sanitarians presently licensed by the department must obtain no less than twelve continuing education contact hours related to the fields of consumer health, environmental health or sanitation within the twelve months preceding renewal of their license after final adoption of these rules and after the department establishes an anniversary date for each registered sanitarian. The requirement of two years of full-time experience, effective September 1, 1999, does not apply to sanitarians already licensed by the department unless the sanitarians allow their licenses to lapse. The educational requirement concerning 30 semester hours or its equivalent in basic or applied science, effective September 1, 2001, does not apply to sanitarians already licensed by the department unless the sanitarians allow their licenses to lapse.

(2) The requirement of two years of full-time experience, effective September 1, 1999, does not apply to sanitarians-in-training already licensed by the department unless the sanitarians-in-training allow their license to lapse. The continuing education contact hours requirement, effective September 1, 1999, does not apply to sanitarians-in-training already licensed with the department. The continuing education contact hours requirement will apply only after the sanitarians-in-training upgrade to sanitarian status. For all sanitarians, the hours must be accrued in the twelve months preceding renewal of their sanitarian license based on their anniversary date. The educational requirement concerning 30 semester hours or its equivalent in basic or applied science, effective September 1, 2001, does not apply to sanitarians-in-training already licensed with the department unless the sanitarians-in-training allow their license to lapse.

(3) Effective September 1, 1999, applicants for registration as a sanitarian must have graduated from an accredited college or university with no less that fifteen semester hours or its equivalent in basic or natural science; have not less than two years of full-experience in consumer health, environmental health or sanitation; have completed all required department application forms; have paid all required fees; and have successfully complete an examination prescribed by the department. An applicant with less than two years of full-time experience will be registered as a sanitarian-in-training and be issued a license remaining in effect for a period not to exceed two years after date of issue.

(4) Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science.

§265.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings.

(1) Act - Article 4477-3, Vernon's Civil Statutes, concerning the registration of sanitarians.

(2) Administrator - The department employee designated as the administrator of registration activities authorized by the Act.

(3) Advanced mathematics - A mathematics course equivalent to or beyond calculus that was taken at an accredited college or university.

(4) Applicant - A person who applies for registration under the Act.

(5) Applied science - The application of general principles from environmental science, agricultural science, public health, epidemiology, food science, medical science, and sanitary engineering to solve problems.

(6) Basic Science - Science such as anatomy, bacteriology, biochemistry, biology, chemistry, geology, microbiology, pathology, physiology and physics.

(7) Board - The Texas Board of Health.

(8) Consumer health - The application of scientific knowledge to recognize, evaluate, and control hazards associated with the distribution of contaminated, adulterated, unsafe, and misbranded foods, drugs, medical devices, cosmetics, toys or consumer products.

(9) Continuing education unit - Fifty minutes of continuing education training or experience, applicable to consumer health, environmental health or sanitation and pre-approved by the department or its designee. Acceptable continuing education opportunities include conferences, home-study training modules (including professional journals requiring successful completion of a test document), lectures, panel discussions, seminars, accredited college or university courses, video or film presentations, field demonstrations or other activities pre-approved by the department or its designee.

(10) Department - The Texas Department of Health.

(11) Education - Until September 1, 2001, bachelor's degree from an accredited college or university that includes not less than fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in basic or applied science.

(12) Environmental health or sanitation - The application of scientific knowledge to recognize, evaluate, and control environmental hazards and to preserve and improve environmental factors for the achievement of the health, safety, comfort, and well being of humans.

(13) Examination - The examination prescribed by the department.

(14) Experience - Not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation.

(15) Full-time experience - Employment, self-employment, or independent contracting for not less than thirty-two hours per week in the practice of consumer health, environmental health or sanitation.

(16) Natural Science - Branches of science such as physics, chemistry and biology that deal with matter, energy, and their interrelations and transformations or with objectively measurable phenomena.

(17) Preceptor - A teacher or tutor.

(18) Preceptorship - An arrangement where a novice is taught or tutored by an experienced person.

(19) Registered sanitarian - A department licensed public health professional qualified by specific education, specialized training and field experience to protect the health, safety and general welfare of the public from adverse environmental determinants.

(20) Registrant - A person licensed under the Act.

(21) Registration - The procedure by which the department accepts, processes, and approves applications for registration of sanitarians including the furnishing, replacement or duplication of certificates.

(22) Sanitarian-in-Training - A person meeting all the requirements for registration as a sanitarian except for the required experience.

(23) Scope of professional practice - Includes, but not limited to, evaluating, planning, designing, managing, organizing, enforcing, or implementing programs, facilities, or services that protect public health and the environment. The scope of practice also includes educating, communicating, and warning communities of factors that may adversely affect the general health and welfare. The scope of practice may be in the areas of food quality and safety, on-site wastewater treatment and disposal, solid and hazardous waste management, ambient and indoor air quality, drinking and bathing water quality, insect and animal vector control, recreational and institutional facility inspections, consumer health and occupational health and safety.

§265.143. Fees

(a) All fees shall be submitted in the form of a certified check, cashier's check or money order; checks from state agencies, municipalities, counties, or other political subdivisions of the state are also acceptable. All fees shall be made payable to the Texas Department of Health and are not refundable.

(b) The schedule of fees is as follows:

(1) application processing fee:

(A) sanitarian-in-training - $25; or

(B) registered sanitarian (including reciprocity) - $40;

(2) initial license fee:

(A) sanitarian-in-training (in effect for two years after date of issue) - $50; or

(B) registered sanitarian - $25

(3) Annual license renewal fee:

(A) sanitarian-in-training (one-time renewal for a two year period) - $50; or

(B) registered Sanitarian - $25;

(4) reinstatement (late) fee - $25;

(5) processing fee for upgrading from a sanitarian-in-training to a sanitarian - $40;

(6) license (framing size) or identification card (billfold size) replacement fee - $20;

(7) examination fee - $50 for a department exam or the actual cost of any prescribed exam; or

(8) reexamination fee - $50 for a department exam or the actual cost of any prescribed exam;

(9) continuing education course review fee - $25 per course. The fees is for the department's review of the continuing education course material to establish compliance with these rules. The department, federal agencies, accredited institutions of higher education, and other state agencies are exempt from this fee, if all other requirements for course content and records are met.

(c) The month the initial license is issued will establish the anniversary date for future annual license renewal.

(d) Registered sanitarians failing to renew their licenses after final adoption of these rules must pay the reinstatement fee. The month the renewal license is issued will establish the anniversary date for future renewal license.

(e) On and after September 1, 2000, renewal licensing as a sanitarian will be on an anniversary date established by the department. Registrants not already issued an anniversary date for future license renewal will receive a renewal notice establishing their anniversary date and the renewal license fee due to the department. Registrants with a September anniversary date must pay the annual renewal license fee. Registrants with an anniversary date of October or later must pay a renewal license fee of $2.00 for each month they will be registered prior to their anniversary date at which time they must pay the annual renewal license fee.

§265.144. Application Procedures.

(a) Purpose. The purpose of this section is to set the application requests and procedures for registration as a sanitarian. Applications may be submitted for registration as a sanitarian or sanitarian-in-training.

(b) Purpose. General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official department forms.

(2) The department must receive all required application materials at least 45 days prior to the date the applicant wishes to take the examination, including the application fee.

(3) An application not completed within 30 days after the date of the department's notice of deficiency may be voided.

(4) An application is not considered complete until the required prescribed examination has been taken by the applicant.

(c) General application materials. The application packet must contain the following items to be complete:

(1) specific information regarding personal data, social security number (used to coordinate information with the applicant's college or university transcript), birth date, place of employment, other state registrations and certifications held, and misdemeanor or felony convictions;

(2) the date of the application;

(3) the educational qualifications of the applicant (graduation with a bachelor's degree from an accredited college or university that included not less than fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural sci-

ence. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science);

(4) qualifying experience (not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation including training in the basic sciences and/or public health to the extent deemed necessary by the Board in order to effectively serve as a registered sanitarian);

(5) a statement that the applicant has read Texas Civil Statutes, Article 4477-3 (Act) and these rules and agrees to abide by them;

(6) a statement that the applicant shall return to the department any license upon the expiration and nonrenewal, revocation, or suspension of the license;

(7) a statement that the applicant understands that fees submitted in the registration process are nonrefundable unless the processing time is exceeded without good cause as set out in §265.156 of this title (relating to Processing Applications);

(8) a statement that the applicant understands that materials submitted in the registration process become the property of the department and are not returnable;

(9) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application, or denial or or the revocation of any license issued; and

(10) the signature of the applicant which has been dated and notarized.

(d) Documents. The following documents shall be submitted:

(1) a full-face photo of a minimum size of 1-1/2 by 1-1/2 inches signed on the reverse side with the applicant's signature as it appears on the application. The photograph must have been taken within the two-year period prior to application; and

(2) an official transcript from an accredited college or university (sealed as a true and exact copy of an unaltered original) showing graduation with a bachelor's degree from an accredited college or university that included not less than fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science; and

(3) proof of the successful completion of the prescribed examination if administered by the department's designee.

§265.145. Qualifications for Registration as a Sanitarian or Sanitarian-in-Training

(a) The purpose of this section is to set out the qualifications of applicants for examination, registration, and licensing as a sanitarian or sanitarian-in-training.

(b) An applicant who qualifies under Texas Civil Statutes, Article 4477-3, §5(a) (Act), must have:

(1) graduated with a bachelor's degree from an accredited college or university that included not less than fifteen semester hours or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science;

(2) not less than two years of full-time experience in the fields of consumer health, environmental health or sanitation which may include the following:

(A) regulatory inspections or evaluations of retail food establishments; retail grocery stores; food warehousing facilities; food manufacturing facilities; food service at special events; mobile food service vehicles and facilities; producer dairy farms; dairy product manufacturing facilities; frozen dessert manufacturing facilities; on site sewage facilities; asbestos abatement processes; mass gathering events; industrial pretreatment processes (sewage); municipal sewage facilities and wastewater plants; public and semi-public swimming pools; child care facilities; long term care facilities; hospitals; correctional facilities; public and private schools; youth camps; and recreational areas for children; radiation hazards, including lasers and microwaves; and private and public water systems;

(B) site evaluation and design of on-site sewage system facilities as specified in Texas Natural Resource Conservation Commission rules;

(C) Hazard Analysis and Critical Control Point (HACCP) systems or processes;

(D) investigation of food borne illnesses; water borne illnesses; vector borne illnesses; zoonotic illnesses; food product contamination or adulteration; the environmental conditions surrounding reported elevated blood lead in children and adults; consumer, governmental agency or industry complaints; and animal bites;

(E) performance of vector control activities related to mosquitoes, flies and rodents; environmental assessments; code enforcement activities; and food handler or certified food service manager training;

(F) first responder to hazardous material spills and incidents; and natural and man made disasters; or

(G) regulatory review of plans and specifications for food establishments; plans and specifications for public, semi-public and private swimming pools; and plans and specifications for on-site sewage systems facilities;

(3) regularly assigned duties which must have included consumer health, environmental health or sanitation. The applicant need not have had the titles " sanitarian" or "sanitarian-in-training";

(4) not less than two years of experience gained under the preceptorship of a department registered sanitarian or a person possessing equal qualifications, as determined by the department. This preceptor is required to verify and affirm the experience of the applicant;

(5) passed the prescribed examination as set forth in §265.148 of this title (relating to Examinations);

(6) filed the documents and application required by §265.144 of this title (relating to Application Procedures); and

(7) paid the appropriate fees.

(c) An applicant who qualifies under Texas Civil Statutes, Article 4477-3, §5(b) (Act), must have:

(1) graduated with a bachelor's degree from an accredited college or university that included not less than fifteen semester hours

or its equivalent in basic or natural science or any combination of basic or natural science. Effective September 1, 2001, the educational requirements for registration as a sanitarian will require graduation with a bachelor's degree from an accredited college or university with not less than thirty semester hours or its equivalent in a basic or applied science;

(2) passed the prescribed examination as set forth in §265.148 of this title;

(3) completed a preceptor contract on department forms that includes:

(A) the name and signature of each preceptor and the name and signature of the sanitarian-in-training;

(B) the registration number of each preceptor;

(C) the primary location and address where consumer health, environmental health or sanitation services are provided;

(D) a description of consumer health, environmental health or sanitation duties to be rendered by the sanitarian-in-training;

(E) a statement that each preceptor and the sanitarian-in-training have read and agree to adhere to the Act and this subchapter; and

(F) the date the preceptor and sanitarian-in-training signed the department's preceptor contract;

(4) filed the documents and application required by §265.144 of this title; and

(5) paid the appropriate fees.

(d) On proper application, the department may grant a license of registration to a licensee or registrant of another state, commonwealth, or territory of the United States that has requirements equivalent to or higher than those in effect in this state for the registration of a sanitarian or sanitarian-in-training.

§265.146. Educational Requirements

(a) Purpose. This section sets out the initial educational requirements for examination and registration as a sanitarian or sanitarian-in-training and the requirements for license renewal.

(b) Core educational requirements for initial registration include the following.

(1) Acceptable courses are air pollution; anatomy; animal science; bacteriology; biochemistry; biology; biomedical science; biophysics (no more than six semester hours or its equivalent); biostatistics; botany; cell physiology; chemical engineering; chemistry; community health; computer science (no more than six semester hours or its equivalent); dairy science; ecology; embryology (no more than six semester hours or its equivalent); entomology; environmental health; environmental science; environmental diseases; environmental law; epidemiology; food bacteriology; food science; food technology; genetics; geophysics; geology; hazardous waste; histolgy; hydrogeology; hydrology; industrial hygiene; infectious diseases; limnology; mathematics (beyond algebra - no more than six semester hours or its equivalent); courses taken in an accredited allopathic or osteopathic school of medicine (no more than six semester hours or its equivalent); meteorology (no more than six semester hours or its equivalent); microbiology; molecular biology; occupational health; occupational safety; parasitology; pathology; physics (no more than six semester hours or its equivalent); physiology; plant toxonomy; public health; public health education (no more than six semester hours or its equivalent); public health law; radiological health sanitary engineering; sewage sanitation soil science; statistics (no more than six semester hours or its equivalent); toxicology; vector control; veterinary medical courses (no more than six semester hours or its equivalent) ; veterinary public health; virology; water quality; and zoology.

(2) Courses considered not acceptable are anthropology; archaelogy; astronomy; education; geography; government; history; kinesiology; languages; physical education; psychology; and sociology.

(3) Courses not listed may be submitted for consideration for acceptance by the department or the Sanitarian/Code Enforcement Officers' Advisory Committee.

§265.147. Continuing Education Requirements

(a) Each registered sanitarian licensed by the department must meet the renewal requirements set out in this section.

(b) Each registered sanitarian must obtain and show proof of not less than twelve continuing education units related to the fields of consumer health, environmental health or sanitation within the twelve months preceding renewal of their license.

(c) Department approved continuing education activities for license renewal include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences; or

(10) other activities approved by the department.

(d) Only continuing education activities approved by the department or its designee shall serve as a basis for license renewal. Training courses relating to the fields of consumer health, environmental health or sanitation approved by state and federal agencies will be accepted by the department. Course review and prior approval shall not be required for continuing education courses conducted by the department provided all other requirements for course content and records are met.

(e) Continuing education activities must meet the following criteria if they are to be approved for continuing education credit:

(1) the activity must have significant educational or practical content to maintain appropriate levels of competency;

(2) the activity must be conducted by an accredited college or university, a governmental agency, an association with a membership of 25 or more persons, or a commercial education business;

(3) the activity must have a record keeping procedure provided by the sponsor which includes a register of who took the course and the number of continuing education units earned;

(4) the sponsor must include procedures for verifying participant's attendance as well as comprehension of subject matter presented. These procedures may include, but are not limited to,

examinations, post-activity questionnaires, field demonstrations, in-class workbooks or handout materials, and/or question and answer periods to assure participant understanding of the subject matter;

(5) the activity must be at least fifty minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of fifty minutes per activity is permissible. No credit will be given for time used to promote the sponsor or other nonrelevant activities.

(6) the sponsor must certify the activity complies with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(f) To obtain department approval for a continuing education unit, the sponsor must submit:

(1) a completed department provided application form which includes name, address, and phone number of the sponsor and a contact person;

(2) a course outline or syllabus including the time scheduled for each topic to be covered, and a description of course content;

(3) the names, addresses, and phone numbers of the instructor(s), and their credentials;

(4) the dates, times, and locations of each activity;

(5) any additional information or material relevant to the activity which is requested by the department; and

(6) the application and information must be received by the department at least 90 days in advance of the first date of the activity. The department may waive the 90 day provision providing all other requirements are met.

(g) The department shall approve, reject, or request additional information within 30 days of receipt of the application.

(h) Each approved continuing education activity shall be sanctioned for three years from date of approval. Sponsors who wish to continue accreditation must file for renewal 90 days prior to the end of the three year period on a form provided by the department, which, in addition to the items listed in subsection (f) of this subsection, shall include:

(1) the sponsor's name, address, and phone number;

(2) the name of the activity and any changes in the activity; and

(3) any changes in the courses or the instructors and their credentials.

(i) Department personnel may audit for compliance all approved activities at no expense to the department.

(j) Documentation of continuing education activity shall be on a department approved activity roster form that includes the following:

(1) name, address, phone number, registered sanitarian license number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the department registered sanitarian. Continuing education units may also be on a department activity roster form;

(2) sponsors of approved continuing education activities shall:

(A) at the conclusion of the activity distribute to those registered sanitarians who have successfully completed the activity a certificate of completion which shall include the name of the sponsor, the date and name of the activity, and the continuing education units earned;

(B) maintain a roster on department provided forms or in an approved format. A copy of the roster and a report of the continuing education activity must be forwarded to the department within 14 days after the completion of an activity; and

(C) each registered sanitarian shall collect and keep certificates of completion of approved courses. These certificates of completion will be used to document a registered sanitarian attendance at approved courses. The department will conduct random audits for compliance with this requirement.

(k) Continuing education instructors must have one of the following credentials:

(1) teaching or work experience determined by the department to be sufficient;

(2) certification as a registered sanitarian by the department;

(3) instructors at the Texas Engineering Extension Service;

(4) hold a faculty position at an accredited college or university; or

(5) department personnel.

(l) A registered sanitarian may seek credit for a continuing education activity that has not been approved by the department. If approved, the department will assign the number of credits for the activity where:

(1) the activity met the following criteria:

(A) the activity contains course content equal to or exceeding department standards;

(B) the activity is sponsored by an institution of higher education, a regional association, a national association, or the state or federal government;

(C) the activity content is described, including the time allotted to each aspect of the activity, identification of sponsor, instructor's qualifications, instructor's name and address, proof of attendance, date, time and place of the activity; and

(D) the information required in subparagraphs (A) - (C) of this paragraph is submitted to the department within 30 days after completion of the activity.

(2) the activity is a course approved by a university, college, or other institution of higher education for credit and is in an area directly related to the activities of registered sanitarians, and the following criteria are met:

(A) the registered sanitarian provides the department with sufficient information describing activity and content including the time allotted to each aspect of the activity; identification of sponsor; instructor(s) name and address; proof of attendance, date, time, and place of activity; and

(B) the information required in subparagraph (A) of this paragraph is submitted to the department within 30 days after completion of the activity.

(m) Failure to comply with the annual continuing education contact hour requirements for the registered sanitarian license issued by the department will:

(1) result in suspension of a registered sanitarian license until the necessary credits for continuing education are successfully completed; and

(2) require the registered sanitarian to make application for registration as a sanitarian, if the registered sanitarian does not renew within one year after the original license expired.

(n) The department may deny, revoke, or refuse to renew approval for any or all courses of a sponsor if the sponsor fails to file a timely activity report, fails to provide or maintain the quality of activity approved by the department, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(o) A registered sanitarian or sponsor may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 30 days, shall be granted by the department if the registered sanitarian or sponsor files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

§265.148. Examinations

(a) Purpose. This section sets out provisions governing the administration, content, grading, and other procedures for examination for registration as a sanitarian and sanitarian-in-training.

(b) Examination. The examination shall consist of a written examination prescribed by the department under the supervision of a person or agency designated by the department.

(c) Application for examination.

(1) An applicant must file an application in accordance with §265.144 of this title (relating to Application Procedures).

(2) An applicant meeting the requirements of §265.145 of this title (relating to Qualifications for Registration as a Sanitarian or Sanitarian-in-Training) shall be approved to take the exam. The department will notify the applicant of his or her eligibility for examination. Applications that are incomplete or late may cause the applicant to miss the examination deadline. The notice shall include the examination registration form. The notice of eligibility for examination must be presented at the examination station prior to taking the examination.

(3) The examination registration form must be completed and returned to the department by the applicant with the required examination fee on or before the deadline set by the department.

(4) The examination will be conducted in the English language. The exam may be taken in an individual's native language if the individual notifies the department at least 60 days in advance. The applicant will be responsible for any fee or consideration to be paid to an acceptable interpreter and/or translator whose services are necessary for the examination. The interpreter or translator must be acceptable to the department or the department's designee.

(5) An applicant with a disability must inform the department of special accommodations needed for the examination at least 20 days prior to the exam. The documentation of disability on a form provided by the department shall be completed and signed by a person familiar with the applicant's disability and the appropriate accommodations needed. The person should be a physician, psychologist, rehabilitation counselor, educator or other professionally qualified individual.

(d) Date and location. Examinations will be held on dates and in locations determined and announced by the department or the department's designee.

(e) Grading. Examinations will be graded by the department or the department's designee.

(f) Notice. The department shall notify each examinee of the results of the examination within 30 days of the date of the examination. However, if an examination is graded or reviewed by a national testing service, the department shall notify examinees of the results of the examination not later than the 14th day after the day on which the department receives the results from the testing service. If the notice of the examination results will be delayed for longer than 90 days after the examination date, the department shall notify the examinee of the reason for the delay before the 90th day.

(g) Failures.

(1) If requested in writing by a person who fails the prescribed examination administered under the Act, the department shall furnish the person with an analysis of the person's performance on the examination. The written request must be submitted within 21 days from the date of the notification of failure. The department will respond to the request within 30 working days.

(2) If requested in writing by a person who fails the examination administered under the Act, the department shall allow the person to review the examination under the supervision of a department appointed proctor. The written request must be submitted within 21 days from the date of the notification of failure. All reviews are subject to the department's security requirements. Textbooks and other references may not be used and persons other than the applicant and department personnel may not be present during the review. The department shall set a date and hour within a reasonable time when the examination may be reviewed. The appointment shall be scheduled during regular business hours and in the office of the Sanitarian Registration Program. The department will respond to the request within 30 working days.

(3) A person who fails the examination may retest after ninety days and after paying another examination fee. All retests must be completed not later than one year after the initial date of examination eligibility or the person's application will be voided.

(h) Failure to apply. Any applicant who fails to apply for and take the examination within a period of three months after an examination approval notice is mailed by the department will have such approval voided by the department.

(i) Refunds. No refunds will be made to examination candidates who fail to appear for an examination unless an extenuating circumstance exists such as illness, death, injury or a vehicular accident.

§265.149. Application Approval or Disapproval

(a) The department shall approve or disapprove all applications received for registration as a sanitarian and sanitarian-in-training.

(b) Notices of application approval, disapproval, or deficiency shall be in accordance with §265.156 of this title (relating to Processing Applications).

(c) An application for registration shall be disapproved if the person has:

(1) not met the requirements in §265.145 of this title (relating to Qualifications for Registration as a Sanitarian or Sanitarian-in-Training);

(2) failed to pass the examination prescribed by the department as set out in §265.148 of this title (relating to Examinations);

(3) failed to or refused to properly complete or submit any application form, documents, or fee or deliberately presented false information on any form or document required by the department;

(4) violated any provisions of the Texas Civil Statutes, Article 4477-3 (Act) or this subchapter;

(5) been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a registered sanitarian or sanitarian-in-training as set out in§265.154 of this title (relating to Registration of Persons with Criminal Backgrounds); or

(6) had a certification or registration to engage in sanitation or a related profession revoked by another licensing entity in this state or another state, commonwealth, or territory of the United States for any of the following reasons:

(A) unprofessional conduct;

(B) fraud, deceit, or negligence; or

(C) misconduct in the practice of sanitation or a related profession.

(d) If after review, the department determines that the application should not be approved, the administrator shall give the applicant written notice of the reason for the decision and provide notice and an opportunity for a fair hearing under 25 TAC §1.51 et seq.

§265.150. Sanitarian-in-Training Preceptorship.

(a) Preceptorship. The purpose of this section is to set out the nature and the scope of the supervision provided for a sanitarian-in-training.

(1) Preceptorship contract. A sanitarian-in-training must have a contract on department forms on file with the department. A sanitarian-in-training must work in the field of consumer health, environmental health or sanitation. Requirements of preceptorship are as follows.

(A) The preceptor must have adequate training, knowledge, and skill to consult competently concerning consumer health, environmental health or sanitation services which the sanitarian-in-training undertakes.

(B) The preceptor must be a department registered sanitarian or person of equivalent qualifications.

(C) The preceptor may not oversee more than three sanitarians-in-training at any given time.

(D) The sanitarian-in-training must clearly advise his or her employer of the supervised status and must provide the name, address, and telephone number of the preceptor to the employer.

(E) The preceptor may not be employed by the sanitarian-in-training, may not lease or rent space from the sanitarian-in-training, and must avoid any dual relationship with the sanitarian-in-training which could impair the preceptor's judgment.

(F) The preceptor need not be the sanitarian-in-training's work supervisor.

(G) The preceptor must be available for discussion of any work related problems encountered by the sanitarian-in-training.

(H) The preceptor shall provide an alternate registered sanitarian to provide mentoring for the sanitarian-in-training in circumstances when the preceptor is not available for more than four continuous weeks.

(2) Payment. A sanitarian-in-training may not pay or otherwise compensate the preceptor for supervision.

(b) Required preceptor. A sanitarian-in-training must be under the preceptorship of a sanitarian registered in the State of Texas during the times the sanitarian-in-training is engaged in consumer health, environmental health or sanitation services. Time shall not be counted toward the two years of full-time experience required for registration as a sanitarian unless the sanitarian- in-training had a qualified preceptor.

(c) Upgrading to a registered sanitarian. The purpose of this subsection is to set out the procedure to upgrade a registration from a sanitarian-in-training to a sanitarian.

(1) The sanitarian-in-training shall submit to the department a properly completed verification of experience documentation form as set out in §265.144 of this title (relating to Application Procedures) with a written request to upgrade the registration.

(2) After review of all application materials, the program administrator shall notify the sanitarian-in-training of eligibility for registration as a sanitarian.

(3) The sanitarian-in-training shall submit the registration fee and form for registration as a sanitarian.

(4) If the sanitarian-in-training does not meet the requirements for registration as a sanitarian, the program administrator shall notify the sanitarian-in-training in writing of the reasons for deficiency and the additional experience or documentation needed to meet the minimum requirements for registration as a sanitarian.

(d) Time Limits. A sanitarian-in-training license is valid for two years from the date the license is issued. A sanitarian-in-training who fails to accrue at least two years of experience in consumer health, environmental health or sanitation may renew their license once for a period not to exceed two years after paying a renewal fee.

§265.151. Sanitarian Registration Procedures.

(a) Purpose. The purpose of this section is to set out the sanitarian registration procedures of the department.

(b) Issuance of licenses.

(1) The department will send each applicant whose application has been approved and who has passed the examination a sanitarian license and an identification card containing the license number.

(2) A license issued under this Act is valid for one year and may be renewed annually on payment of the required renewal fee and documentation of the required continuing education units.

(3) Any license or identification card remains the property of the department and must be surrendered on demand by the department.

(c) Replacement license. The department will replace a lost, damaged, or destroyed license or identification card upon written request from a registrant and payment of the license or identification card replacement fee. The request shall include a statement describing the loss or destruction of the original license or identification card or be accompanied by the damaged license or card.

(d) Name change. Before another license or identification card will be issued by the department due to a name change, the registrant must document the name change with a duly executed affidavit provided by the department and a notarized copy of a marriage license, court decree evidencing such change, or a copy of a Social Security card reflecting the new name. The registrant

shall return any previously issued license or identification card and remit the license or identification card replacement fee as set out in §265.143 of this title (relating to Fees).

§265.152. Sanitarian License Renewal.

(a) Purpose. The purpose of this section is to set forth the rules governing license renewal for sanitarians.

(b) General.

(1) A registrant must renew the license annually.

(2) Each registrant is responsible for renewing the license before the expiration date and shall not be excused from paying the renewal fee. Failure to receive notification from the department prior to the expiration date of the license will not excuse the sanitarian from renewing.

(3) The department will not renew the license of a registrant who is in violation of the Act or this subchapter at the time of application for renewal.

(4) Notices of renewal approval, disapproval, or deficiency shall be in accordance with §265.156 of this title (relating to Processing Applications).

(5) The department shall deny renewal of the license of the registrant if renewal is prohibited by the Education Code, §57.491.

(c) License renewal.

(1) At least 45 days prior to the expiration date of a person's license, the department will send notice to the registrant at the address in the department's records of the expiration date of the license, the amount of the renewal fee due, and a renewal form which the registrant must complete and return to the department with the required renewal fee.

(2) The renewal form shall require the provision of the preferred mailing address, primary employment address and telephone number, category of employment, and a statement of all misdemeanor and felony offenses for which the registrant has been convicted.

(3) A registrant has renewed the registration when the registrant has mailed the renewal form, proof of completion of continuing education units, and the required renewal fee to the department prior to the expiration date of the license. The postmark date shall be considered as the date the renewal was filed.

(4) The department shall issue a registrant who has met all requirements for renewal a license and identification card.

(d) Late Renewal Reinstatement.

(1) The department shall inform a person who has not renewed a registration within 30 working days following the expiration of the license of the amount of the renewal fee and reinstatement fee required for renewal and the date the license expired.

(2) A registered sanitarian whose license has expired for not more than one year may renew the license by submitting to the department the license renewal form, the renewal fee, proof of completion of continuing education units, and the reinstatement fee. The renewal must be mailed to the department not more than one year after the expiration date of registration. The postmark date shall be considered as the date the renewal was filed.

(3) A person whose license has been expired for more than one year may not renew. The person may apply for a new license by meeting the then current requirements and procedures for registration as a sanitarian.

(e) License Expiration.

(1) A registered sanitarian whose license has expired may not claim to be a sanitarian or sanitarian-in-training or use the titles " sanitarian" or "sanitarian-in-training".

(2) A registered sanitarian who fails to renew a license is required to surrender the license to the department not later than after 90 days from expiration of the license or prior to that date at the request of the department.

(f) Military duty. If a registrant fails to timely renew a registration because the registrant is or was on active duty with the uniformed services of the United States of America serving outside the State of Texas, the registrant may renew the license in accordance with this subsection.

(1) Renewal of the license may be requested by the registrant, the registrant's spouse, or an individual having power of attorney from the registrant. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after the expiration of the license.

(3) A copy of the official orders or other official documentation showing that the registrant is or was on active duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the registrant shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(5) A registrant renewing under this subsection shall only pay the applicable renewal fee. There will be no reinstatement fee charged.

§265.153. Grounds for Suspension or Revocation.

A registration or license may be suspended or revoked for the following reasons:

(1) fraud or deceit in obtaining registration or a license including:

(A) presenting false information to the department on any initial application or document; or

(B) presenting false information to the department on any renewal document;

(2) gross negligence:

(A) as determined by the final judgment of a civil or criminal lawsuit; or

(B) as defined by case law;

(3) incompetency including:

(A) a determination of mental incompetency by a court;

(B) commitment, emergency detention, or admission to a mental health facility under the Texas Mental Health Code; or

(C) any mental or physical condition which does not allow performance with reasonable skill or safety; or

(4) misconduct in the practice of professional sanitation including:

(A) presenting false information to the department in any investigation or disciplinary proceeding of the department;

(B) making deceptive, false, or misleading statements concerning:

(i) qualifications or credentials;

(ii) advertising for the registrant's services; or

(iii) the registrant's practice;

(C) failing to comply with an order issued by the department;

(D) consuming alcohol or taking controlled substances not prescribed by a licensed physician while on active duty as a sanitarian;

(E) aiding or abetting the practice of an unlicensed person when that person is required to be registered under the Texas Civil Statutes, Article 4477-3;

(F) verbally, physically, or sexually abusing or attempting to abuse an individual while on active duty as a sanitarian;

(G) falsifying reports made as a sanitarian;

(H) accepting or offering to accept any form of compensation for:

(i) not reporting a hazard as required; or

(ii) allowing a person not to correct a hazard found by the sanitarian while on duty; or

(I) while on duty as a sanitarian failing to report a crime when the report is required by law.

§265.154. Registration of Persons with Criminal Backgrounds.

(a) This section sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain registration as a sanitarian or sanitarian-in-training.

(b) Criminal convictions which directly relate to the occupation of sanitarian shall be considered by the department as follows.

(1) The department may suspend or revoke an existing registration, disqualify a person from receiving a license, or deny a person the opportunity to be examined for a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities under that registration in accordance with Texas Civil Statutes, Article 6252-13c, Section 4.

(2) In considering whether a criminal conviction directly relates, the department shall consider:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a license as a sanitarian;

(C) the extent to which a license migh
e type as that in which the person previously had been involved; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a sanitarian or sanitarian-in-training. In determining the present fitness of a person, the department shall consider the evidence described in Texas Civil Statutes, Article 6252-13c, §4(c).

(c) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to perform or to be unfit for license:

(1) the misdemeanor of violating the Texas Civil Statutes, Article 4477-3;

(2) a conviction relating to deceptive business practices;

(3) a misdemeanor or felony offense involving:

(A) bribery;

(B) forgery;

(C) tampering with a governmental record;

(D) perjury;

(E) burglary; or

(F) arson;

(4) a conviction for practicing another profession without a certification, license, or registration required by state or federal law;

(5) a conviction relating to delivery, possession, manufacturing, or use of:

(A) controlled substances; or

(B) dangerous drugs;

(6) a conviction involving moral turpitude;

(7) a misdemeanor or felony offense under various titles of the Texas Penal Code:

(A) Title 5 concerning offenses against the person;

(B) Title 7 concerning offenses against the property;

(C) Title 9 concerning offenses against public order and decency;

(D) Title 10 concerning offenses against public health, safety, and morals; or

(E) Title 4 concerning offenses of attempting or conspiring to commit any of the offenses in this subsection; and

(8) other misdemeanors and felonies which indicate an inability or tendency for the person to be unable to perform as a registrant or to be unfit for licensure.

(d) Procedures for revoking, suspending, or denying a license to persons with criminal backgrounds shall be as follows.

(1) The administrator shall give a written notice to the person that the department proposes to deny the application or suspend or revoke the registration in accordance with the provisions of §265.155 of this title (relating to Violations, Complaints, Investigations and Disciplinary Actions).

(2) In accordance with Texas Civil Statutes, Article 6252-13d, if the department denies, suspends, or revokes an application or registration under this section, the administrator shall give the person written notice:

(A) of the reasons for the decision;

(B) that the person, after exhausting administrative appeals, may file an action in a district court of Travis County, for review of the evidence presented to the department and its decision;

(C) that the person must begin the judicial review by filing a petition with the court within 30 days after the department's action is final and appealable; and

(D) of the earliest date that the person may appeal.

§265.155. Violations, Complaints, Investigations, and Disciplinary Actions.

(a) Purpose. The purpose of this section is to set out:

(1) violations and prohibited actions under the Texas Civil Statutes, Article 4477-3, and this chapter;

(2) procedures concerning complaints alleging violations of the Act or this chapter; and

(3) department actions against a person when violations have occurred.

(b) Compliance. A registrant or applicant must comply with the Act and this chapter.

(c) Filing complaints.

(1) Any person may complain to the department alleging that a sanitarian or a sanitarian-in-training has violated the Act or this chapter.

(2) A person wishing to file a complaint against a sanitarian or a sanitarian-in- training shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the administrator's office.

(3) Upon receipt of a complaint, the administrator shall send to the complainant an acknowledgment letter and the department's complaint form, which the complainant must complete and return to the administrator before further action can be taken. If the complaint is made by visit to the administrator's office, the form may be given to the complainant at that time; however, it must be completed and returned to the department before further action can be taken.

(4) Anonymous complaints may be investigated by the department if the complainant provides sufficient information to conduct an investigation.

(d) Investigation of complaints.

(1) The department may investigate any complaint.

(2) If the administrator determines that the complaint does not come within the department's jurisdiction, the administrator shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.

(3) The department shall notify the parties quarterly as to the status of the complaint until its final disposition.

(4) If the administrator determines that there are insufficient grounds to support the complaint, the program administrator shall dismiss the complaint and give written notice of the dismissal to the registrant or person against whom the complaint has been filed and the complainant.

(5) If the administrator determines that there are sufficient grounds to support the complaint, the administrator may propose to deny, suspend, revoke, or not renew a license.

(e) Disciplinary actions.

(1) The department may deny an application or license renewal or suspend or revoke a license.

(2) Prior to institution of formal proceedings to revoke or suspend a license, the department shall give written notice to the registrant of the facts or conduct alleged to warrant revocation or suspension, and the registrant shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.

(3) If denial, revocation, or suspension of a license is proposed, the department shall give written notice to the applicant or registrant that the applicant or registrant must request, in writing, a fair hearing within 20 days of receipt of the notice. The notice shall state the basis for the proposed action. Receipt of the notice is presumed to occur on the 5th day after the notice is mailed to the last address known to the department unless another date is reflected on a United States Postal Service return receipt.

(4) If no timely request for a hearing is received, the applicant or registrant is deemed to have waived the hearing and be in agreement with the allegations and proposed action.

(5) If the applicant or registrant fails to appear or be represented at the scheduled hearing, the person is deemed to be in agreement with the allegations and proposed action and to have waived the right to a hearing.

(6) If the hearing is waived, the application or registration shall be denied, suspended, or revoked by an order of the commissioner of health.

(7) The fair hearing shall be conducted according to the hearing procedures in§265.154 of this title (relating to Registration of Persons with Criminal Backgrounds), if applicable and the department's fair hearing procedures in 25 TAC §1.51 et seq.

(f) Denial, suspension, or revocation.

(1) The department shall suspend or revoke a license issued under this Act if the department determines that the license holder engaged in fraud or deceit in obtaining a license or is grossly negligent, incompetent, or has engaged in misconduct in professional practice.

(2) If the department suspends or revokes a license, the suspension or revocation shall remain in effect until the administrator or the department determines that the reason for suspension or revocation no longer exists unless an order specifies a time period. The administrator or the department shall investigate prior to making a determination.

(3) During the time of suspension, the suspended license holder shall return his or her license and identification card to the department.

(4) If the suspension overlaps a license renewal date, the suspended license holder may comply with the renewal procedures in this chapter; however, the department may not renew the license until the administrator determines that the reason for suspension no longer exists or the period of suspension is completed.

(5) If the department suspends or revokes a license, a person may not reapply for a period of one year after suspension or three years after revocation. The department may refuse to issue a license if the reason for suspension or revocation continues to exist.

(6) Upon revocation, a license holder shall return the license and identification card to the department.

§265.156. Processing Applications

(a) Time periods. The department shall comply with the following procedures in processing applications for registration and renewal.

(1) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been

approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(A) letter of acceptance of application for license of registration or sanitarian- in-training license - 30 working days;

(B) letter of application or renewal deficiency - 30 working days; and

(C) issuance of registration renewal or letter of renewal deficiency - 30 working days.

(2) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. The time periods are as follows:

(A) letter of approval for examination - 20 working days;

(B) initial letter of approval for registration - 30 working days;

(C) letter of denial of registration - 30 working days; and

(D) issuance of registration renewal - 10 working days.

(b) Reimbursement of fees.

(1) In the event an application is not processed in the time periods stated in subsection (a) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process and to withdraw the application. Application for reimbursement shall be made to the administrator. If the administrator does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(2) Good cause for exceeding the time period is considered to exist if the number of applications for registration and registration renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; if another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

(c) Appeal. If a request for reimbursement under subsection (b) of this section is denied by the administrator, the applicant may appeal to the commissioner of the department for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The commissioner shall provide written notice of the decision to the applicant and the administrator. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made. The decision of the commissioner is final and the applicant is not entitled to a hearing for reimbursement.

(d) Contested cases. The time periods for contested cases related to the denial of registration or registration renewals are not included within the time periods stated in subsection (a) of this section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable.

§265.157. Exemptions

(a) Those persons such as physicians, dentists, engineers, and doctors of veterinary medicine, who are duly licensed by another official state licensing agency, who by nature of their employment or duties might be construed to come under the provisions of this Act, shall be exempt from the provision of this Act.

(b) This state or a political subdivision of this state is not required to employ a person registered under this Act if the state or political subdivision engages in sanitation. However, if this state or a political subdivision of the state employs a person who uses the title "sanitarian", or uses any title containing the word "sanitarian," the person must be registered under this Act.

§265.158. Advertising.

(a) A registrant shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(b) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(1) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(2) makes a customer/client likely to create an unjustified expectation about the results of a service or procedure;

(3) compares a professional's service with another professional's services unless the comparison can be factually substantiated;

(4) causes confusion or misunderstanding as to the credentials, education, or registration of a professional; or

(5) advertises or represents in the use of a professional name, a title, or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(c) A registrant shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(1) on each written contract for services of a registrant; or

(2) on a sign prominently displayed in the primary place of business of each registrant; or

(3) in a bill for services provided by a registrant to a client or third party.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907899
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Chapter 289. RADIATION CONTROL

Subchapter E. REGISTRATION REGULATIONS

25 TAC §289.231

The Texas Department of Health (department) proposes new §289.231, concerning general provisions and standards for protection against machine-produced radiation.

The new section consolidates general provisions and standards for protection against machine-produced radiation that are currently combined with similar requirements for radioactive material in §289.201 of this title (relating to General Provisions) and §289.202 of this title (relating to Standards for Protection Against Radiation Control). The similar requirements for radioactive materials are much lengthier and more complex. Therefore, separating and consolidating these requirements for machine-produced radiation provides for a more efficient rule and less burden on the registrants required to comply with these requirements. In addition to consolidation of requirements, the new section includes clarification of several definitions. Language is added to clarify that persons who receive, possess, use, or acquire radiation machines prior to receiving a certificate of registration are also subject to the requirements in this chapter. The language that allows the department to make exemptions to the requirements of this chapter is revised to reflect changes made as a result of legislation in House Bill 1172 passed by the 76th Legislature. Language that specifies the department may enter public or private property to determine compliance with department rules and orders is added. Several of the routine inspection intervals are modified based upon the department's evaluation of compliance history. Training requirements for department inspectors of lasers are added. The condition requiring monitoring of radiation exposures to minors is modified. The condition requiring monitoring of radiation exposures to a declared pregnant woman is modified and clarified to state that the dose limit requiring monitoring for a declared pregnant woman is applicable only for the nine-month gestation period. Other minor grammatical changes are made to the section for clarification.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be to ensure continued protection of the public and workers from unnecessary exposure to machine-produced radiation. There will be no economic effects on micro-businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the new section as proposed. There is no anticipated impact on local employment. The new section consolidates and clarifies requirements that currently exist in other sections. Because the amendment imposes no additional requirements such as record keeping, regulatory limits, procedures, or processes, there are no economic effects associated with the section as proposed.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 10:30 a.m., Friday, December 17, 1999, in Conference Room S402, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new section affects Health and Safety Code, Chapter 401 and Chapter 12.

§289.231. General Provisions and Standards for Protection Against Machine-Produced Radiation.

(a) Purpose.

(1) This section establishes standards for protection against ionizing radiation resulting from the use of radiation machines.

(2) The requirements in this section are designed to control the receipt, possession, use, and transfer of radiation machines by any person so the total dose to an individual, including doses resulting from all sources of radiation other than background radiation, does not exceed the standards for protection against radiation prescribed in this section. However, nothing in this section shall be construed as limiting actions that may be necessary to protect health and safety in an emergency. A person who receives, possesses, uses, owns, or acquires radiation machines prior to receiving a certificate of registration is subject to the requirements of this chapter.

(b) Scope.

(1) Except as specifically provided in other sections of this chapter, this section applies to persons who receive, possess, use, or transfer radiation machines. The dose limits in this section do not apply to doses due to background radiation, to exposure of patients to radiation for the purpose of medical diagnosis or therapy, to exposure from individuals administered radioactive material and released in accordance with this chapter, or to voluntary participation in medical research programs. However, no radiation may be deliberately applied to human beings except by or under the supervision of an individual authorized by and licensed in accordance with Texas' statutes to engage in the healing arts.

(2) Registrants who are also licensed by the agency to receive possess, use, and transfer radioactive materials must also comply with the requirements of §289.201 of this title (relating to General Provisions) and §289.202 of this title (relating to Standards for Protection Against Radiation).

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context clearly indicates otherwise.

(1) Absorbed dose - The energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the gray (Gy) and the rad.

(2) Adult - An individual 18 or more years of age.

(3) Agency - The Texas Department of Health.

(4) Agreement State - Any state with which the United States Nuclear Regulatory Commission (NRC) has entered into an effective agreement under Section 274b. of the Atomic Energy Act of 1954, as amended (73 Stat. 689).

(5) As low as is reasonably achievable (ALARA) - Making every reasonable effort to maintain exposures to radiation as far below the dose limits in this chapter as is practical, consistent with the purpose for which the registered activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and radiation machines in the public interest.

(6) Background radiation - Radiation from cosmic sources; non-technologically enhanced naturally occurring radioactive material, including radon, except as a decay product of source or special nuclear material, and including global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the registrant. "Background radiation" does not include radiation from sources of radiation regulated by the agency.

(7) Certificate of registration - A form of permission given by the agency to an applicant who has met the requirements for registration or mammography system certification set out in the Act and this chapter.

(8) Certification of mammography systems (state certification) - A form of permission given by the agency to an applicant who has met the requirements for mammography system certification set out in the Act and this chapter.

(9) Chiropractor - An individual licensed by the Texas State Board of Chiropractic Examiners, with license in good standing.

(10) Collective dose - The sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(11) Declared pregnant woman - A woman who has voluntarily informed the registrant, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman voluntarily withdraws the declaration in writing or is no longer pregnant.

(12) Deep dose equivalent (DDE), that applies to external whole body exposure - The DE at a tissue depth of 1 centimeter (cm) (1,000 milligrams per square centimeter (mg/cm^2)).

(13) Dentist - An individual licensed by the Texas State Board of Dental Examiners, with license in good standing.

(14) Dose - For external exposure to x-ray radiation from radiation machines, a generic term that means absorbed dose, DE, or total effective dose equivalent. For purposes of this chapter, "radiation dose" is an equivalent term.

(15) Dose equivalent (DE) - The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of DE are the sievert (Sv) and rem.

(16) Dose limits - The permissible upper bounds of radiation doses established in accordance with this chapter. For purposes of this chapter, "limits" is an equivalent term.

(17) Dosimetry processor - A registrant that processes and evaluates personnel monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(18) Embryo/fetus - The developing human organism from conception until the time of birth.

(19) Entrance or access point - Any opening through which an individual or extremity of an individual could gain access to radiation areas or to radiation machines. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(20) Exposure - The quotient of dQ by dm where "dQ" is the absolute value of the total charge of the ions of one sign produced in air when all the electrons (negatrons and positrons) liberated by photons in a volume element of air having mass "dm" are completely stopped in air. The SI unit of exposure is the coulomb per kilogram (C/kg). The roentgen is the special unit of exposure. For purposes of this chapter, this term is used as a noun.

(21) Exposure rate - The exposure per unit of time.

(22) External dose - That portion of the DE received from any source of radiation outside the body.

(23) Extremity - Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

(24) Gray (Gy) - The SI unit of absorbed dose. One gray is equal to an absorbed dose of 1 joule per kilogram (J/kg) or 100 rad.

(25) High radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving a DE in excess of 0.1 rem (1 millisievert (mSv)) in one hour at 30 cm from any source of radiation or from any surface that the radiation penetrates.

(26) Human use - For exposure to x-ray radiation from radiation machines, the external administration of radiation to human beings for healing arts purposes or research and/or development specifically authorized by the agency.

(27) Individual - Any human being.

(28) Individual monitoring - The assessment of DE to an individual by the use of:

(A) individual monitoring devices; or

(B) survey data.

(29) Individual monitoring devices - Devices designed to be worn by a single individual for the assessment of DE. For purposes of this chapter, "personnel dosimeter" and "dosimeter" are equivalent terms. Examples of individual monitoring devices are film badges, thermoluminescence dosimeters (TLDs), optically stimulated luminescence dosimeters (OSLs), pocket ionization chambers (pocket dosimeters), and electronic personal dosimeters.

(30) Inspection - An official examination and/or observation including, but not limited to, records, tests, surveys, and monitoring to determine compliance with the Act and rules, orders, requirements, and conditions of the agency.

(31) Ionizing radiation - Any electromagnetic or particulate radiation capable of producing ions, directly or indirectly, in its passage through matter. Ionizing radiation includes gamma rays and x rays, alpha and beta particles, high speed electrons, neutrons, and other nuclear particles.

(32) Lens dose equivalent (LDE) - The external DE to the lens of the eye at a tissue depth of 0.3 cm (300 mg/cm^2).

(33) License - A form of permission given by the agency to an applicant who has met the requirements for licensing set out in the Act and this chapter.

(34) Licensed material - Radioactive material received, possessed, used, or transferred under a general or specific license issued by the agency.

(35) Licensee - Any person who is licensed by the agency in accordance with the Act and this chapter.

(36) Licensing state - Any state with rules equivalent to the Suggested State Regulations for Control of Radiation relating to, and having an effective program for, the regulatory control of naturally occurring or accelerator-produced radioactive material (NARM) and has been designated as such by the Conference of Radiation Control Program Directors, Inc.

(37) Lost or missing radiation machine(s) - A radiation machine(s) whose location is unknown.

(38) Machine-produced radiation - A stimulated emission of radiation from a manufactured product or device or component part of a manufactured product or device that has an electronic circuit that during operation can generate or emit a physical field of radiation.

(39) Manufacture - To fabricate or mechanically produce.

(40) Member of the public - Any individual, except when that individual is receiving an occupational dose.

(41) Minimal threat radiation machines - Those radiation machines capable of generating or emitting fields of radiation that, during the operation of which:

(A) no deliberate exposure of an individual occurs;

(B) the radiation is not emitted in an open beam configuration; and

(C) no known physical injury to an individual has occurred.

(42) Minor - An individual less than 18 years of age.

(43) Monitoring - The measurement of radiation and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(44) Occupational dose - The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to sources of radiation from licensed/registered and unlicensed/unregistered sources of radiation, whether in the possession of the licensee/registrant or other person. Occupational dose does not include dose received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, from voluntary participation in medical research programs, or as a member of the public.

(45) Particle accelerator - Any machine capable of accelerating electrons, protons, deuterons, or other charged particles in a vacuum and designed to discharge the resultant particulate or other associated radiation at energies usually in excess of 1 MeV.

(46) Person - Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, local government, any other state or political subdivision or agency thereof, or any other legal entity, and any legal successor, representative, agent, or agency of the foregoing, other than the NRC, and other than federal government agencies licensed or exempted by the NRC.

(47) Personnel monitoring equipment (See definition for individual monitoring devices.)

(48) Physician - An individual licensed by the Texas State Board of Medical Examiners, with license in good standing.

(49) Podiatrist - An individual licensed by the Texas State Board of Podiatric Examiners, with license in good standing.

(50) Public dose - The dose received by a member of the public from exposure to sources of radiation released by a licensee, or to any other source of radiation under the control of a licensee/registrant. It does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, or from voluntary participation in medical research programs.

(51) Quarter - A period of time equal to one-fourth of the year observed by the registrant, approximately 13 consecutive weeks, providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(52) Rad - The special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs per gram (erg/g) or 0.01 J/kg (0.01 gray).

(53) Radiation - One or more of the following:

(A) gamma and x rays; alpha and beta particles and other atomic or nuclear particles or rays;

(B) stimulated emission of radiation from any electronic device to such energy density levels as to reasonably cause bodily harm; or

(C) sonic, ultrasonic, or infrasonic waves from any electronic device or resulting from the operation of an electronic circuit in an electronic device in the energy range to reasonably cause detectable bodily harm.

(54) Radiation area - Any area, accessible to individuals, in which radiation levels could result in an individual receiving a DE in excess of 0.005 rem (0.05 mSv) in one hour at 30 cm from the radiation machine or from any surface that the radiation penetrates.

(55) Radiation machine - Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(56) Radiation safety officer (RSO) - An individual who has a knowledge of and the authority and responsibility to apply appropriate radiation protection rules, standards, and practices, who must be specifically authorized on a certificate of registration, and who is the primary contact with the agency.

(57) Registrant - Any person issued a certificate of registration by the agency in accordance with the Act and this chapter.

(58) Regulation (See definition for rule.)

(59) Rem - The special unit of any of the quantities expressed as DE. The DE in rem is equal to the absorbed dose in rad multiplied by the quality factor (1 rem = 0.01 sievert (Sv)).

(60) Research and development - Research and development is defined as:

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(61) Restricted area - An area, access to which is limited by the registrant for the purpose of protecting individuals against undue risks from exposure to radiation. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

(62) Roentgen (R) - The special unit of exposure. One roentgen (R) equals 2.58 x 10^{-4} C/kg of air. (See definition for exposure.)

(63) Rule (as defined in the Government Code, Chapters 2001 and 2002, as amended) - Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior section but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures. The word "rule" was formerly referred to as "regulation."

(64) Shallow dose equivalent (SDE) - The DE at a tissue depth of 0.007 cm (7 mg/cm^2) averaged over an area of 1 square centimeter (cm^2) (applies to the external exposure of the skin or an extremity).

(65) SI - The abbreviation for the International System of Units.

(66) Sievert (Sv) - The SI unit of any of the quantities expressed as DE. The DE in sievert is equal to the absorbed dose in gray multiplied by the quality factor (1 Sv = 100 rem).

(67) Site boundary - That line beyond which the land or property is not owned, leased, or otherwise controlled by the registrant.

(68) Source of radiation - Any radioactive material, or any device or equipment emitting or capable of producing radiation.

(69) Special units - The conventional units historically used by registrants, i.e., rad (absorbed dose), and rem (DE).

(70) Survey - An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, disposal, and/or presence of sources of radiation. When appropriate, such survey includes, but is not limited to, tests, physical examination of location of equipment, measurements of levels of radiation present, and evaluation of administrative and/or engineered controls.

(71) Termination - A release by the agency of the obligations and authorizations of the registrant under the terms of the certificate of registration. It does not relieve a person of duties and responsibilities imposed by law.

(72) Texas Regulations for Control of Radiation (TRCR) - All sections of Title 25 Texas Administrative Code, Chapter 289.

(73) Total effective dose equivalent (TEDE) - For external exposures only to x- ray radiation from radiation machines, the TEDE is equal to the DDE. If an individual receives an occupational dose from both radiation machines and radioactive materials, the TEDE is the sum of the DDE for external exposures and the committed effective dose equivalent for internal exposures as defined in §289.201(b) of this title.

(74) Unrestricted area (uncontrolled area) - An area, access to which is neither limited nor controlled by the registrant. For purposes of this chapter, "uncontrolled area" is an equivalent term.

(75) Very high radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter (m) from a radiation machine or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose, gray and rad, are appropriate, rather than units of DE, Sv and rem.

(76) Veterinarian - An individual licensed by the Texas Board of Veterinary Medical Examiners, with license in good standing.

(77) Week - Seven consecutive days starting on Sunday.

(78) Whole body - For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(79) Worker - An individual engaged in work under a certificate of registration issued by the agency and controlled by a registrant, but does not include the registrant.

(80) Year - The period of time beginning in January used to determine compliance with the provisions of this chapter. The registrant may change the starting date of the year used to determine compliance by the registrant provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(d) Exemptions. The agency may, upon application therefor or upon its own initiative, exempt a source of radiation or a kind of use or user from the requirements of this chapter if the agency determines that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment. In determining such exemptions, the agency will consider:

(1) state of technology;

(2) economic considerations in relation to benefits to the public health and safety; and

(3) other societal, socioeconomic, or public health and safety considerations.

(e) Prohibited uses.

(1) A hand-held fluoroscopic screen shall not be used unless accepted for certification by the United States Food and Drug Administration (FDA), Center for Devices and Radiological Health.

(2) A shoe-fitting fluoroscopic device shall not be used.

(f) Additional requirements. The agency may, by rule, order, or condition of certificate of registration, impose upon any registrant such requirements in addition to those established in this chapter as it deems appropriate or necessary to minimize danger to public health and safety or property or the environment.

(g) Violations. An injunction or other court order may be obtained prohibiting any violation of any provision of the Act or any rule or order issued thereunder. Any person who willfully violates

any provision of the Act or any rule or order issued thereunder may be subject to civil and/or administrative penalties. Such person may also be guilty of a misdemeanor and upon conviction, may be punished by fine or imprisonment or both, as provided by law.

(h) Impounding. Radiation machines shall be subject to impounding in accordance with §401.068 of the Act and §289.205 of this title (relating to Hearing and Enforcement Procedures).

(i) Communications.

(1) Except where otherwise specified, all communications and reports concerning this chapter and applications filed under them should be addressed to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3189. Communications, reports, and applications may be delivered in person to the agency's office located at 8407 Wall Street, Austin, Texas.

(2) Documents transmitted to the agency will be deemed submitted on the date of the postmark, telegram, telefacsimile, or electronic media transmission.

(j) Interpretations. Except as specifically authorized by the agency in writing, no interpretation of the meaning of this chapter by any officer or employee of the agency other than a written interpretation by the Office of General Counsel, Texas Department of Health, will be considered binding upon the agency.

(k) Mean quality factors and absorbed dose equivalencies.

(1) As used in this chapter, the quality factors for converting absorbed dose to DE are shown in the following table:
Figure: 25 TAC §289.231(k)(1)

(2) If it is more convenient to measure the neutron fluence rate than to determine the neutron dose equivalent rate in sievert per hour or rem per hour, as provided in paragraph (1) of this subsection, 1 rem (0.01 Sv) of neutron radiation of unknown energies may, for purposes of this section, be assumed to result from a total fluence of 25 million neutrons per square centimeter incident upon the body. If sufficient information exists to estimate the approximate energy distribution of the neutrons, the licensee or registrant may use the fluence rate per unit DE or the appropriate Q value from the following table to convert a measured tissue dose in rad (gray) to DE in rem (Sv).
Figure: 25 TAC §289.231(k)(2)

(l) As low as reasonably achievable (ALARA). The registrant shall use, to the extent practical, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and public doses that are ALARA.

(m) Occupational dose limits.

(1) The registrant shall control the occupational dose to individuals to the following dose limits.

(A) An annual limit shall be the TEDE being equal to 5 rems (0.05 Sv).

(B) The annual limits to the lens of the eye, to the skin, and to the extremities shall be:

(i) an LDE of 15 rems (0.15 Sv); and

(ii) an SDE of 50 rems (0.5 Sv) to the skin or to any extremity.

(C) The annual limits for a minor shall be 10% of the annual occupational dose limits specified in subparagraphs (A) and (B) of this paragraph.

(D) If a woman declares her pregnancy, the registrant shall ensure that the DE to an embryo/fetus during the entire pregnancy, due to occupational exposure of a declared pregnant woman, does not exceed 0.5 rem (5 mSv). If a woman chooses not to declare pregnancy, the occupational dose limits specified in paragraph (1)(A) and (B) of this subsection are applicable to the woman.

(i) The registrant shall make efforts to avoid substantial variation above a uniform monthly exposure rate to a declared pregnant woman so as to satisfy the limit in paragraph (1) of this subsection. The National Council on Radiation Protection and Measurements recommended in NCRP Report No. 91 "Recommendations on Limits for Exposure to Ionizing Radiation" (June 1, 1987) that no more than 0.05 rem (0.5 mSv) to the embryo/fetus be received in any one month.

(ii) If by the time the woman declares pregnancy to the registrant, the DE to the embryo/fetus has exceeded 0.45 rem (4.5 mSv), the registrant shall be deemed to be in compliance with paragraph (1) of this subsection, if the additional DE to the embryo/fetus does not exceed 0.05 rem (0.5 mSv) during the remainder of the pregnancy.

(iii) The DE to an embryo/fetus shall be taken as the DE that is most representative of the DE to the embryo/fetus from external radiation, that is, in the mother's lower torso region.

(iv) If multiple measurements have been made, assignment of the DDE for the declared pregnant woman from the individual monitoring device that is most representative of the DE to the embryo/fetus shall be the DE to the embryo/fetus. Assignment of the highest DDE for the declared pregnant woman to the embryo/fetus is not required unless that dose is also the most representative DDE for the region of the embryo/fetus.

(v) If multiple measurements have not been made, assignment of the highest DDE for the declared pregnant woman shall be the DE to the embryo/fetus.

(2) The assigned DDE and SDE shall be for the portion of the body receiving the highest exposure.

(3) When a protective apron is worn while working with fluoroscopic equipment used for clinical diagnostic or research purposes, the effective dose equivalent (EDE) for external radiation shall be determined as follows.

(A) When only one individual monitoring device is used and it is located at the neck (collar) outside the protective apron, the reported DDE shall be the EDE for external radiation; or

(B) When only one individual monitoring device is used and it is located at the neck (collar) outside the protective apron, and the reported dose exceeds 25% of the limit specified in paragraph (1) of this subsection, the reported DDE value multiplied by 0.3 shall be the EDE for external radiation; or

(C) When individual monitoring devices are worn, both under the protective apron at the waist and outside the protective apron at the neck (collar), the EDE for external radiation shall be assigned the value of the sum of the DDE reported for the individual monitoring device located at the waist under the protective apron multiplied by 1.5 and the DDE reported for the individual monitoring device located at the neck (collar) outside the protective apron multiplied by 0.04.

(4) The DDE, LDE, and SDE may be assessed from surveys, calculations, or radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the

individual monitoring device was not in the region of highest potential exposure, or the results of individual monitoring are unavailable.

(5) The registrant shall reduce the dose that an individual may be allowed to receive in the current year by the amount of occupational dose received from radiation machines or radioactive materials while employed by any other person. See subsection (r)(4) of this section.

(n) Conditions requiring individual monitoring of occupational dose.

(1) Each registrant shall monitor exposures from radiation machines at levels sufficient to demonstrate compliance with the occupational dose limits of this section. As a minimum, each registrant shall monitor occupational exposure to radiation from radiation machines and shall supply and require the use of individual monitoring devices by:

(A) adults likely to receive, in one year from sources external to the body, a dose in excess of 10% of the limits in subsection (m)(1) of this section;

(B) minors likely to receive, in one year from sources of radiation external to the body, a DDE in excess of 0.1 rem (1 mSv), an LDE in excess of 0.15 rem (1.5 mSv), or an SDE to the skin or to the extremities in excess of 0.5 rem (5 mSv);

(C) declared pregnant women likely to receive during the entire pregnancy, from sources of radiation external to the body, a DDE in excess of 0.1 rem (1 mSv); and

(D) individuals entering a high or very high radiation area;

(2) Notwithstanding the requirements of paragraph (1)(A) of this subsection, no personnel monitoring shall be required for personnel operating only minimal threat radiation machines as specified in subsection (ll)(2) of this section.

(o) Dose limits for individual members of the public.

(1) Each registrant shall conduct operations so that:

(A) the TEDE to individual members of the public from exposure to radiation from radiation machines does not exceed 0.5 rem (5 mSv) in a year, exclusive of the dose contribution from background radiation, exposure of patients to radiation for the purpose of medical diagnosis or therapy, or to voluntary participation in medical research programs; and

(B) the dose in any unrestricted area from registered external sources does not exceed 0.002 rem (0.02 mSv) in any one hour.

(2) If the registrant permits members of the public to have access to restricted areas, the limits for members of the public continue to apply to those individuals.

(3) The agency may impose additional restrictions on radiation levels in unrestricted areas in order to restrict the collective dose.

(p) Compliance with dose limits for individual members of the public.

(1) The registrant shall make or cause to be made surveys of radiation levels in unrestricted areas to demonstrate compliance with the dose limits for individual members of the public as required in subsection (o) of this section.

(2) A registrant shall show compliance with the annual dose limit in subsection (o) of this section by:

(A) demonstrating by measurement or calculation that the TEDE to the individual likely to receive the highest dose from the registered operation does not exceed the annual dose limit; or

(B) demonstrating that if an individual were continuously present in an unrestricted area, the dose from external sources of radiation would not exceed 0.002 rem (0.02 mSv) in an hour and 0.05 rem (0.5 mSv) in a year.

(3) Registrants exempt from individual monitoring requirements in accordance with subsection (n)(2) of this section are exempt from the requirements of paragraphs (1) and (2) of this subsection.

(q) Location and use of individual monitoring devices.

(1) Each registrant shall ensure that individuals who are required to monitor occupational doses in accordance with subsection (n)(l) of this section wear and use individual monitoring devices as follows.

(A) An individual monitoring device shall be assigned to and worn by only one individual.

(B) An individual monitoring device used for monitoring the dose to the whole body shall be worn at the unshielded location of the whole body likely to receive the highest exposure. When a protective apron is worn, the location of the individual monitoring device is typically at the neck (collar).

(C) If an additional individual monitoring device is used for monitoring the dose to an embryo/fetus of a declared pregnant woman, in accordance with subsection (n)(1)(C) of this section, it shall be located at the waist under any protective apron being worn by the woman.

(D) An individual monitoring device used for monitoring the LDE, to demonstrate compliance with subsection (m)(1)(B)(i) of this section, shall be located at the neck (collar) or at a location closer to the eye, outside any protective apron being worn by the monitored individual.

(E) An individual monitoring device used for monitoring the dose to the extremities, to demonstrate compliance with subsection (m)(1)(B)(ii) of this section, shall be worn on the extremity likely to receive the highest exposure. Each individual monitoring device, to the extent practicable, shall be oriented to measure the highest dose to the extremity being monitored.

(F) An individual monitoring device shall be worn for the period of time authorized by the dosimetry processor's certificate of registration or for no longer than three months, whichever is more restrictive.

(2) Each registrant shall ensure that individual monitoring devices are returned to the dosimetry processor for proper processing.

(3) Each registrant shall ensure that adequate precautions are taken to prevent a deceptive exposure of an individual monitoring device.

(r) Determination of occupational dose for the current year.

(1) For each individual who is likely to receive, in a year, an occupational dose requiring monitoring in accordance with subsection (n) of this section, the registrant shall determine the occupational radiation dose received during the current year. Occupational dose includes doses received from exposure to registered/licensed or un-

registered/unlicensed sources of radiation as defined in subsection (c) of this section.

(2) In complying with the requirements of paragraph (1) of this subsection, a registrant may:

(A) accept, as a record of the occupational dose that the individual received during the current year, BRC Form 231-3 from prior employers, or other clear and legible record, of all information required on that form and indicating any periods of time for which data are not available; or

(B) accept, as a record of the occupational dose that the individual received during the current year, a written signed statement from the individual, or from the individual's prior employer(s) for work involving radiation exposure, that discloses the nature and the amount of any occupational dose that the individual received during the current year; or

(C) obtain reports of the individual's DE from prior employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the registrant, by telephone, telegram, facsimile, or letter. The registrant shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(3) The registrant shall record the exposure data for the current year, as required by paragraph (1) of this subsection, on BRC Form 231-3, or other clear and legible record, of all the information required on BRC Form 231-3.

(4) If the registrant is unable to obtain a complete record of an individual's current occupational dose while employed by any other registrant or licensee, the registrant shall assume in establishing administrative controls in accordance with subsection (m)(5) of this section for the current year, that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 millisieverts (mSv)) for each quarter; or 416 millirems (mrem) (4.16 mSv) for each month for which records were unavailable and the individual was engaged in activities that could have resulted in occupational radiation exposure.

(5) If an individual has incomplete (e.g., a lost or damaged personnel monitoring device) current occupational dose data for the current year and that individual is employed solely by the registrant during the current year, the registrant shall:

(A) assume that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 mSv) for each quarter;

(B) assume that the allowable dose limit for the individual is reduced by 416 mrem (4.16 mSv) for each month; or

(C) assess an occupational dose for the individual during the period of missing data using surveys, radiation measurements, or other comparable data for the purpose of demonstrating compliance with the occupational dose limits.

(6) Administrative controls established in accordance with paragraph (4) of this subsection shall be documented and maintained for inspection by the agency. Occupational dose assessments made in accordance with paragraph (5) of this subsection and records of data used to make the assessment shall be maintained for inspection by the agency. The registrant shall retain the records in accordance with subsection (ll)(5) of this section.

(s) General surveys and monitoring.

(1) Each registrant shall make, or cause to be made, surveys that:

(A) are necessary for the registrant to comply with this section; and

(B) are necessary under the circumstances to evaluate:

(i) the magnitude and extent of radiation levels; and

(ii) the potential radiological hazards.

(2) The registrant shall ensure that instruments and equipment used for quantitative radiation measurements, for example, dose rate, are operable and calibrated:

(A) by a person licensed or registered by the agency, another agreement state, a licensing state, or the NRC to perform such service;

(B) at intervals not to exceed 12 months unless a different time interval is specified in another section of this chapter;

(C) after each instrument or equipment repair;

(D) for the types of radiation used and at energies appropriate for use; and

(E) at an accuracy within 20% of the true radiation level.

(3) All individual monitoring devices, except for direct and indirect reading pocket dosimeters and those individual monitoring devices used to measure the dose to any extremity, that require processing to determine the radiation dose and that are used by registrants to comply with subsection (m) of this section, with other applicable provisions of this chapter, or with conditions specified in a certificate of registration, shall be processed and evaluated by a dosimetry processor:

(A) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology;

(B) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored; and

(C) holding a current certificate of registration from the agency authorizing dosimetry processing.

(t) Control of access to high radiation areas.

(1) The registrant shall ensure that each entrance or access point to a high radiation area has one or more of the following features:

(A) a control device that, upon entry into the area, causes the level of radiation to be reduced below that level at which an individual might receive a DDE of 0.1 rem (1 mSv) in one hour at 30 cm from the source of radiation from any surface that the radiation penetrates;

(B) a control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry; or

(C) entryways that are locked, except during periods when access to the areas is required, with positive control over each individual entry.

(2) In place of the controls required by paragraph (1) of this subsection for a high radiation area, the registrant may

substitute continuous direct or electronic surveillance that is capable of preventing unauthorized entry.

(3) The registrant may apply to the agency for approval of alternative methods for controlling access to high radiation areas.

(4) The registrant shall establish the controls required by paragraphs (1) and (3) of this subsection in a way that does not prevent individuals from leaving a high radiation area.

(5) The registrant is not required to control entrance or access to rooms or other areas containing radiation machines capable of producing a high radiation area as described in this subsection if the registrant has met all the specific requirements for access and control specified in other applicable sections of this chapter, such as, §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators), §289.227 of this title (relating to Use of Radiation Machines in the Healing Arts and Veterinary Medicine), and §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(u) Control of access to very high radiation areas.

(1) In addition to the requirements in subsection (t) of this section, the registrant shall institute measures to ensure that an individual is not able to gain unauthorized or inadvertent access to areas in which radiation levels could be encountered at 500 rads (5 grays) or more in one hour at 1 m from a radiation machine or any surface through which the radiation penetrates at this level.

(2) The registrant is not required to control entrance or access to rooms or other areas containing radiation machines capable of producing a very high radiation area as described in paragraph (1) of this subsection if the registrant has met all the specific requirements for access and control specified in other applicable sections of this chapter, such as, §289.119 of this title, §289.227 of this title, and §289.255 of this title.

(3) The entry control devices required by paragraphs (1) and (2) of this subsection shall be established in such a way that no individual will be prevented from leaving the area.

(v) Security and control of radiation machines.

(1) The registrant shall secure radiation machines from unauthorized removal.

(2) The registrant shall use devices and/or administrative procedures to prevent unauthorized use of radiation machines.

(w) Caution signs. Unless otherwise authorized by the agency, the standard radiation symbol prescribed shall use the colors magenta, or purple, or black on yellow background. The standard radiation symbol prescribed is the three-bladed design as follows:
Figure: 25 TAC §289.231(w)

(1) the cross-hatched area of the symbol is to be magenta, or purple, or black; and

(2) the background of the symbol is to be yellow.

(x) Posting requirements.

(1) The registrant shall post each radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIATION AREA."

(2) The registrant shall post each high radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(3) The registrant shall post each very high radiation area with a conspicuous sign or signs bearing the radiation symbol and words "GRAVE DANGER, VERY HIGH RADIATION AREA." If the very high radiation area involves medical treatment of patients, the registrant may omit the word "GRAVE" from the sign or signs.

(y) Exceptions to posting requirements. A registrant is not required to post caution signs in areas or rooms containing radiation machines for periods of less than 8 hours, if each of the following conditions is met:

(1) the radiation machines are constantly attended during these periods by an individual who takes the precautions necessary to prevent the exposure of individuals to radiation in excess of the limits established in this section; and

(2) the area or room is subject to the registrant's control.

(z) Labeling radiation machines. Each registrant shall ensure that each radiation machine is labeled in a conspicuous manner that cautions individuals that radiation is produced when it is energized. This label shall be affixed in a clearly visible location on the face of the control unit.

(aa) Open records.

(1) Subject to the limitations provided in the Texas Public Information Act, Government Code, Chapter 552, all information and data collected, assembled, or maintained by the agency are public records open to inspection and copying during regular office hours.

(2) Any person who submits written information or data to the agency and requests that the information be considered confidential, privileged, or otherwise not available to the public under the Texas Public Information Act, shall justify such request in writing, including statutes and cases where applicable, addressed to the agency.

(A) Documents containing information that is claimed to fall within an exception to the Texas Public Information Act shall be marked to indicate that fact. Markings shall be placed on the document on origination or submission.

(i) The words "NOT AN OPEN RECORD" shall be placed conspicuously at the top and bottom of each page containing information claimed to fall within one of the exceptions.

(ii) The following wording shall be placed at the bottom of the front cover and title page, or first page of text if there is no front cover or title page:
Figure: 25 TAC §289.231(aa)(2)(A)(ii)

(B) The agency requests, whenever possible, that all information submitted under the claim of an exception to the Texas Public Information Act be extracted from the main body of the application and submitted as a separate annex or appendix to the application.

(C) Failure to comply with any of the procedures described in subparagraphs (A) and (B) of this paragraph may result in all information in the agency file being disclosed upon an open records request.

(3) The agency will determine whether information falls within one of the exceptions to the Texas Public Information Act. The Office of General Counsel will be queried as to whether or not there has been a previous determination that the information falls within one of the exceptions to the Texas Public Information Act. If there has been no previous determination and the agency believes that the information falls within one of the exceptions, an opinion of the

Attorney General will be requested. If the agency agrees in writing to the request, the information shall not be open for public inspection unless the Attorney General's office subsequently determines that it does not fall within an exception.

(4) Requests for information.

(A) All requests for open records information must be in writing and refer to documents currently in possession of the agency.

(B) The agency will ascertain whether the information may be released or whether it falls within an exception to the Texas Public Information Act.

(i) The agency may take a reasonable period of time to determine whether information falls within one of the exceptions to the Texas Public Information Act.

(ii) If the information is determined to be public, it will be presented for inspection and/or copies of documents will be furnished within a reasonable period of time. A fee will be charged to recover agency costs for copies.

(C) Original copies of public records may not be removed from the agency. Under no circumstances shall material be removed from existing records.

(bb) General provisions for records.

(1) Each registrant shall make and maintain records showing the receipt, transfer, and disposal of all radiation machines. These records shall be maintained by the registrant in accordance with subsection (ll)(5) of this section. Additional record requirements are specified elsewhere in this chapter. All records required by this chapter shall be accurate and factual.

(2) Records are only valid if stamped, initialed, or signed and dated by authorized personnel or otherwise authenticated.

(3) Each registrant shall use the SI units gray, sievert, and coulomb per kilogram, or the special units rad, rem, and roentgen, including multiples and subdivisions, and shall clearly indicate the units of all quantities on records required by this chapter.

(4) The registrant shall make a clear distinction among the quantities entered on the records required by this section, such as, TEDE, SDE, LDE, or DDE.

(5) Records required in accordance with paragraph (1) of this subsection, and subsections (cc)-(ee) of this section shall include the date and the identification of individual(s) making the record, and, as applicable, a unique identification of survey instrument(s) used, and an exact description of the location of the survey. Records of receipt, transfer, and disposal of shall uniquely identify the radiation machine(s).

(6) Copies of records required in accordance with paragraph (1) of this subsection, and subsections (cc)-(ee) of this section, and by certificate of registration conditions that are relevant to operations at an additional authorized use/storage site shall be maintained at that site in addition to the main site specified on a certificate of registration in accordance with subsection (ll)(5) of this section.

(cc) Records of surveys.

(1) Each registrant shall make and maintain records showing the results of surveys and calibrations required by subsection (s) of this section. The registrant shall retain these records in accordance with subsection (ll)(5) of this section.

(2) The registrant shall retain the results of surveys to determine the dose from external sources of radiation used, in the absence of or in combination with individual monitoring data, in the assessment of individual DEs in accordance with subsection (ll)(5) of this section.

(dd) Records of individual monitoring results.

(1) Each registrant shall make and maintain records in accordance with subsection (r) of this section of the doses received by all individuals for whom monitoring was required in accordance with subsection (n) of this section, and records of doses received during accidents, and emergency conditions. Assessments of DE and records made using units in effect before January 1, 1994, need not be changed. These records shall include, when applicable:

(A) the DDE to the whole body, LDE, SDE to the skin, and SDE to the extremities;

(B) the data used to make occupational dose assessments in accordance with subsection (r)(5) of this section.

(2) The registrant shall make entries of the records specified in paragraph (1) of this subsection at intervals not to exceed one year and within 60 days of the end of the year.

(3) The registrant shall maintain the records specified in paragraph (1) of this subsection on BRC Form 231-3, in accordance with the instructions for BRC Form 231-3, or in clear and legible records containing all the information required by BRC Form 231-3.

(4) The registrant shall maintain the records of dose to an embryo/fetus with the records of dose to the declared pregnant woman. The declaration of pregnancy, including the estimated date of conception, shall also be kept on file, but may be maintained separately from the dose records.

(5) The registrant shall retain each required form or record required by this subsection in accordance with subsection (ll)(5) of this section. The registrant shall retain records used in preparing BRC Form 231-3 or equivalent in accordance with subsection (ll)(5) of this section.

(ee) Records of dose to individual members of the public.

(1) Each registrant shall maintain records sufficient to demonstrate compliance with the dose limit for individual members of the public. See subsections (o) and (p) of this section.

(2) The registrant shall retain the records required by paragraph (1) of this subsection in accordance with subsection (ll)(5) of this section.

(ff) Form of records.

(1) Each record required by this chapter shall be legible throughout the specified retention period.

(2) The record shall be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period.

(3) The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.

(4) Records, such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures.

(5) The registrant shall maintain adequate safeguards against tampering with and loss of records.

(gg) Reports of stolen, lost, or missing radiation machines.

(1) Each registrant shall report to the agency by telephone a stolen, lost, or missing radiation machine immediately after its occurrence becomes known to the registrant.

(2) Each registrant required to make a report in accordance with paragraph (1) of this subsection shall, within 30 days after making the telephone report, make a written report to the agency that includes the following information:

(A) a description of the radiation machine involved, including, the manufacturer, model and serial number;

(B) a description of the circumstances under which the loss or theft occurred;

(C) a statement of disposition, or probable disposition, of the radiation machine involved;

(D) exposures of individuals to radiation, circumstances under which the exposures occurred, and the possible TEDE to persons in unrestricted areas;

(E) actions that have been taken, or will be taken, to recover the radiation machine; and

(F) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of radiation machines.

(3) Subsequent to filing the written report, the registrant shall also report additional substantive information on the loss or theft within 30 days after the registrant learns of such information.

(4) The registrant shall prepare any report filed with the agency in accordance with this subsection so that names of individuals who may have received exposure to radiation are stated in a separate and detachable portion of the report.

(hh) Notification of incidents.

(1) Notwithstanding other requirements for notification, each registrant shall immediately report each event involving a radiation machine possessed by the registrant that may have caused or threatens to cause an individual to receive:

(A) a TEDE of 25 rems (0.25 Sv) or more;

(B) an LDE of 75 rems (0.75 Sv) or more; or

(C) an SDE to the skin or extremities of 250 rads (2.5 grays) or more.

(2) Each registrant shall, within 24 hours of discovery of the event, report to the agency each event involving loss of control of a radiation machine possessed by the registrant that may have caused, or threatens to cause an individual to receive, in a period of 24 hours:

(A) a TEDE exceeding 5 rems (0.05 Sv);

(B) an LDE exceeding 15 rems (0.15 Sv); or

(C) an SDE to the skin or extremities exceeding 50 rems (0.5 Sv).

(3) Registrants shall make the initial notification reports required by paragraphs (1) and (2) of this subsection by telephone to the agency and shall confirm the initial notification report within 24 hours by telegram, mailgram, or facsimile to the agency.

(4) The registrant shall prepare each report filed with the agency in accordance with this section so that names of individuals who have received exposure to radiation are stated in a separate and detachable portion of the report.

(ii) Reports of exposures and radiation levels exceeding the limits.

(1) In addition to the notification required by subsection (hh) of this section, each registrant shall submit a written report within 30 days after learning of any of the following occurrences:

(A) incidents for which notification is required by subsection (hh) of this section;

(B) doses in excess of any of the following:

(i) the occupational dose limits for adults in subsection (m)(1)(A) of this section;

(ii) the occupational dose limits for a minor in subsection (m)(1)(C) of this section;

(iii) the limits for an embryo/fetus of a declared pregnant woman in subsection (m)(1)(D) of this section;

(iv) the limits for an individual member of the public in subsection (o) of this section; or

(v) any applicable limit in the registration;

(C) levels of radiation in:

(i) a restricted area in excess of applicable limits in the certificate of registration; or

(ii) an unrestricted area in excess of 10 times the applicable limit set forth in this section or in the registration, whether or not involving exposure of any individual in excess of the limits in subsection (o) of this section.

(2) Each report required by paragraph (1) of this subsection shall describe the extent of exposure of individuals to radiation, including, as appropriate:

(A) estimates of each individual's dose;

(B) the levels of radiation involved;

(C) the cause of the elevated exposures, dose rates; and

(D) corrective steps taken or planned to ensure against a recurrence, including the schedule for achieving conformance with applicable limits, and associated registration conditions.

(3) Each report filed in accordance with paragraph (1) of this subsection shall include for each individual exposed: the name, social security number, and date of birth. With respect to the limit for the embryo/fetus in subsection (m)(1)(D) of this section, the identifiers should be those of the declared pregnant woman. The report shall be prepared so that this information is stated in a separate and detachable portion of the report.

(4) All registrants who make reports in accordance with paragraph (1) of this subsection shall submit the report in writing to the agency.

(jj) Notifications and reports to individuals.

(1) Requirements for notification and reports to individuals of exposure to radiation are specified in §289.203 of this title (relating to Notices, Instructions and Reports to Workers; Inspections).

(2) When a registrant is required in accordance with subsection (ii) of this section to report to the agency any exposure

of an identified occupationally exposed individual, or an identified member of the public, to radiation, the registrant shall also notify the individual and provide a copy of the report submitted to the agency, to the individual. Such notice shall be transmitted at a time not later than the transmittal to the agency, and shall comply with the provisions of §289.203 of this title.

(kk) Inspections.

(1) The agency may enter public or private property at reasonable times to determine whether, in a matter under the agency's jurisdiction, there is compliance with the Act, the agency's rules, certificate of registration conditions, and orders issued by the agency.

(2) Each registrant shall afford the agency, at all reasonable times, opportunity to inspect sources of radiation and the premises and facilities wherein such sources of radiation are used or stored.

(3) Each registrant shall make available to the agency for inspection, upon reasonable notice, records made and maintained in accordance with this chapter.

(4) Routine inspection of radiation machines and services.

(A) Routine inspections by agency personnel will be made no more frequently than the intervals specified in subsection (ll)(1) of this section. Registrants having certificates of registration authorizing multiple uses will be inspected at the most frequent interval specified for the uses authorized.

(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, for those radiation machines determined by the agency to constitute a minimal threat to human health and safety, the routine inspection interval will be five years. The applicable categories are listed in subsection (ll)(2) of this section.

(C) Notwithstanding the inspection intervals specified in this section, the agency may inspect registrants more frequently due to:

(i) the persistence or severity of violations found during an inspection;

(ii) investigation of an incident or complaint concerning the facility;

(iii) a request for an inspection by a worker(s) in accordance with §289.203 of this title;

(iv) any change in a facility or equipment that might cause a significant increase in radiation output or hazard; or

(v) a mutual agreement between the agency and registrant.

(D) The agency will conduct inspections of medical, podiatric medical, veterinary, and chiropractic radiation machines or lasers in a manner designed to cause as little disruption of a medical, podiatric medical, veterinary, or chiropractic practice as is practicable.

(5) A person who inspects medical, podiatric medical, veterinary, or chiropractic radiation machines or lasers will have training in the design and uses of the products and will receive training specified in subsection (ll)(3) and/or (4) of this section.

(6) Each registrant shall perform, upon instructions from the agency, or shall permit the agency to perform such reasonable surveys as the agency deems appropriate or necessary including, but not limited to, surveys of:

(A) radiation machines;

(B) facilities wherein radiation machines are used or stored;

(C) radiation detection and monitoring instruments; and

(D) other equipment and devices used in connection with utilization or storage of radiation machines.

(ll) Appendices.

(1) Routine inspection intervals for registrants.
Figure: 25 TAC §289.231(ll)(1)

(2) Minimal threat radiation machines. Minimal threat radiation machines include, but are not limited to, the following:

(A) electron microscope;

(B) x-ray fluorescence (machine);

(C) x-ray gauges;

(D) particle size analyzer (x-ray);

(E) airport baggage x-ray;

(F) electron beam welding;

(G) ion implantation devices;

(H) cathodoluminescence devices;

(I) package x-ray; and

(J) certified cabinet x-ray.

(3) Training for agency inspectors of radiation machines.

(A) Objectives. Training of agency inspectors of radiation machines will be conducted by the agency. Upon completion of training, the inspector will be able to:

(i) select and operate the necessary testing equipment used to perform an inspection of radiation machines;

(ii) utilize radiation protection principles;

(iii) operate radiation detection instruments;

(iv) define basic regulatory terminology;

(v) apply this section regarding radiation machines;

(vi) perform routine agency inspections of radiation machines;

(vii) complete agency inspection documentation;

(viii) demonstrate knowledge of agency ethics, professional, and technical policies; and

(ix) successfully achieve the objectives in this subparagraph.

(B) Initial training program.

(i) Initial training will be conducted during a six-month period.

(ii) All training evaluation instruments will be developed by the agency.

(iii) Instruments to be used in determining a proficiency level are as follows:

(I) evaluation of each inspector's training needs prior to initial training;

(II) evaluation of knowledge obtained and verification of tasks performed by each inspector subsequent to training received by the agency; and

(III) evaluation of each inspector's task performance by the agency.

(C) Continuing education.

(i) The agency inspector of radiation machines will accumulate 24 hours of continuing education regarding radiation machines, at intervals not to exceed 24 months. These hours of continuing education may be acquired as follows:

(I) documented continuing education earned in an agency-accepted training format; and

(II) agency staff meetings.

(ii) Failure to obtain 24 hours of continuing education within each 24 month interval may result in a reassessment by the agency of an agency inspector's proficiency level.

(iii) After the initial training period, each inspector of radiation machines will be evaluated by the agency, at intervals not to exceed 12 months.

(D) Agency proficiency standards. The agency proficiency standards for agency inspectors of radiation machines are as follows.

(i) Level I. The agency inspector has not successfully achieved the objectives in subparagraph (A) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections will not be performed.

(ii) Level II. The agency inspector has partially achieved the objectives in subparagraph (A) of this paragraph, but has not achieved the objective in subparagraph (A)(ix) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections are not permitted for the type of radiation machines for which the objectives of subparagraph (A)(ix) of this paragraph have not been achieved. Unsupervised inspections may be performed for the type of radiation machines for which the objectives in subparagraph (A)(ix) of this paragraph have been successfully achieved.

(iii) Level III. The agency inspector has successfully achieved the objectives in subparagraph (A) of this paragraph. Supervision is not required for routine inspections.

(4) Training for agency inspectors of lasers. Initial training will include an introduction to the requirements in this chapter and inspection forms. Inspections of two medical and two entertainment lasers, conducted by an inspector having completed the requirements of this paragraph, shall be observed before unsupervised inspection of lasers is permitted.

(5) Time requirements for record keeping. The following are time requirements for record keeping.
Figure: 25 TAC §289.231(ll)(5)

(6) Occupational exposure form. The following, BRC Form 231-3, is to be used to document occupational exposure record for a monitoring period: (Please find BRC Form 231-3 at the end of this section).
Figure: 25 TAC §289.231(ll)(6)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907979
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Subchapter F. LICENSE REGULATIONS

25 TAC §289.201

The Texas Department of Health (department) proposes an amendment to §289.201, concerning general provisions for radioactive materials.

The revision deletes pertinent references to x-ray radiation, registered sources of radiation, and radiation machines because the requirements for the use of radiation machines are being consolidated in a new section. The revision includes new definitions that support the changes in the rule as a result of legislation in House Bill 1172 passed by the 76th Legislature. Several of the definitions have been designated as items of compatibility by the United States Nuclear Regulatory Commission. As an Agreement State, Texas must adopt these items of compatibility in accordance with that agreement. Language is added to clarify that persons who receive, possess, use, transfer, or acquire radioactive material prior to receiving a license are also subject to the requirements in this chapter. The language that allows the department to make exemptions to the requirements of this chapter is revised to reflect changes made as a result of legislation passed by the 76th Legislature. Language that specifies the department may enter public or private property to determine compliance with department rules and orders is added. Other minor grammatical changes are made to the section for clarification.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation from radioactive material. There will be no economic effects on microbusinesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment. The amendment clarifies definitions and existing requirements. The amendment deletes requirements that are specific to radiation machines because those requirements are being consolidated in a new section. Because the amendment imposes no additional requirements such as record keeping, regulatory limits, procedures, or processes, there are no economic effects associated with the section as proposed.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of

Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512) 834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:30 p.m., Friday, December 17, 1999, in Conference Room S402, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects Health and Safety Code, Chapter 401 and Chapter 12.

§289.201. General Provisions for Radioactive Materials.

(a) Scope. Except as otherwise specifically provided, this section applies to all persons who receive, possess, use, transfer, or acquire any radioactive material [source of radiation], provided, however, that nothing in this section shall apply to any person to the extent such person is subject to regulation by the United States Nuclear Regulatory Commission (NRC) or to radioactive material [sources of radiation] in the possession of federal agencies. Attention is directed to the fact that regulation by the state of source material, byproduct material, and special nuclear material in quantities not sufficient to form a critical mass is subject to the provisions of the agreement between the state and the NRC and to Part 150 of the NRC regulations (10 Code of Federal Regulations (CFR) Part 150). A person who receives, possesses, uses, owns, transfers, or acquires radioactive material prior to receiving a license is subject to the requirements of this chapter.

(b) Definitions. The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(9) (No change.)

(10) As low as is reasonably achievable (ALARA) - Making every reasonable effort to maintain exposures to radiation as far below the dose limits in these regulations as is practical, consistent with the purpose for which the licensed [or registered] activity is undertaken, taking into account the state of technology, the economics of improvements in relation to the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of ionizing radiation and licensed [or registered] sources of radiation in the public interest.

(11) Background radiation - Radiation from cosmic sources; non-technologically enhanced naturally occurring radioactive material, including radon, except as a decay product of source or special nuclear material, and including global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee. "Background radiation" does not include radiation [sources of radiation] from sources of radiation [radioactive materials] regulated by the agency.

(12) (No change.)

(13) Bioassay - The determination of kinds, quantities, or concentrations, and, in some cases, the locations of radioactive material in the human body, whether by direct measurement, in vivo counting, or by analysis and evaluation of materials excreted or removed from the human body. For purposes of this chapter [section], "radiobioassay" is an equivalent term.

(14)-(15) (No change.)

[(16) CFR - Code of Federal Regulations.]

(16) [(17)] Certificate of registration - A form of permission given by the agency to an applicant who has met the requirements for registration or mammography system certification set out in the Act and this chapter.

(17) Certification of mammography systems (state certification) - A form of permission given by the agency to an applicant who has met the requirements for mammography system certification set out in the Act and this chapter.

(18)-(19) (No change.)

[(20) Commission - The Texas Natural Resource Conservation Commission.]

(20) [(21)] Committed dose equivalent ($H_{T,50}$) - The dose equivalent to organs or tissues of reference (T) that will be received from an intake of radioactive material by an individual during the 50-year period following the intake.

(21) [(22)]Committed effective dose equivalent ($H_{E,50}$) - The sum of the products of the weighting factors applicable to each of the body organs or tissues that are irradiated and the committed dose equivalent to each of these organs or tissues ($H_{E,50} = \Sigma w_T, H_{T,50}$).

(22) Constraint (dose constraint) - A value above which specified licensee actions are required.

(23) Critical group - The group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

(24) [(23)] Curie (Ci) - A unit of measurement of radioactivity. One curie (Ci) is that quantity of radioactive material that decays at the rate of 3.7×10^{10} disintegrations per second (dps). Commonly used submultiples of the curie are the millicurie (mCi) and the microcurie (μCi). One mCi = 1×10^{-3} Ci = 3.7×10^{7} dps. One μCi = 1×10^{-6} Ci = 3.7×10^{4} dps. One nanocurie (nCi) = 1×10^{-9} Ci = 3.7×10^{1} dps. One picocurie (pCi) = 1×10^{-12} Ci = 3.7×10^{-2} dps.

(25) [(24)] Decommission - To remove a facility or site safely from service and reduce residual radioactivity to a level that permits the following:

(A) release of the property for unrestricted use and/or termination of license;[.] or

(B) release of the property under alternate requirements for license termination.

(26) [(25)] Deep dose equivalent (H_d), that applies to external whole body exposure - The dose equivalent at a tissue depth of 1 centimeter (cm)(1,000 milligrams per square centimeter (mg/cm^2)).

(27) [(26)] Depleted uranium - The source material uranium in which the isotope uranium-235 is less than 0.711 weight percent of the total uranium present. Depleted uranium does not include special nuclear material.

(28) Distinguishable from background - The detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the site, or, in the case of structures or equipment, in similar materials using adequate measurement technology, survey, and statistical techniques.

(29) [~~(27)~~] Distribution - The physical conveyance and authorized transfer of commodities from producers to consumers and any intermediate persons involved in that conveyance.

(30) [~~(28)~~] Dose - A generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, total organ dose equivalent, or total effective dose equivalent. For purposes of this chapter, "radiation dose" is an equivalent term.

(31) [~~(29)~~] Dose equivalent (H_T) - The product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the sievert (Sv) and rem.

(32) [~~(30)~~] Dose limits - The permissible upper bounds of radiation doses established in accordance with this chapter. For purposes of this chapter, "limits" is an equivalent term.

(33) [~~(31)~~] Effective dose equivalent (H_E) - The sum of the products of the dose equivalent to each organ or tissue (H_T) and the weighting factor (w_T) applicable to each of the body organs or tissues that are irradiated ($H_E = \Sigma w_T H_T$).

(34) [~~(32)~~] Embryo/fetus - The developing human organism from conception until the time of birth.

(35) [~~(33)~~] Entrance or access point - Any opening through which an individual or extremity of an individual could gain access to radiation areas or to licensed [~~or registered~~] sources of radiation. This includes portals of sufficient size to permit human access, irrespective of their intended use.

(36) [~~(34)~~] Exposure - The quotient of dQ by dm where "dQ" is the absolute value of the total charge of the ions of one sign produced in air when all the electrons (negatrons and positrons) liberated by photons in a volume element of air having mass "dm" are completely stopped in air. The SI unit of exposure is the coulomb per kilogram (C/kg). The roentgen is the special unit of exposure. [~~See subsection (o) of this section for the special unit.~~] For purposes of this chapter, this term is used as a noun.

(37) [~~(35)~~] Exposure rate - The exposure per unit of time.

(38) [~~(36)~~] External dose - That portion of the dose equivalent received from any source of radiation outside the body.

(39) [~~(37)~~] Extremity - Hand, elbow, arm below the elbow, foot, knee, and leg below the knee. The arm above the elbow and the leg above the knee are considered part of the whole body.

[~~(38) Eye dose equivalent - The external dose equivalent to the lens of the eye at a tissue depth of 0.3 cm (300 mg/cm^2).~~]

[~~(39) Filing timeframes - Documents transmitted to the agency will be deemed submitted on the date of the postmark, telegram, telefacsimile or electronic media transmission.~~]

(40) (No change.)

(41) Gray (Gy) - The SI unit of absorbed dose. One gray is equal to an absorbed dose of 1 joule per kilogram (J/kg) or 100 rad [~~(100 rad)~~].

(42) High radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert (mSv)) in one hour at 30 cm from any source of radiation or from any surface that the radiation penetrates.

(43)-(44) (No change.)

(45) Individual monitoring - The assessment of:

(A) dose equivalent to an individual by the use of individual monitoring devices; or

(B) committed effective dose equivalent to an individual by bioassay or by determination of the time-weighted air concentrations to which an individual has been exposed, that is, DAC-hours. (See the definition for DAC-hours in §289.202(c) of this title); or

(C) dose equivalent to an individual by the use of survey data.

(46) Individual monitoring devices - Devices designed to be worn by a single individual for the assessment of dose equivalent. For purposes of this chapter, "personnel dosimeter" and "dosimeter" are equivalent terms. Examples of individual monitoring devices are film badges, thermoluminescence [~~thermoluminescent~~] dosimeters (TLDs), optically stimulated luminescence dosimeters (OSLs), pocket ionization chambers (pocket dosimeters), electronic personal dosimeters, and personal air sampling devices.

(47)-(49) (No change.)

(50) Land disposal facility - The land, buildings, and equipment that are intended to be used for the disposal of low-level radioactive waste (LLRW) [~~radioactive wastes~~] into the subsurface of the land.

(51) Lens dose equivalent - The external dose equivalent to the lens of the eye at a tissue depth of 0.3 cm (300 mg/cm^2).

(52) [~~(51)~~] License - A form of permission given by the agency to an applicant who has met the requirements for licensing set out in the Act and this chapter.

(53) [~~(52)~~] Licensed material - Radioactive material received, possessed, used, or transferred under a general or specific license issued by the agency.

(54) [~~(53)~~] Licensee - Any person who is licensed by the agency in accordance with the Act and this chapter [~~and the Act~~].

(55) [~~(54)~~] Licensing state - Any state with rules equivalent to the *Suggested State Regulations for Control of Radiation* relating to, and having an effective program for, the regulatory control of naturally occurring or accelerator-produced radioactive material (NARM) and has been designated as such by the Conference of Radiation Control Program Directors, Inc. For the purposes of evaluation and/or distribution of sealed sources, this includes Licensing State Status: Product Review Only.

(56) [~~(55)~~] Lost or missing radioactive material [~~source of radiation~~] - Radioactive material [~~A source of radiation~~] whose location is unknown. This definition includes licensed material that has been shipped but has not reached its planned destination and whose location cannot be readily traced in the transportation system.

(57) Low-level radioactive waste (LLRW) - Radioactive material that meets the following criteria:

(A) LLRW is radioactive material that is:

(i) discarded or unwanted and is not exempt by rule adopted under the Texas Radiation Control Act (Act), Health and Safety Code, §401.106;

(ii) waste, as that term is defined in 10 CFR Part 61.2; and

(iii) subject to:

(I) concentration limits established in 10 CFR Part 61.55, or compatible rules adopted by the agency or the Texas Natural Resource Conservation Commission (TNRCC), as applicable; and

(II) disposal criteria established in 10 CFR, or established by the agency or TNRCC, as applicable.

(B) LLRW does not include:

(i) high-level radioactive waste as defined by 10 CFR 60.2;

(ii) spent nuclear fuel as defined by 10 CFR 72.3;

(iii) byproduct material defined in the Act, Health and Safety Code, §401.003(3)(B);

(iv) naturally occurring radioactive material (NORM) waste that is not oil and gas NORM waste;

(v) oil and gas NORM waste; or

(vi) transuranics greater than 100 nanocuries per gram.

[(56) Mammography system certification - An authorization for the use of a mammography system.]

(58) [(57)] Manufacture - To fabricate or mechanically produce.

(59) [(58)] Member of the public - Any individual, except when that individual is receiving an occupational dose.

[(59) Minimal threat - That during the operation of electronic devices capable of generating or emitting fields of radiation:]

[(A) no deliberate exposure of an individual occurs;]

[(B) the radiation is not emitted in an open beam configuration; and]

[(C) no known physical injury to an individual has occurred.]

(60) (No change.)

[(61) Misadministration - The administration of:]

[(A) a radiopharmaceutical or radiation from a sealed source other than the one intended;]

[(B) a radiopharmaceutical or radiation from a sealed source to the wrong patient;]

[(C) a radiopharmaceutical or radiation from a sealed source by a route of administration other than that intended by the prescribing physician;]

[(D) a diagnostic dosage of a radiopharmaceutical differing from the prescribed dosage by more than 50%;]

[(E) a therapeutic dosage of a radiopharmaceutical differing from the prescribed dosage by more than 10%; or]

[(F) a therapeutic radiation dose from a sealed source such that errors in the source calibration, time of exposure, and treatment geometry result in a calculated total treatment dose differing from the final prescribed total treatment dose by more than 10%.]

(61) [(62)] Monitoring - The measurement of radiation, radioactive material concentrations, surface area activities, or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses. For purposes of this chapter, "radiation monitoring" and "radiation protection monitoring" are equivalent terms.

(62) [(63)] NARM - Any naturally occurring or accelerator-produced radioactive material except source material or special nuclear material.

(63) [(64)] Natural radioactivity - Radioactivity of naturally occurring nuclides whose location and chemical and physical form have not been altered by man.

(64) [(65)] NRC - The United States Nuclear Regulatory Commission (NRC) or its duly authorized representatives.

(65) [(66)] Occupational dose - The dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to sources of radiation from licensed/registered and unlicensed/unregistered sources of radiation, whether in the possession of the licensee/registrant or other person. Occupational dose does not include dose received from background radiation, rom any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, [as a patient from medical practices,] from voluntary participation in medical research programs, or as a member of the public.

(66) [(67)] Particle accelerator - Any machine capable of accelerating electrons, protons, deuterons, or other charged particles in a vacuum and designed to discharge the resultant particulate or other associated radiation [into a medium] at energies usually in excess of 1 MeV.

(67) [(68)] Person - Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, local government, any other state or political subdivision or agency thereof, or any other legal entity, and any legal successor, representative, agent, or agency of the foregoing, other than the NRC, and other than federal government agencies licensed or exempted by the NRC.

(68) [(69)] Personnel monitoring equipment (See definition for individual monitoring devices.)

(69) [(70)] Pharmacist - An individual licensed by the Texas State Board of Pharmacy, and with license in good standing, to compound and dispense drugs, prescriptions, and poisons.

(70) [(71)] Physician - An individual licensed by the Texas State Board of Medical Examiners, with license in good standing.

(71) [(72)] Principal activities - Activities authorized by the license that are essential to achieving the purpose(s) for which the license was issued or amended. Storage during which no licensed material is accessed for use or disposal and activities incidental to decontamination or decommissioning are not principal activities.

(72) [(73)] Public dose - The dose received by a member of the public from exposure to sources of radiation released by a licensee, or to any other source of radiation under the control of a licensee/registrant. It does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered

radioactive material and released in accordance with this chapter, [~~as a patient from medical practices,~~] or from voluntary participation in medical research programs.

(73) [~~(74)~~] Quality factor (Q) - The modifying factor listed in subsection (n)(3) and (4) [~~(o)(3) and (4)~~] of this section that is used to derive dose equivalent from absorbed dose.

(74) [~~(75)~~] Quarter (calendar quarter) - A period of time equal to one-fourth of the year observed by the licensee [~~or registrant~~], approximately 13 consecutive weeks, providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(75) [~~(76)~~] Rad - The special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs per gram (erg/g) or 0.01 J/kg (0.01 gray).

(76) [~~(77)~~] Radiation - One or more of the following:

(A) gamma and x rays; alpha and beta particles and other atomic or nuclear particles or rays;

(B) stimulated emission of radiation from any electronic device to such energy density levels as to reasonably cause bodily harm; or

(C) sonic, ultrasonic, or infrasonic waves from any electronic device or resulting from the operation of an electronic circuit in an electronic device in the energy range to reasonably cause detectable bodily harm.

(77) [~~(78)~~] Radiation area - Any area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 mSv) in one hour at 30 cm from the source of radiation or from any surface that the radiation penetrates.

(78) [~~(79)~~] Radiation machine - Any device capable of producing ionizing radiation except those devices with radioactive material as the only source of radiation.

(79) [~~(80)~~] Radiation safety officer (RSO) - An individual who has a knowledge of and the authority and responsibility to apply appropriate radiation protection rules, standards, and practices, [~~and~~] who must be specifically authorized on a [~~certificate of registration or~~] radioactive material license, and who is the primary contact with the agency.

(80) [~~(81)~~] Radioactive material - Any material (solid, liquid, or gas) that emits radiation spontaneously.

(81) [~~(82)~~] Radioactive waste - As used in §289.254 of this chapter, this term is equivalent to LLRW. [~~Any discarded or unwanted radioactive material, unless exempted by agency rule or any radioactive material that would require processing before it could be put to a beneficial reuse. The term does not include byproduct material as defined in paragraph (15)(B) of this subsection, or uranium ore, naturally occurring radioactive material (NORM) waste, or oil and gas NORM waste.~~]

(82) [~~(83)~~] Radioactivity - The disintegration of unstable atomic nuclei with the emission of radiation.

(83) [~~(84)~~] Radiobioassay (See definition for bioassay.)

(84) [~~(85)~~] Registrant - Any person issued a certificate of registration by the agency in accordance with the Act and this chapter [~~and the Act~~].

(85) [~~(86)~~] Regulation (See definition for rule.)

(86) [~~(87)~~] Regulations of the United States Departmnt of Transportation (DOT) - The requirements in 49 CFR Parts 100-189.

(87) [~~(88)~~] Rem - The special unit of any of the quantities expressed as dose equivalent. The dose equivalent in rem is equal to the absorbed dose in rad multiplied by the quality factor (1 rem = 0.01 sievert (Sv)).

(88) [~~(89)~~] Research and development - Research and development is defined as:

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(89) Residual radioactivity - The radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 30 Texas Administrative Code §336.334.

(90) Restricted area - An area, access to which is limited by the licensee [~~or registrant~~] for the purpose of protecting individuals against undue risks from exposure to sources of radiation. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

(91)-(96) (No change.)

(97) Site boundary - That line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee [~~or registrant~~].

(98)-(99) (No change.)

(100) Special form radioactive material - Radioactive material that satisfies the following conditions. [~~:~~]

(A) (No change.)

(B) The piece or capsule has at least one dimension not less than 5 millimeters (mm) (0.2 inch [~~(in)~~]); and

(C) (No change.)

(101)-(103) (No change.)

(104) Survey - An evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, and/or presence of sources of radiation. When appropriate, such survey [~~evaluation~~] includes, but is not limited to, tests, physical examination of location of materials and equipment, [~~and~~] measurements of levels of radiation or concentration of radioactive material present, and evaluation of administrative and/or engineered controls.

(105) Termination - A release by the agency of the obligations and authorizations of the licensee [~~or registrant~~] under the terms of the license [~~or certificate of registration~~]. It does not relieve a person of duties and responsibilities imposed by law.

(106) (No change.)

(107) Texas Regulations for Control of Radiation (TRCR) [~~These rules~~] - All sections of Title 25 Texas Administrative Code (TAC), Chapter 289 [~~the *Texas Regulations for Control of Radiation* (TRCR)~~].

(108)-(113) (No change.)

(114) Unrestricted area (uncontrolled area) - An area, access to which is neither limited nor controlled by the licensee [~~or registrant~~]. For purposes of this chapter, "uncontrolled area" is an equivalent term.

(115) Very high radiation area - An area, accessible to individuals, in which radiation levels from sources of radiation external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter (m) from a source of radiation or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose, gray and rad, are appropriate, rather than units of dose equivalent, Sv and rem.

(116) [~~(115)~~] Veterinarian - An individual licensed by the Texas Board of Veterinary Medical Examiners, with license in good standing.

(117) [~~(116)~~] Week - Seven consecutive days starting on Sunday.

(118) [~~(117)~~] Whole body - For purposes of external exposure, head, trunk including male gonads, arms above the elbow, or legs above the knee.

(119) [~~(118)~~] Worker - An individual engaged in work under a license or certificate of registration issued by the agency and controlled by a licensee or registrant, but does not include the licensee or registrant.

(120) [~~(119)~~] Working level (WL) - Any combination of short-lived radon daughters in 1 liter of air that will result in the ultimate emission of 1.3 x 105 million electron volts (MeV) of potential alpha particle energy. The short-lived radon daughters are – for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead-212, bismuth-212, and polonium-212.

(121) [~~(120)~~] Working level month (WLM) - An exposure to one working level for 170 hours - - 2,000 working hours per year divided by 12 months per year is approximately equal to 170 hours per month.

(122) [~~(121)~~] Year - The period of time beginning in January used to determine compliance with the provisions of this chapter. The licensee [~~or registrant~~] may change the starting date of the year used to determine compliance by the licensee [~~or registrant~~] provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

(c) Exemptions.

(1) General provision. The agency may, upon application therefor or upon its own initiative, exempt a source of radiation or a kind of use or user from the requirements of this chapter if the agency determines that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment. [~~grant exemptions from the requirements of this chapter as it determines will not result in undue hazard to public health and safety or property.~~] In determining such exemptions, the agency will consider:

(A) state of technology;

(B) economic considerations in relation to benefits to the public health and safety; and

(C) other societal, socioeconomic, or public health and safety considerations.

(2) (No change.)

(d) Records.

(1) Each licensee [~~and registrant~~] shall maintain records showing the receipt, transfer, and disposal of all licensed [~~or registered~~] sources of radiation. These records shall be maintained by the licensee [~~or registrant~~] until disposal is authorized by the agency. Additional record requirements are specified elsewhere in this chapter. All records required by this chapter shall be accurate and factual.

(2)-(3) (No change.)

(e) Inspections.

(1) The agency may enter public or private property at reasonable times to determine whether, in a matter under the agency's jurisdiction, there is compliance with the Act, the agency's rules, license conditions, and orders issued by the agency.

(2) [~~(1)~~] Each licensee [~~and registrant~~] shall afford the agency, at all reasonable times, opportunity to inspect sources of radiation and the premises and facilities wherein such sources of radiation are used or stored.

(3) [~~(2)~~] Each licensee [~~and registrant~~] shall make available to the agency for inspection, upon reasonable notice, records maintained in accordance with this chapter.

[~~(3) Routine inspection of radiation machines and services.~~]

[~~(A) Routine inspections by agency personnel will be made no more frequently than the intervals specified in subsection (q)(1) of this section. Registrants having certificates of registration authorizing multiple uses will be inspected at the most frequent interval specified for the uses authorized.~~]

[~~(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, for those radiation machines determined by the agency to constitute a minimal threat to human health and safety, the routine inspection interval will be five years. The applicable categories are listed in subsection (q)(2) of this section.~~]

[~~(C) Notwithstanding the inspection intervals specified in this section, the agency may inspect registrants more frequently due to:~~]

[~~*(i)* the persistence or severity of violations found during an inspection;~~]

[~~*(ii)* investigation of an incident or complaint concerning the facility;~~]

[~~*(iii)* a request for an inspection by a worker(s) in accordance with 22.16 of TRCR Part 22 as adopted by reference in §289.114 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections);~~]

[~~*(iv)* any change in a facility or equipment that might cause a significant increase in radiation output or hazard; or~~]

[~~*(v)* a mutual agreement between the agency and registrant.~~]

[~~(4) Training for agency inspectors of electronic products.~~]

[(A) The agency will conduct inspections of medical, podiatric medical, dental, veterinary, and chiropractic electronic products in a manner designed to cause as little disruption of a medical, podiatric medical, dental, veterinary, or chiropractic practice as is practicable.]

[(B) A person who inspects medical, podiatric medical, dental, veterinary, or chiropractic electronic products will have training in the design and uses of the products.]

[(C) A person performing inspections of electronic products for the uses described in subparagraph (A) of this paragraph will receive training specified in subsection (q)(3) of this section.]

(f) Tests.

(1) Each licensee [and registrant] shall perform, upon instructions from the agency, or shall permit the agency to perform such reasonable tests as the agency deems appropriate or necessary including, but not limited to, tests of:

(A) sources of radiation;

(B) facilities wherein sources of radiation are used or stored;

(C) radiation detection and monitoring instruments; and

(D) other equipment and devices used in connection with utilization or storage of licensed [or registered] sources of radiation.

(2) (No change.)

(g) Tests for leakage and/or contamination of sealed sources.

(1) The licensee in possession of any sealed source shall assure that:

(A)-(D) (No change.)

(E) tests for leakage for all sealed sources, except brachytherapy sources manufactured to contain radium, shall be capable of detecting the presence of 0.005 μCi (185 Bq [becquerels (Bq)]) of radioactive material on a test sample. Test samples shall be taken from the sealed source or from the surfaces of the container in which the sealed source is stored or mounted where contamination might accumulate. For a sealed source contained in a device, test samples are obtained when the source is in the "off" position;

(F)-(G) (No change.)

(2)-(5) (No change.)

(6) The licensee shall immediately withdraw a leaking sealed source from use and shall take action to prevent the spread of contamination. The leaking sealed source shall be repaired or transferred for disposal in accordance with §289.202 of this title [this section].

(7) (No change.)

(h) Additional requirements. The agency may, by rule, order, or condition of license[, certificate of registration,] or general license acknowledgment, impose upon any licensee [or registrant] such requirements in addition to those established in this chapter as it deems appropriate or necessary to minimize danger to public health and safety or property or the environment.

(i) (No change.)

(j) Impounding. Sources of radiation shall be subject to impounding in accordance with §401.068 of the Act and §289.205 [§289.112] of this title (relating to Hearing and Enforcement Procedures).

[(k) Prohibited uses.]

[(1) A hand-held fluoroscopic screen shall not be used with x-ray equipment unless it has been listed in the Registry of Sealed Sources and Devices maintained by the agency or the NRC, or accepted for certification by the United States Food and Drug Administration (FDA), Center for Devices and Radiological Health.]

[(2) A shoe-fitting fluoroscopic device shall not be used.]

(k) [(l)] Communications.

(1) Except where otherwise specified, all communications and reports concerning this chapter and applications filed under them should be addressed to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3189. Communications, reports, and applications may be delivered in person to the agency's office located at 8407 Wall Street, Austin, Texas.

(2) Documents transmitted to the agency will be deemed submitted on the date of the postmark, telegram, telefacsimile, or electronic media transmission.

(l) [(m)] Interpretations. Except as specifically authorized by the agency in writing, no interpretation of the meaning of this chapter by any officer or employee of the agency other than a written interpretation by the Office of General Counsel, Texas Department of Health, will be considered binding upon the agency.

(m) [(n)] Open records.

(1) Subject to the limitations provided in the Texas Public Information Act, Government Code, Chapter 552, all information and data collected, assembled, or maintained by the agency are public records open to inspection and copying during regular office hours.

(2) Any person who submits written information or data to the agency and requests that the information be considered confidential, privileged, or otherwise not available to the public under the Texas Public Information Act, shall justify such request in writing, including statutes and cases where applicable, addressed to the agency.

(A) Documents containing information that is claimed to fall within [be] an exception to the Texas Public Information Act shall be marked to indicate that fact. Markings shall be placed on the document on origination or submission.

(i) The words "NOT AN OPEN RECORD" shall be placed conspicuously at the top and bottom of each page containing information claimed to fall within one of the exceptions.

(ii) The following wording shall be placed at the bottom of the front cover and title page, or first page of text if there is no front cover or title page:
Figure: 25 TAC §289.201(m)(2)(A)(ii)
[Figure: 25 TAC §289.201(n)(2)(A)(ii)]

(B) The agency requests, whenever possible, that all information submitted under the claim of an exception to the Texas Public Information Act be extracted from the main body of the application and submitted as a separate annex or appendix to the application.

(C) Failure to comply with any of the procedures described in subparagraphs (A) and (B) of this paragraph may result

in all information in the agency file being disclosed upon an open records request.

(3) The agency will determine whether [~~Whether~~] information falls within one of the exceptions to the Texas Public Information Act [~~shall be determined by the agency~~]. The Office of General Counsel will be queried as to whether or not there has been a previous determination that the information falls within one of the exceptions to the Texas Public Information Act. If there has been no previous determination and the agency believes that the information falls within one of the exceptions, an opinion of the Attorney General will be requested. If the agency agrees in writing to the request, the information shall not be open for public inspection unless the Attorney General's office subsequently determines that it does [~~is~~] not fall within an exception.

(4) Requests for information.

(A) All requests for open records information must be in writing and refer to documents currently in possession of the agency.

(B) The agency will ascertain whether the information may be released or whether it falls within an exception to the Texas Public Information Act.

(i) The agency may take a reasonable period of time to determine whether information falls within one of the exceptions to the Texas Public Information Act.

(ii) If the information is determined to be public, it will be presented for inspection and/or copies of documents will be furnished within a reasonable period of time. A fee will be charged to recover agency costs for copies.

(C) Original copies of public records may not be removed from the agency. Under no circumstances shall material be removed from existing records.

(n) [~~(o)~~] Mean quality factors and absorbed dose equivalencies [~~Units of exposure and dose~~].

[~~(1) As used in this chapter, the unit of exposure is the coulomb per kilogram (C/kg) of air. One roentgen (R) is equal to 2.58 x 10^{-4} C/kg~~]

[~~(2) As used in this chapter, the units of dose are as follows:~~]

[~~(A) Rad is the special unit of absorbed dose. One rad is equal to an absorbed dose of 100 erg/g or 0.01 J/kg (0.01 gray). Gray (Gy) is the SI unit of absorbed dose. One gray is equal to an absorbed dose of 1 J/kg (100 rads).~~]

[~~(B) Rem is the special unit of any of the quantities expressed as dose equivalent. The dose equivalent in rem is equal to the absorbed dose in rad multiplied by the quality factor (1 rem = 0.01 sievert).~~]

[~~(C) Sievert (Sv) is the SI unit of any of the quantities expressed as dose equivalent. The dose equivalent in sievert is equal to the absorbed dose in gray multiplied by the quality factor (1 Sv = 100 rems).~~]

(1) [~~(3)~~] As used in this chapter, the quality factors for converting absorbed dose to dose equivalent are shown in the following table:
Figure: 25 TAC §289.201(n)(1)
[~~Figure: 25 TAC §289.201(o)(3)~~]

(2) [~~(4)~~] If it is more convenient to measure the neutron fluence rate than to determine the neutron dose equivalent rate in sievert per hour or rem per hour, as provided in paragraph (1) of this subsection [~~subsection (o)(3) of this section~~], 1 rem (0.01 Sv) of neutron radiation of unknown energies may, for purposes of this section, be assumed to result from a total fluence of 25 million neutrons per square centimeter incident upon the body. If sufficient information exists to estimate the approximate energy distribution of the neutrons, the licensee [~~or registrant~~] may use the fluence rate per unit dose equivalent or the appropriate Q value from the following table to convert a measured tissue dose in rad (gray) to dose equivalent in rem (Sv).
Figure: 25 TAC §289.201(n)(2)
[~~Figure: 25 TAC §289.201(o)(4)~~]

(o) [~~(p)~~] Units of activity. For purposes of this chapter, activity is expressed in the special unit of curie (Ci) (becquerel (Bq)), or its multiples, or disintegrations or transformations per second (dps or tps).

(1) 1 [~~One~~] Ci = 3.7 x 10^{10} dps or tps = 3.7 x 10^{10} (Bq) = 2.22 x 10^{12} disintegrations or transformations per minute (dpm or tpm).

(2) 1 [~~One~~] Bq = 1 dps or tps.

[~~(q) Appendices.~~]

[~~(1) Routine inspection intervals for registrants.~~]
[~~Figure: 25 TAC §289.201(q)(1)~~]

[~~(2) Minimal threat radiation machines. The following radiation machines are considered to be of minimal threat:~~]

[~~(A) electron microscope;~~]

[~~(B) x-ray fluorescence (machine);~~]

[~~(C) x-ray gauges radiography - certified cabinet x-ray only;~~]

[~~(D) particle size analyzer (x-ray);~~]

[~~(E) baggage or package x-ray;~~]

[~~(F) electron beam welding;~~]

[~~(G) ion implantation devices; and~~]

[~~(H) cathodoluminescence devices;~~]

[~~(3) Training for agency inspectors of electronic products.~~]

[~~(A) Objectives. Training of agency inspectors of electronic products will be conducted by the agency. Upon completion of training, the inspector will be able to:~~]

[~~(i)~~ ~~select and operate the necessary testing equipment used to perform an inspection of electronic products;~~]

[~~(ii)~~ ~~utilize radiation protection principles;~~]

[~~(iii)~~ ~~operate radiation detection instruments;~~]

[~~(iv)~~ ~~define basic regulatory terminology;~~]

[~~(v)~~ ~~apply this section regarding electronic products;~~]

[~~(vi)~~ ~~perform routine agency inspections of electronic products;~~]

[~~(vii)~~ ~~complete agency inspection documentation;~~]

~~[(viii) demonstrate knowledge of agency ethics, professional, and technical policies; and]~~

~~[(ix) successfully achieve the objectives in this subparagraph.]~~

~~[(B) Initial training program.]~~

~~[(i) Initial training will be conducted during a six-month period.]~~

~~[(ii) All training evaluation instruments will be developed by the agency.]~~

~~[(iii) Instruments to be used in determining a proficiency level are as follows:]~~

~~[(I) evaluation of each inspectors training needs prior to initial training;]~~

~~[(II) evaluation of knowledge obtained and verification of tasks performed by each inspector subsequent to training received by the agency; and]~~

~~[(III) evaluation of each inspector's task performance by the agency.]~~

~~[(C) Continuing education.]~~

~~[(i) The agency inspector of electronic products will accumulate 24 hours of continuing education regarding electronic products, at intervals not to exceed 24 months. These hours of continuing education may be acquired as follows:]~~

~~[(I) documented continuing education earned in an agency-accepted training format; and]~~

~~[(II) agency staff meetings.]~~

~~[(ii) Failure to obtain 24 hours of continuing education within each 24 month interval may result in a reassessment by the agency of an agency inspector's proficiency level.]~~

~~[(iii) After the initial training period, each inspector of electronic products will be evaluated by the agency, at intervals not to exceed 12 months.]~~

~~[(D) Agency proficiency standards. The agency proficiency standards for agency inspectors of electronic products are as follows.]~~

~~[(i) Level I. The agency inspector has not successfully achieved the objectives in subparagraph (A) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections will not be performed.]~~

~~[(ii) Level II. The agency inspector has partially achieved the objectives in subparagraph (A) of this paragraph, but has not achieved the objective in subparagraph (A)(ix) of this paragraph after the initial training period. Additional training is required. Unsupervised inspections are not permitted for the type of electronic products for which the objectives of subparagraph (A)(ix) of this paragraph have not been achieved. Unsupervised inspections may be performed for the type of electronic products for which the objectives in subparagraph (A)(ix) of this paragraph have been successfully achieved.]~~

~~[(iii) Level III. The agency inspector has successfully achieved the objectives in subparagraph (A) of this paragraph. Supervision is not required for routine inspections.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907978
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §289.202

The Texas Department of Health (department) proposes an amendment to §289.202 concerning standards for protection against radiation from radioactive materials.

The revision deletes pertinent references to x-ray radiation, registered sources of radiation, and radiation machines because the requirements for the use of radiation machines are being consolidated in a new section. The revision includes new definitions that support the changes in the rule. A requirement for licensees to establish a constraint on air emissions of radioactive material to the environment is added. Language is added to clarify that exposure from an individual who has had a medical administration of radioactive material is not to be included in the dose limits required by this section. The conditions requiring monitoring of radiation exposures to minors and to pregnant women are modified. The requirement is also clarified to state that the dose limit requiring monitoring for a declared pregnant woman is applicable only for the nine-month gestation period. Additional conditions are added under which teletherapy rooms may be exempted from posting requirements. Requirements for notification of certain events are moved from another section and more appropriately placed in this section. New requirements for decommissioning that are dose-based rather than concentration-based are added. Several of the revisions have been designated as items of compatibility by the United States Nuclear Regulatory Commission (NRC). As an Agreement State, Texas must adopt these items of compatibility in accordance with that agreement. Other minor grammatical changes are made to the section for clarification.

Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation from radioactive material. There will be no economic effects on micro- businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment. The additional requirement for a constraint on air emissions is an existing federal requirement. The jurisdictional conflict concerning air emissions from radioactive materials between the United States Environmental Protection

Agency and the NRC was resolved and the requirement was incorporated in NRC rules. It was then made an item of compatibility for Agreement States. So, licenses have already been complying with this requirement. Decommissioning is an existing requirement, but must now be dose-based rather than concentration-based. Because the amendment imposes no additional requirements such as record keeping, regulatory limits, procedures, or processes, there are no economic effects associated with the section as proposed.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 1:30 p.m., Friday, December 17, 1999, in Conference Room S402, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects Health and Safety Code, Chapter 401 and Chapter 12.

§289.202. Standards for Protection Against Radiation from Radioactive Materials.

(a) Purpose.

(1) This section establishes standards for protection against ionizing radiation resulting from activities conducted in accordance with licenses [~~or certificates of registration~~] issued by the agency. [~~These rules are issued in accordance with the Texas Radiation Control Act.~~]

(2) The requirements [~~rules~~] in this section are designed to control the receipt, possession, use, and transfer of sources of radiation by any licensee [~~or registrant~~] so the total dose to an individual, including doses resulting from all sources of radiation other than background radiation, does not exceed the standards for protection against radiation prescribed in this section. However, nothing in this section shall be construed as limiting actions that may be necessary to protect health and safety in an emergency.

(b) Scope.

(1) Except as specifically provided in other sections of this chapter, this section applies to persons who [~~licensed or registered by the agency to~~] receive, possess, use, or transfer sources of radiation, unless otherwise exempted. No person may use, manufacture, produce, transport, transfer, receive, acquire, own, possess, process, or dispose of sources of radiation unless that person has a license or exemption from the agency. The dose limits in this section do not apply to doses due to background radiation, to exposure of patients to radiation for the purpose of medical diagnosis or therapy, to exposure from individuals administered radioactive material and released in accordance with this chapter, or to voluntary participation in medical research programs. However, no radiation may be deliberately applied to human beings except by or under the supervision of an individual authorized by and licensed in accordance with Texas' statutes to engage in the healing arts.

(2) Licensees who are also registered by the agency to receive, possess, use, and transfer radiation machines must also comply with the requirements of §289.231 of this title (relating to General Provisions and Standards for Protection Against Machine-Produced Radiation).

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context clearly indicates otherwise.

(1)-(2) (No change.)

(3) Declared pregnant woman - A woman who has voluntarily informed the licensee [~~her employer~~], in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman voluntarily withdraws the declaration in writing or is no longer pregnant.

(4)-(10) (No change.)

(11) Quarter - A period of time equal to one-fourth of the year observed by the licensee [~~or registrant~~], approximately 13 consecutive weeks, providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(12)-(15) (No change.)

[~~(16) Very high radiation area - An area, accessible to individuals, in which radiation levels could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at 1 meter (m) from a source of radiation or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose, gray and rad, are appropriate, rather than units of dose equivalent, Sv and rem.~~]

(16) [~~(17)~~] Weighting factor wT for an organ or tissue (T) - The proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of wT are:
Figure: 25 TAC §289.202(c)(16)
[~~Figure: 25 TAC §289.202(c)(17)~~]

(d) Implementation.

(1) Any existing license [~~or certificate of registration~~] condition that is more restrictive than this section remains in force until there is an amendment or renewal of the license that modifies or removes this condition [~~or registration~~].

(2) If a license [~~or certificate of registration~~] condition exempts a licensee [~~or registrant~~] from a provision of this section in effect on or before January 1, 1994, it also exempts the licensee [~~or registrant~~] from the corresponding provision of this section.

(3) If a license [~~or registration~~] condition cites provisions of this section in effect prior to January 1, 1994, that do not correspond to any provisions of this section, the license [~~or registration~~] condition remains in force until there is an amendment or renewal of the license [~~or registration~~] that modifies or removes this condition.

(e) Radiation protection programs.

(1) Each licensee [~~or registrant~~] shall develop, document, and implement a radiation protection program sufficient to ensure compliance with the provisions of this section. See subsection

(mm) of this section for recordkeeping requirements relating to these programs.

(2) The licensee [~~or registrant~~] shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and public doses that are as low as is reasonably achievable (ALARA).

(3) The licensee [~~or registrant~~] shall, at intervals not to exceed 12 months, ensure the radiation protection program content and implementation is reviewed.

(4) To implement the ALARA requirement in paragraph (2) of this subsection and notwithstanding the requirements in subsection (n) of this section, a constraint on air emissions of radioactive material to the environment, excluding radon-222 and its daughters, shall be established by licensees such that the individual member of the public likely to receive the highest dose will not be expected to receive a total effective dose equivalent in excess of 10 millirems (mrem) (0.1 mSv) per year from these emissions. If a licensee subject to this requirement exceeds this dose constraint, the licensee shall report the exceedance as required in subsection (yy) of this section and promptly take appropriate corrective action.

(f) Occupational dose limits for adults.

(1) The licensee [~~or registrant~~] shall control the occupational dose to individuals [~~individual adults~~], except for planned special exposures in accordance with subsection (k) of this section, to the following dose limits.

(A) An annual limit shall be the more limiting of:

(i) the total effective dose equivalent being equal to 5 rems (0.05 Sv); or

(ii) the sum of the deep dose equivalent and the committed dose equivalent to any individual organ or tissue other than the lens of the eye being equal to 50 rems (0.5 Sv).

(B) The annual limits to the lens of the eye, to the skin, and to the extremities shall be:

(i) a lens [~~an eye~~] dose equivalent of 15 rems (0.15 Sv); and

(ii) a shallow dose equivalent of 50 rems (0.5 Sv) to the skin or to any extremity.

(2) Doses received in excess of the annual limits, including doses received during accidents, emergencies, and planned special exposures, shall be subtracted from the limits for planned special exposures that the individual may receive during the current year and during the individual's lifetime. See subsection (k)(6)(A) and (B) of this section [~~subsection (k)(1)(F)(i) and (ii) of this section~~].

(3) (No change.)

(4) The deep dose equivalent, lens [~~eye~~] dose equivalent and shallow dose equivalent may be assessed from surveys, calculations, or [~~other~~] radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the individual monitoring device was not in the region of highest potential exposure, or the results of individual monitoring are unavailable.

[~~(5) When a protective apron is worn while working with fluoroscopic equipment used for clinical diagnostic or research purposes, the effective dose equivalent for external radiation shall be determined as follows.~~]

[~~(A) When only one individual monitoring device is used and it is located at the neck outside the protective apron, the reported deep dose equivalent shall be the effective dose equivalent for external radiation.~~]

[~~(B) When only one individual monitoring device is used and it is located at the neck outside the protective apron, and the reported dose exceeds 25% of the limit specified in paragraph (1) of this subsection, the reported deep dose equivalent value multiplied by 0.3 shall be the effective dose equivalent for external radiation.~~]

[~~(C) When individual monitoring devices are worn, both under the protective apron at the waist and outside the protective apron at the neck, the effective dose equivalent for external radiation shall be assigned the value of the sum of the deep dose equivalent reported for the individual monitoring device located at the waist under the protective apron multiplied by 1.5 and the deep dose equivalent reported for the individual monitoring device located at the neck outside the protective apron multiplied by 0.04.~~]

(5) [~~(6)~~] Derived air concentration (DAC) and annual limit on intake (ALI) values are specified in Table I of subsection (ggg)(2) of this section and may be used to determine the individual's dose and to demonstrate compliance with the occupational dose limits. See subsection (rr) of this section.

(6) [~~(7)~~] Notwithstanding the annual dose limits, the licensee shall limit the soluble uranium intake by an individual to 10 milligrams (mg) in a week in consideration of chemical toxicity. See footnote 3 of subsection (ggg)(2) of this section.

(7) [~~(8)~~] The licensee [~~or registrant~~] shall reduce the dose that an individual may be allowed to receive in the current year by the amount of occupational dose received while employed by any other person. See subsection (j)(4) of this section.

(g) Compliance with requirements for summation of external and internal doses.

(1) If the licensee is required to monitor in accordance with both subsection (q)(1) and (3) of this section, the licensee shall demonstrate compliance with the dose limits by summing external and internal doses. If the licensee [~~or registrant~~] is required to monitor only in accordance with subsection (q)(1) of this section or only in accordance with subsection (q)(3) of this section, then summation is not required to demonstrate compliance with the dose limits. The licensee may demonstrate compliance with the requirements for summation of external and internal doses in accordance with paragraphs (2)-(4) [~~(2), (3) and (4)~~] of this subsection. The dose equivalents for the lens of the eye, the skin, and the extremities are not included in the summation, but are subject to separate limits.

(2)-(4) (No change.)

(h) (No change.)

(i) Determination of internal exposure.

(1)-(3) (No change.)

(4) If the licensee chooses to assess intakes of Class Y material using the measurements given in paragraph (1)(A) or (B) of this subsection, the licensee may delay the recording and reporting of the assessments for periods up to seven [~~7~~] months, unless otherwise required by subsections (xx) or (yy) of this section. This delay permits the licensee to make additional measurements basic to the assessments.

(5)-(8) (No change.)

(j) Determination of occupational dose for the current year.

(1) For each individual who is likely to receive, in a year, an occupational dose requiring monitoring in accordance with subsection (q) of this section, the licensee [~~or registrant~~] shall determine the occupational radiation dose received during the current year.

(2) In complying with the requirements of paragraph (1) of this subsection, a licensee [~~or registrant~~] may:

(A) accept, as a record of the occupational dose that the individual received during the current year, BRC Form 202-2 [~~TRC Form 21-2~~] from prior employers, or other clear and legible record, of all information required on that form and indicating any periods of time for which data are not available; or

(B) accept, as a record of the occupational dose that the individual received during the current year, a written signed statement from the individual, or from the individual's prior employer(s) for work involving radiation exposure, that discloses the nature and the amount of any occupational dose that the individual received during the current year; or

(C) obtain reports of the individual's dose equivalent from prior employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee [~~or registrant~~], by telephone, telegram, facsimile, or letter. The licensee [~~or registrant~~] shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(3) The licensee [~~or registrant~~] shall record the exposure data for the current year, as required by paragraph (1) of this subsection, on BRC Form 202-3 [~~TRC Form 21-3~~], or other clear and legible record, of all the information required on that form.

(4) If the licensee [~~or registrant~~] is unable to obtain a complete record of an individual's current occupational dose while employed by any other licensee [~~or registrant~~], the licensee [~~or registrant~~] shall assume in establishing administrative controls in accordance with subsection (f)(8) of this section for the current year, that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 millisieverts (mSv)) for each quarter; or 416 mrem [~~millirems (mrem)~~] (4.16 mSv) for each month for which records were unavailable and the individual was engaged in activities that could have resulted in occupational radiation exposure.

(5) If an individual has incomplete (e.g., a lost or damaged personnel monitoring device) current occupational dose data for the current year and that individual is employed solely by the licensee [~~or registrant~~] during the current year, the licensee [~~or registrant~~] shall:

(A) assume that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 mSv) for each quarter;

(B) assume that the allowable dose limit for the individual is reduced by 416 mrem (4.16 mSv) for each month; or

(C) assess an occupational dose for the individual during the period of missing data using surveys, radiation measurements, or other comparable data for the purpose of demonstrating compliance with the occupational dose limits.

(6) Administrative controls established in accordance with paragraph (4) of this subsection shall be documented and maintained for inspection by the agency. Occupational dose assessments made in accordance with paragraph (5) of this subsection and records of data used to make the assessment shall be maintained for inspection by the agency. The licensee [~~or registrant~~] shall retain the records in accordance with subsection (rr) of this section.

(k) Planned special exposures. A licensee may authorize an adult worker to receive doses in addition to and accounted for separately from the doses received under the limits specified in subsection (f) of this section provided that each of the following conditions is satisfied.

[~~(1) A licensee may authorize an adult worker to receive doses in addition to and accounted for separately from the doses received under the limits specified in subsection (f) of this section provided that each of the following conditions is satisfied.~~]

(1) [~~(A)~~] The licensee authorizes a planned special exposure only in an exceptional situation when alternatives that might avoid the doses estimated to result from the planned special exposure [~~higher exposure~~] are unavailable or impractical.

(2) [~~(B)~~] The licensee and employer, if the employer is not the licensee [~~or registrant~~], specifically authorizes the planned special exposure, in writing, before the exposure occurs.

(3) [~~(C)~~] Before a planned special exposure, the licensee ensures that each individual involved is:

(A) [~~(i)~~] informed of the purpose of the planned operation;

(B) [~~(ii)~~] informed of the estimated doses and associated potential risks and specific radiation levels or other conditions that might be involved in performing the task; and

(C) [~~(iii)~~] instructed in the measures to be taken to keep the dose ALARA considering other risks that may be present.

(4) [~~(D)~~] Prior to permitting an individual to participate in a planned special exposure, the licensee shall determine:

(A) [~~(i)~~] the internal and external doses from all previous planned special exposures;

(B) [~~(ii)~~] all doses in excess of the limits, including doses received during accidents and emergencies, received during the lifetime of the individual; and

(C) [~~(iii)~~] all lifetime cumulative occupational radiation doses.

(5) [~~(E)~~] In complying with the requirements of paragraph (4)(C) of this subsection [~~subparagraph (D)(iii) of this paragraph~~], a licensee may:

(A) [~~(i)~~] accept, as the record of lifetime cumulative radiation dose, an up-to-date BRC Form 202-2 [~~TRC Form 21-2~~] or equivalent, signed by the individual and countersigned by an appropriate official of the most recent employer for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee; and

(B) [~~(ii)~~] obtain reports of the individual's dose equivalent from prior employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee, by telephone, telegram, facsimile, or letter. The licensee shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(6) [~~(F)~~] Subject to subsection (f)(2) of this section, the licensee shall not authorize a planned special exposure that would cause an individual to receive a dose from all planned special exposures and all doses in excess of the limits to exceed:

(A) [~~(i)~~] the numerical values of any of the dose limits in subsection (f)(1) of this section in any year; and

(B) [~~(ii)~~] five times the annual dose limits in subsection (f)(1) of this section during the individual's lifetime.

(7) [~~(G)~~] The licensee maintains records of the conduct of a planned special exposure in accordance with subsection (qq) of this section and submits a written report to the agency in accordance with subsection (zz) of this section.

(8) [~~(H)~~] The licensee records the best estimate of the dose resulting from the planned special exposure in the individual's record and informs the individual, in writing, of the dose within 30 days from the date of the planned special exposure. The dose from planned special exposures shall not be considered in controlling future occupational dose of the individual in accordance with subsection (f)(1) of this section but shall be included in evaluations required by paragraphs (4) and (6) of this subsection [~~subparagraphs (D) and (F) of this paragraph~~].

(9) [~~(I)~~] The licensee shall record the exposure history, as required by paragraph (4) of this subsection [~~subparagraph (D) of this paragraph~~], on BRC Form 202-2 [~~TRC Form 21-2~~], or other clear and legible record, of all the information required on that form. The form or record shall show each period in which the individual received occupational exposure to radiation or radioactive material and shall be signed by the individual who received the exposure. For each period for which the licensee obtains reports, the licensee shall use the dose shown in the report in preparing BRC Form 202- 2 [~~TRC Form 21-2~~] or equivalent.

[~~(2) Planned special exposures are not applicable to registrants.~~]

(l) (No change.)

(m) Dose equivalent to an embryo/fetus.

(1) If a woman declares her pregnancy, the licensee [~~or registrant~~] shall ensure that the dose equivalent to an embryo/fetus during the entire pregnancy, due to occupational exposure of a declared pregnant woman, does not exceed 0.5 rem (5 mSv). If a woman chooses not to declare pregnancy, the occupational dose limits specified in subsection (f)(1) of this section are applicable to the woman. See subsection (rr) of this section for recordkeeping requirements.

(2) The licensee [~~or registrant~~] shall make efforts to avoid substantial variation above a uniform monthly exposure rate to a declared pregnant woman so as to satisfy the limit in paragraph (1) of this subsection. The National Council on Radiation Protection and Measurements recommended in NCRP Report No. 91 "Recommendations on Limits for Exposure to Ionizing Radiation" (June 1, 1987) that no more than 0.05 rem (0.5 mSv) to the embryo/fetus be received in any one [~~1~~] month.

(3) The dose equivalent to an embryo/fetus shall be taken as:

(A) the dose equivalent to the embryo/fetus from radionuclides in the embryo/fetus and radionuclides in the declared pregnant woman; and

(B) the dose equivalent that is most representative of the dose equivalent to the embryo/fetus from external radiation, that is, in the mother's lower torso region.

(i) If multiple measurements have not been made, assignment of the highest deep dose equivalent for the declared pregnant woman shall be the dose equivalent to the embryo/fetus.

(ii) If multiple measurements have been made, assignment of the deep dose equivalent for the declared pregnant woman from the individual monitoring device that is most representative of the dose equivalent to the embryo/fetus shall be the dose equivalent to the embryo/fetus. Assignment of the highest deep dose equivalent for the declared pregnant woman to the embryo/fetus is not required unless that dose equivalent is also the most representative deep dose equivalent for the region of the embryo/fetus.

(4) If by the time the woman declares pregnancy to the licensee [~~or registrant~~], the dose equivalent to the embryo/fetus has exceeded 0.45 rem (4.5 mSv), the licensee [~~or registrant~~] shall be deemed to be in compliance with paragraph (1) of this subsection, if the additional dose equivalent to the embryo/fetus does not exceed 0.05 rem (0.5 mSv) during the remainder of the pregnancy.

(n) Dose limits for individual members of the public.

(1) Each licensee [~~or registrant~~] shall conduct operations so that:

(A) except as provided in subparagraph (B) of this paragraph, the total effective dose equivalent to individual members of the public from the licensed and/or registered operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contribution from [~~the licensee's disposal of radioactive material into sanitary sewerage in accordance with subsection~~ (gg) of this section,] background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with this chapter, [~~exposure of patients to radiation for the purpose of medical diagnosis or therapy, or to~~] from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage in accordance with subsection (gg) of this section; and[~~;~~]

[~~(B) the total effective dose equivalent to individual members of the public from exposure to radiation from radiation machines does not exceed 0.5 rem (5 mSv) in a year; and~~]

(B) [~~(C)~~] the dose in any unrestricted area from licensed and/or registered external sources, exclusive of the dose contributions from patients administered radioactive material and released in accordance with this chapter, does not exceed 0.002 rem (0.02 mSv) in any one hour.

(2) If the licensee [~~or registrant~~] permits members of the public to have access to restricted areas, the limits for members of the public continue to apply to those individuals.

(3)-(5) (No change.)

(o) Compliance with dose limits for individual members of the public.

(1) The licensee [~~or registrant~~] shall make or cause to be made surveys of radiation levels in unrestricted areas and radioactive materials in effluents released to unrestricted areas to demonstrate compliance with the dose limits for individual members of the public as required in subsection (n) of this section.

(2) A licensee [~~or registrant~~] shall show compliance with the annual dose limit in subsection (n) of this section by:

(A) demonstrating by measurement or calculation that the total effective dose equivalent to the individual likely to receive the highest dose from the licensed or registered operation does not exceed the annual dose limit; or

(B) demonstrating that:

(i) the annual average concentrations of radioactive material released in gaseous and liquid effluents at the boundary of the unrestricted area do not exceed the values specified in Table II of subsection (ggg)(2) of this section; and

(ii) if an individual were continuously present in an unrestricted area, the dose from external sources of radiation would not exceed 0.002 rem (0.02 mSv) in an hour and 0.05 rem (0.5 mSv) in a year.

~~[(3) Registrants exempt from personnel monitoring requirements in accordance with subsection (p)(4)-(5) of this section are exempt from the requirements of paragraphs (1) and (2)of this subsection.]~~

(3) ~~[(4)]~~ Upon approval from the agency, the licensee may adjust the effluent concentration values in Table II, of subsection (ggg)(2) of this section, for members of the public, to take into account the actual physical and chemical characteristics of the effluents, such as, aerosol size distribution, solubility, density, radioactive decay equilibrium, and chemical form.

(p) General surveys and monitoring.

(1) Each licensee [~~or registrant~~] shall make, or cause to be made, surveys that:

(A) are necessary for the licensee [~~or registrant~~] to comply with this section; and

(B) are necessary under the circumstances to evaluate:

(i) the magnitude and extent of radiation levels;

(ii) concentrations or quantities of radioactive material; and

(iii) the potential radiological hazards [~~that could be present~~].

(2) The licensee [~~or registrant~~] shall ensure that instruments and equipment used for quantitative radiation measurements, for example, dose rate and effluent monitoring, are operable and calibrated:

(A) by a person licensed or registered by the agency, another agreement state, a licensing state, or the United States Nuclear Regulatory Commission (NRC) to perform such service;

(B) at intervals not to exceed 12 months unless a different time interval is specified in another section of this chapter;

(C) after each instrument or equipment repair;

(D) for the types of radiation used and at energies appropriate for use; and

(E) at an accuracy within 20% of the true radiation level.

(3) All individual monitoring devices [~~personnel dosimeters~~], except for direct and indirect reading pocket dosimeters [~~ionization chambers~~] and those individual monitoring devices [~~dosimeters~~] used to measure the dose to any extremity, that require processing to determine the radiation dose and that are used by licensees [~~and registrants~~] to comply with subsection (f) of this section, with other applicable provisions of this chapter [~~these rules~~], or with conditions specified in a license [~~or certificate of registration~~], shall be processed and evaluated by a dosimetry processor:

(A) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology;

(B) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored; and

(C) holding a current certificate of registration from the agency authorizing dosimetry processing.

~~[(4) Notwithstanding the requirements of subsection (q)(1) of this section, no personnel monitoring shall be required for personnel operating only minimal threat devices as specified in §289.201(q)(4) of this title (relating to General Provisions).]~~

~~[(5) Notwithstanding the requirements of subsection (q)(1) of this section, no personnel monitoring shall be required for personnel operating only dental radiographic systems for healing arts purposes.]~~

(q) Conditions requiring individual monitoring of external and internal occupational dose. Each licensee [~~or registrant~~] shall monitor exposures from sources of radiation at levels sufficient to demonstrate compliance with the occupational dose limits of this section. As a minimum:

(1) each licensee [~~or registrant~~] shall monitor occupational exposure to radiation and shall supply and require the use of individual monitoring devices by:

(A) adults likely to receive, in one [~~1~~] year from sources external to the body, a dose in excess of 10% of the limits in subsection (f)(1) of this section;

(B) minors [~~and declared pregnant women~~] likely to receive, in one [~~1~~] year from sources of radiation external to the body, a deep dose equivalent in excess of 0.1 rem (1 mSv), a lens dose equivalent in excess of 0.15 rem (1.5 mSv), or a shallow dose equivalent to the skin or to the extremities in excess of 0.5 rem (5 mSv); [~~dose in excess of 10% of any of the applicable limits in subsections (l) or (m)of this section; and~~]

(C) declared pregnant women likely to receive during the entire pregnancy, from sources of radiation external to the body, a deep dose equivalent in excess of 0.1 rem (1 mSv); and

(D) [~~(C)~~] individuals entering a high or very high radiation area;

(2) notwithstanding paragraph (1)(C) of this subsection, a licensee is exempt from supplying individual monitoring devices to healthcare personnel who may enter a high radiation area while providing patient care if:

(A) the personnel are not likely to receive, in one [~~1~~] year from sources external to the body, a dose in excess of 10% of the limits in subsection (f)(1) of this section; and

(B) the licensee complies with the requirements of subsection (e)(2) of this section; and

(3) each licensee shall monitor, to determine compliance with subsection (i) of this section, the occupational intake of radioactive material by and assess the committed effective dose equivalent to:

(A) adults likely to receive, in one [~~1~~] year, an intake in excess of 10% of the applicable ALI in Columns 1 and 2 of Table I of subsection (ggg)(2) of this section; [~~and~~]

(B) minors [~~and declared pregnant women~~] likely to receive, in one year, a committed effective dose equivalent in excess of 0.1 [~~0.05~~] rem (1 [~~0.5~~] mSv); and [~~.~~]

(C) declared pregnant women likely to receive, during the entire pregnancy, a committed effective dose equivalent in excess of 0.1 rem (1 mSv).

(r) Location and use of individual monitoring devices.

(1) Each licensee [~~or registrant~~] shall ensure that individuals who are required to monitor occupational doses in accordance with subsection (q)(l) of this section wear and use individual monitoring devices as follows.

(A) An individual monitoring device used for monitoring the dose to the whole body shall be worn at the unshielded location of the whole body likely to receive the highest exposure. When a protective apron is worn, the location of the individual monitoring device is typically at the neck (collar).

(B) If an additional individual monitoring device is used for monitoring the dose to an embryo/fetus of a declared pregnant woman, in accordance with subsection (m)(1) of this section, it shall be located at the waist under any protective apron being worn by the woman.

(C) An individual monitoring device used for monitoring the lens [~~eye~~] dose equivalent, to demonstrate compliance with subsection (f)(1)(B)(i) of this section, shall be located at the neck (collar) or at a location closer to the eye, outside any protective apron being worn by the monitored individual.

(D) An individual monitoring device used for monitoring the dose to the extremities, to demonstrate compliance with subsection (f)(1)(B)(ii) of this section, shall be worn on the extremity likely to receive the highest exposure. Each individual monitoring device, to the extent practicable, shall be oriented to measure the highest dose to the extremity being monitored.

(E) An individual monitoring device shall be assigned to and worn by only one individual.

(F) An individual monitoring device shall be worn for the period of time authorized by the dosimetry processor's certificate of registration or for no longer than three [~~3~~] months, whichever is more restrictive.

(2) Each licensee [~~or registrant~~] shall ensure that individual monitoring devices are returned to the dosimetry processor for proper processing.

(3) Each licensee [~~or registrant~~] shall ensure that adequate precautions are taken to prevent a deceptive exposure of an individual monitoring device.

(s) Control of access to high radiation areas.

(1) The licensee [~~or registrant~~] shall ensure that each entrance or access point to a high radiation area has one or more of the following features:

(A) a control device that, upon entry into the area, causes the level of radiation to be reduced below that level at which an individual might receive a deep dose equivalent of 0.1 rem (1 mSv) in one hour at 30 centimeters (cm) from the source of radiation from any surface that the radiation penetrates;

(B) a control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry; or

(C) entryways that are locked, except during periods when access to the areas is required, with positive control over each individual entry.

(2) In place of the controls required by paragraph (1) of this subsection for a high radiation area, the licensee [~~or registrant~~] may substitute continuous direct or electronic surveillance that is capable of preventing unauthorized entry.

(3) The licensee [~~or registrant~~] may apply to the agency for approval of alternative methods for controlling access to high radiation areas.

(4) The licensee [~~or registrant~~] shall establish the controls required by paragraphs (1) and (3) of this subsection in a way that does not prevent individuals from leaving a high radiation area.

(5) The licensee is not required to control each entrance or access point to a room or other area that is a high radiation area solely because of the presence of radioactive materials prepared for transport and packaged and labeled in accordance with the regulations of the United States Department of Transportation (DOT) provided that:

(A) the packages do not remain in the area longer than three [~~3~~] days; and

(B) (No change.)

(6) The licensee is not required to control entrance or access to rooms or other areas in hospitals solely because of the presence of patients containing radioactive material, provided that there are personnel in attendance who are taking the necessary precautions to prevent the exposure of individuals to sources of radiation [~~or radioactive material~~] in excess of the established limits in this section and to operate within the ALARA provisions of the licensee's radiation protection program.

[~~(7) The registrant is not required to control entrance or access to rooms or other areas containing sources of radiation capable of producing a high radiation area as described in this subsection if the registrant has met all the specific requirements for access and control specified in other applicable sections of this chapter, such as, §289.115 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography), §289.116 of this title (relating to Use of Radiation Machines in the Healing Arts and Veterinary Medicine), and §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators).~~]

(t) Control of access to very high radiation areas.

[~~(1)~~] In addition to the requirements in subsection (s) of this section, the licensee [~~or registrant~~] shall institute measures to ensure that an individual is not able to gain unauthorized or inadvertent access to areas in which radiation levels could be encountered at 500 rads (5 grays) or more in one hour at 1 m from a source of radiation or any surface through which the radiation penetrates at this level. [~~This requirement does not apply to rooms or areas in which diagnostic x-ray systems are the only source of radiation.~~]

[~~(2) The registrant is not required to control entrance or access to rooms or other areas containing sources of radiation capable of producing a very high radiation area as described in paragraph (1) of this subsection if the registrant has met all the specific requirements for access and control specified in other applicable parts of this chapter, such as, §289.115 of this title, §289.116 of this title, and §289.119 of this title.~~]

(u)-(x) (No change.)

(y) Security and control of licensed [~~or registered~~] sources of radiation.

(1) The licensee shall secure radioactive material from unauthorized removal or access.

(2) The licensee shall maintain constant surveillance, using devices and/or administrative procedures to prevent unauthorized use of radioactive material that is in an unrestricted area and that is not in storage.

[~~(3) The registrant shall secure radiation machines from unauthorized removal.~~]

[~~(4) The registrant shall use devices and/or administrative procedures to prevent unauthorized use of radiation machines.~~]

(z) Caution signs.

(1) (No change.)

(2) Notwithstanding the requirements of paragraph (1) of this subsection, licensees [~~or registrants~~] are authorized to label sources, source holders, or device components containing sources of radiation that are subjected to high temperatures, with conspicuously etched or stamped radiation caution symbols and without a color requirement.

(aa) Posting requirements.

(1) The licensee [~~or registrant~~] shall post each radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIATION AREA."

(2) The licensee [~~or registrant~~] shall post each high radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(3) The licensee [~~or registrant~~] shall post each very high radiation area with a conspicuous sign or signs bearing the radiation symbol and words "GRAVE DANGER, VERY HIGH RADIATION AREA." If the very high radiation area involves medical treatment of patients, the licensee [~~or registrant~~] may omit the word "GRAVE" from the sign or signs.

(4)-(5) (No change.)

(bb) Exceptions to posting requirements.

(1) A licensee [~~or registrant~~] is not required to post caution signs in areas or rooms containing sources of radiation for periods of less than 8 hours, if each of the following conditions is met:

(A) the sources of radiation are constantly attended during these periods by an individual who takes the precautions necessary to prevent the exposure of individuals to sources of radiation in excess of the limits established in this section; and

(B) the area or room is subject to the licensee's [~~or registrant's~~] control.

(2) Rooms or other areas in hospitals that are occupied by patients are not required to be posted with caution signs in accordance with subsection (aa) of this section provided that the patient could be released from licensee control [~~confinement~~] in accordance with this chapter [~~§289.252(f)(3) of this title (relating to Licensing of Radioactive Material)~~].

(3) (No change.)

(4) Rooms in medical facilities that are used for teletherapy are exempt from the requirement to post caution signs in accordance with subsection (aa)of this section provided the following conditions are met.

(A) Access to the room is controlled in accordance with this chapter; and

(B) Personnel in attendance take necessary precautions to prevent the inadvertent exposure of workers, other patients, and members of the public to radiation in excess of the limits established in this section..

(cc) Labeling containers [~~and radiation machines~~].

(1) The licensee shall ensure that each container of licensed material bears a durable, clearly visible label bearing the radiation symbol and the words "CAUTION, RADIOACTIVE MATERIAL" or "DANGER, RADIOACTIVE MATERIAL." The label shall also provide information, such as the radionuclides present, an estimate of the quantity of radioactivity, the date for which the activity is estimated, radiation levels, kinds of materials, and mass enrichment, to permit individuals handling or using the containers, or working in the vicinity of the containers, to take precautions to avoid or minimize exposures.

(2) Each licensee shall, prior to removal or disposal of empty uncontaminated containers to unrestricted areas, remove or deface the radioactive material label or otherwise clearly indicate that the container no longer contains radioactive materials.

[~~(3) Each registrant shall ensure that each radiation machine is labeled in a conspicuous manner that cautions individuals that radiation is produced when it is energized. This label shall be affixed in a clearly visible location on the face of the control unit.~~]

(dd) (No change.)

(ee) Procedures for receiving and opening packages.

(1)-(2) (No change.)

(3) The licensee shall perform the monitoring required by paragraph (2) of this subsection as soon as practicable after receipt of the package, but not later than three [~~3~~] hours after the package is received at the licensee's facility if it is received during the licensee's normal working hours. If a package is received after working hours, the package shall be monitored no later than three [~~3~~] hours from the beginning of the next working day. If the licensee discovers there is evidence of degradation of package integrity, such as a package that is crushed, wet, or damaged, the package shall be surveyed immediately.

(4) The licensee shall immediately notify the final delivery carrier and, by telephone and telegram, mailgram, or facsimile, the agency when removable radioactive surface contamination or external radiation levels exceed the limits established in subparagraphs (A) and (B) of this paragraph.

(A) Limits for removable radioactive surface contamination levels.

(i) The level of removable radioactive contamination on the external surfaces of each package offered for shipment shall be ALARA. The level of removable radioactive contamination may be determined by wiping an area of 300 square centimeters (cm^2) of the surface concerned with an absorbent material, using moderate pressure, and measuring the activity on the wiping material. Sufficient measurements must be taken in the most appropriate locations to yield a representative assessment of the removable contamination levels. Except as provided in clause (iii) of this subparagraph, the

amount of radioactivity measured on any single wiping material, when averaged over the surface wiped, must not exceed the limits given in clause (ii) of this subparagraph at any time during transport. If other methods are used, the detection efficiency of the method used must be taken into account and in no case may the removable contamination on the external surfaces of the package exceed 10 [~~ten~~] times the limits listed in clause (ii) of this subparagraph.

(ii)-(iii) (No change.)

(B) Limits for external radiation levels.

(i) (No change.)

(ii) For a package transported in exclusive use by rail, highway or water, radiation levels external to the package may exceed the limits specified in clause (i) of this subparagraph but shall not exceed any of the following:

(I)-(III) (No change.)

(IV) 2 mrem/hr (0.02 mSv/hr) in any normally occupied positions of the vehicle, except that this provision does not apply to private motor carriers when persons occupying these positions are provided with special health supervision, personnel radiation exposure monitoring devices, and training in accordance with §289.203(c) [~~22.12 of Texas Regulations for Control of Radiation (TRCR) Part 22 as adopted by reference in §289.114~~] of this title (relating to Notices, Instructions, and Reports to Workers; Inspections).

(5)-(6) (No change.)

(ff) General requirements for waste management.

(1) Unless otherwise exempted, a licensee shall discharge, treat, or decay licensed material or transfer waste for disposal only:

(A) by transfer to an authorized recipient as provided in subsection (jj) of this section or in, [~~§289.127 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)),~~] §289.252 of this title, or §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities), §289.257 of this title, §289.259 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)), or to the United States Department of Energy (DOE);

(B)-(D) (No change.)

(2) (No change.)

(gg) Discharge by release into sanitary sewerage.

(1) A licensee may discharge licensed material into sanitary sewerage if each of the following conditions is satisfied:

(A) (No change.)

(B) the quantity of licensed radioactive material that the licensee releases into the sewer in one [~~1~~] month divided by the average monthly volume of water released into the sewer by the licensee does not exceed the concentration listed in Table III of subsection (ggg)(2) of this section; and

(C)-(D) (No change.)

(2) (No change.)

(hh)-(ii) (No change.)

(jj) Transfer for disposal and manifests.

(1) The control of transfers of LLRW [~~low-level radioactive waste~~] intended for disposal at a licensed low-level radioactive waste disposal facility, the establishment of a manifest tracking system, and additional requirements concerning transfers and recordkeeping for those wastes are found in §289.257(s)(5) of this title.

(2) (No change.)

(kk) (No change.)

(ll) General provisions for records.

(1) Each licensee [~~or registrant~~] shall use the SI units becquerel, gray, sievert, and coulomb per kilogram, or the special units curie, rad, rem, and roentgen, including multiples and subdivisions, and shall clearly indicate the units of all quantities on records required by this section. Disintegrations per minute may be indicated on records of surveys performed to determine compliance with subsection (ggg)(6) of this section. To ensure compatibility with international transportation standards, all limits in this section are given in terms of dual units: The International System of Units (SI) followed or preceded by United States (U.S.) standard or customary units. The U.S. customary units are not exact equivalents, but are rounded to a convenient value, providing a functionally equivalent unit. For the purpose of this section, either unit may be used.

(2) (No change.)

(3) The licensee [~~or registrant~~] shall make a clear distinction among the quantities entered on the records required by this section, such as, total effective dose equivalent, total organ dose equivalent, shallow dose equivalent, lens [~~eye~~] dose equivalent, deep dose equivalent, or committed effective dose equivalent.

(4) Records required in accordance with §289.201(d) of this title, and subsections (mm)-(oo), [~~(mm), (nn), (oo),~~] (tt), and (uu) of this section shall include the date and the identification of individual(s) making the record, and, as applicable, a unique identification of survey instrument(s) used, and an exact description of the location of the survey. Records of receipt, transfer, and disposal of sources of radiation shall uniquely identify the source of radiation.

(5) Copies of records required in accordance with §289.201(d) of this title, and subsections (mm)-(uu) [~~(mm) through (uu)~~] of this section, and by license [~~or certificate of registration~~] condition that are relevant to operations at an additional authorized use/storage site shall be maintained at that site in addition to the main site specified on a license [~~or certificate of registration~~].

(mm) Records of radiation protection programs.

(1) Each licensee [~~or registrant~~] shall maintain records of the radiation protection program, including:

(A) the provisions of the program; and

(B) audits and other reviews of program content and implementation.

(2) The licensee [~~or registrant~~] shall retain the records required by paragraph (1)(A) of this subsection until the agency terminates each pertinent license [~~or registration~~] requiring the record. The licensee [~~or registrant~~] shall retain the records required by paragraph (1)(B) of this subsection for three [~~3~~] years after the record is made.

(nn) Records of surveys.

(1) Each licensee [~~or registrant~~] shall maintain records showing the results of surveys and calibrations required by subsections (p) and (ee)(2) of this section. The licensee [~~or registrant~~] shall retain these records for three [~~3~~] years after the record is made.

(2) The licensee [~~or registrant~~] shall retain each of the following records until the agency terminates each pertinent license [~~or registration~~] requiring the record:

(A) the results of surveys to determine the dose from external sources of radiation used, in the absence of or in combination with individual monitoring data, in the assessment of individual dose equivalents; and

(B) results of measurements and calculations used to determine individual intakes of radioactive material and used in the assessment of internal dose; and

(C) results of air sampling, surveys, and bioassays required in accordance with subsection (x)(1)(C)(i) and (ii) of this section; and

(D) results of measurements and calculations used to evaluate the release of radioactive effluents to the environment.

(oo) Records of tests for leakage or contamination of sealed sources. Records of tests for leakage or contamination of sealed sources required by §289.201(g) of this title shall be kept in units of becquerel or microcurie and retained for inspection by the agency for five [~~5~~] years after the records are made.

(pp) Records of lifetime cumulative occupational radiation dose. The licensee shall retain the records of lifetime cumulative occupational radiation dose as specified in subsection (k) of this section on BRC Form 202-2 [~~TRC Form 21-2~~] or equivalent until the agency terminates each pertinent license requiring this record. The licensee shall retain records used in preparing BRC Form 202-2 [~~TRC Form 21-2~~] or equivalent for three [~~3~~] years after the record is made.

(qq) (No change.)

(rr) Records of individual monitoring results.

(1) Each licensee [~~or registrant~~] shall maintain records of doses received by all individuals for whom monitoring was required in accordance with subsection (q) of this section, and records of doses received during planned special exposures, accidents, and emergency conditions. Assessments of dose equivalent and records made using units in effect before January 1, 1994, need not be changed. These records shall include, when applicable:

(A) the deep dose equivalent to the whole body, lens [~~eye~~] dose equivalent, shallow dose equivalent to the skin, and shallow dose equivalent to the extremities;

(B) the estimated intake of radionuclides, see subsection (g) of this section;

(C) the committed effective dose equivalent assigned to the intake of radionuclides;

(D) the specific information used to calculate the committed effective dose equivalent in accordance with subsection (i)(1) and (3) [~~(i)(3)~~] of this section and when required by subsection (q)(1) of this section;

(E) the total effective dose equivalent when required by subsection (g) of this section;

(F) the total of the deep dose equivalent and the committed dose to the organ receiving the highest total dose; and

(G) the data used to make occupational dose assessments in accordance with subsection (j)(5) of this section.

(2) The licensee [~~or registrant~~] shall make entries of the records specified in paragraph (1) of this subsection at intervals not to exceed 1 year and within 60 days of the end of the year.

(3) The licensee [~~or registrant~~] shall maintain the records specified in paragraph (1)of this subsection on BRC Form 202-3 [~~TRC Form 21-3~~], in accordance with the instructions for BRC Form 202-3 [~~TRC Form 21-3~~], or in clear and legible records containing all the information required by BRC Form 202-3 [~~TRC Form 21-3~~].

(4) The licensee [~~or registrant~~] shall maintain the records of dose to an embryo/fetus with the records of dose to the declared pregnant woman. The declaration of pregnancy, including the estimated date of conception, shall also be kept on file, but may be maintained separately from the dose records.

(5) The licensee [~~or registrant~~] shall retain each required form or record until the agency terminates each pertinent license [~~or registration~~] requiring the record. The licensee [~~or registrant~~] shall retain records used in preparing BRC Form 202-3 [~~TRC Form 21-3~~] or equivalent for three [~~3~~] years after the record is made.

(ss) Records of dose to individual members of the public.

(1) Each licensee [~~or registrant~~] shall maintain records sufficient to demonstrate compliance with the dose limit for individual members of the public. See subsection (n) of this section.

(2) The licensee [~~or registrant~~] shall retain the records required by paragraph (1) of this subsection until the agency terminates each pertinent license [~~or registration~~] requiring the record.

(tt) (No change.)

(uu) Records of testing entry control devices for very high radiation areas.

(1) Each licensee [~~or registrant~~] shall maintain records of tests made in accordance with subsection (u)(2)(I) of this section on entry control devices for very high radiation areas. These records must include the date, time, and results of each such test of function.

(2) The licensee [~~or registrant~~] shall retain the records required by paragraph (1) of this subsection for three [~~3~~] years after the record is made.

(vv) Form of records. Each record required by this chapter shall be legible throughout the specified retention period. The record shall be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period or the record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records, such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures. The licensee [~~or registrant~~] shall maintain adequate safeguards against tampering with and loss of records.

(ww) Reports of stolen, lost, or missing licensed [~~or registered~~] sources of radiation.

(1) Each licensee [~~or registrant~~] shall report to the agency by telephone as follows:

(A) immediately after its occurrence becomes known to the licensee, stolen, lost, or missing licensed radioactive material in an aggregate quantity equal to or greater than 1,000 times the quantity specified in subsection (ggg)(3) of this section, under such circumstances that it appears to the licensee that an exposure could result to individuals in unrestricted areas; or

(B) within 30 days after its occurrence becomes known to the licensee, lost, stolen, or missing licensed radioactive material in an aggregate quantity greater than 10 times the quantity specified in subsection (ggg)(3) of this section that is still missing.

~~[(C) immediately after its occurrence becomes known to the registrant, a stolen, lost, or missing radiation machine.]~~

(2) Each licensee [~~or registrant~~] required to make a report in accordance with paragraph (1) of this subsection shall, within 30 days after making the telephone report, make a written report to the agency setting forth the following information:

(A) a description of the licensed [~~or registered~~] source of radiation involved, including, for radioactive material, the kind, quantity, and chemical and physical form; [~~and, for radiation machines, the manufacturer, model and serial number, type and maximum energy of radiation emitted;~~]

(B) a description of the circumstances under which the loss or theft occurred;

(C) a statement of disposition, or probable disposition, of the licensed [~~or registered~~] source of radiation involved;

(D) exposures of individuals to radiation, circumstances under which the exposures occurred, and the possible total effective dose equivalent to persons in unrestricted areas;

(E) actions that have been taken, or will be taken, to recover the source of radiation; and

(F) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed [~~or registered~~] sources of radiation.

(3) Subsequent to filing the written report, the licensee [~~or registrant~~] shall also report additional substantive information on the loss or theft within 30 days after the licensee [~~or registrant~~] learns of such information.

(4) The licensee [~~or registrant~~] shall prepare any report filed with the agency in accordance with this subsection so that names of individuals who may have received exposure to radiation are stated in a separate and detachable portion of the report.

(xx) Notification of incidents.

(1) Notwithstanding other requirements for notification, each licensee [~~or registrant~~] shall immediately report each event involving a source of radiation possessed by the licensee [~~or registrant~~] that may have caused or threatens to cause:

(A) an individual to receive:

(i) a total effective dose equivalent of 25 rems (0.25 Sv) or more;

(ii) a lens [~~an eye~~] dose equivalent of 75 rems (0.75 Sv) or more; or

(iii) a shallow dose equivalent to the skin or extremities or a total organ dose equivalent of 250 rads (2.5 grays) or more; or

(B) the release of radioactive material, inside or outside of a restricted area, so that, had an individual been present for 24 hours, the individual could have received an intake five times the occupational ALI. This provision does not apply to locations where personnel are not normally stationed during routine operations, such as hot-cells or process enclosures.

(2) Each licensee [~~or registrant~~] shall, within 24 hours of discovery of the event, report to the agency each event involving loss of control of a licensed [~~or registered~~] source of radiation possessed by the licensee [~~or registrant~~] that may have caused, or threatens to cause:

(A) an individual to receive, in a period of 24 hours:

(i) a total effective dose equivalent exceeding 5 rems (0.05 Sv);

(ii) a lens [~~an eye~~] dose equivalent exceeding 15 rems (0.15 Sv); or

(iii) a shallow dose equivalent to the skin or extremities or a total organ dose equivalent exceeding 50 rems (0.5 Sv); or

(B) the release of radioactive material, inside or outside of a restricted area, so that, had an individual been present for 24 hours, the individual could have received an intake in excess of one occupational ALI. This provision does not apply to locations where personnel are not normally stationed during routine operations, such as hot-cells or process enclosures.

(3) Licensees [~~or registrants~~] shall make the initial notification reports required by paragraphs (1) and (2) of this subsection by telephone to the agency and shall confirm the initial notification report within 24 hours by telegram, mailgram, or facsimile to the agency.

(4) The licensee [~~or registrant~~] shall prepare each report filed with the agency in accordance with this section so that names of individuals who have received exposure to sources of radiation are stated in a separate and detachable portion of the report.

(5) (No change.)

(6) Each licensee shall notify the agency as soon as possible but not later than four hours after the discovery of an event that prevents immediate protective actions necessary to avoid exposures to radioactive materials that could exceed regulatory limits or releases of radioactive materials that could exceed regulatory limits (events may include fires, explosions, toxic gas releases, etc.).

(7) Each licensee shall notify the agency within 24 hours after the discovery of any of the following events involving radioactive material:

(A) an unplanned contamination event that:

(i) requires access to the contaminated area, by workers or the public, to be restricted for more than 24 hours by imposing additional radiological controls or by prohibiting entry into the area;

(ii) involves a quantity of material greater than five times the lowest annual limit on intake specified in subsection (ggg)(2) of this section for the material; and

(iii) has access to the area restricted for a reason other than to allow isotopes with a half-life of less than 24 hours to decay prior to decontamination.

(B) an event in which equipment is disabled or fails to function as designed when:

(i) the equipment is required by rule or license condition to prevent releases exceeding regulatory limits, to prevent exposures to radioactive materials exceeding regulatory limits, or to mitigate the consequences of an accident;

(ii) the equipment is required to be available and operable when it is disabled or fails to function; and

(iii) no redundant equipment is available and operable to perform the required safety function;

(C) an event that requires unplanned medical treatment at a medical facility of an individual with spreadable radioactive contamination on the individual's clothing or body; or

(D) an unplanned fire or explosion damaging any radioactive material or any device, container, or equipment containing radioactive material when:

(i) the quantity of material involved is greater than five times the lowest annual limit on intake specified in subsection (ggg)(2) of this section for the material; and

(ii) the damage affects the integrity of the radioactive material or its container.

(8) Preparation and submission of reports. Reports made by licensees in response to the requirements of paragraphs (6) and (7) of this subsection shall be made as follows.

(A) Licensees shall make reports required by paragraphs (6) and (7) of this subsection by telephone to the agency. To the extent that the information is available at the time of notification, the information provided in these reports shall include:

(i) the caller's name and call back telephone number;

(ii) a description of the event, including date and time;

(iii) the exact location of the event;

(iv) the isotopes, quantities, and chemical and physical form of the radioactive material involved; and

(v) any personnel radiation exposure data available.

(B) Each licensee who makes a report required by paragraphs (6) and (7) of this subsection shall submit to the agency a written follow-up report within 30 days of the initial report. Written reports prepared in accordance with other requirements of this chapter may be submitted to fulfill this requirement if the reports contain all of the necessary information and the appropriate distribution is made. The reports must include the following:

(i) a description of the event, including the probable cause and the manufacturer and model number (if applicable) of any equipment that failed or malfunctioned;

(ii) the exact location of the event;

(iii) the isotopes, quantities, and chemical and physical form of the radioactive material involved;

(iv) date and time of the event;

(v) corrective actions taken or planned and the results of any evaluations or assessments; and

(vi) the extent of exposure of individuals to radioactive materials without identification of individuals by name.

(yy) Reports of exposures, radiation levels, and concentrations of radioactive material exceeding the limits.

(1) In addition to the notification required by subsection (xx) of this section, each licensee [~~or registrant~~] shall submit a written report within 30 days after learning of any of the following occurrences:

(A) incidents for which notification is required by subsection (xx) of this section;

(B) doses in excess of any of the following:

(i) the occupational dose limits for adults in subsection (f) of this section;

(ii) the occupational dose limits for a minor in subsection (l) of this section;

(iii) the limits for an embryo/fetus of a declared pregnant woman in subsection (m) of this section;

(iv) the limits for an individual member of the public in subsection (n) of this section; [~~or~~]

(v) any applicable limit in the license or registration; or

(vi) the ALARA constraints for air emissions as required by subsection (e)(4) of this section;

(C) levels of radiation or concentrations of radioactive material in:

(i) a restricted area in excess of applicable limits in the license [~~or registration~~]; or

(ii) an unrestricted area in excess of 10 times the applicable limit set forth in this section or in the license [~~or registration~~], whether or not involving exposure of any individual in excess of the limits in subsection (n) of this section; or

(D) for licensees subject to the provisions of the EPA's generally applicable environmental radiation standards in 40 CFR 190, levels of radiation or releases of radioactive material in excess of those standards, or of license conditions related to those requirements.

(2) Each report required by paragraph (1) of this subsection shall describe the extent of exposure of individuals to radiation and radioactive material, including, as appropriate:

(A)-(C) (No change.)

(D) corrective steps taken or planned to ensure against a recurrence, including the schedule for achieving conformance with applicable limits, ALARA constraints, generally applicable environmental standards, and associated license [~~or registration~~] conditions.

(3) Each report filed in accordance with paragraph (1) of this subsection shall include for each occupationally overexposed individual [~~exposed~~]: the name, social security number, and date of birth. With respect to the limit for the embryo/fetus in subsection (m) of this section, the identifiers should be those of the declared pregnant woman. The report shall be prepared so that this information is stated in a separate and detachable portion of the report.

(4) All licensees [~~or registrants~~] who make reports in accordance with paragraph

(1) of this subsection shall submit the report in writing to the agency.

(zz) (No change.)

(aaa) Notifications and reports to individuals.

(1) Requirements for notification and reports to individuals of exposure to sources of radiation are specified in §289.203 [~~§289.114~~] of this title.

(2) When a licensee [~~or registrant~~] is required in accordance with subsection (yy) or (zz) of this section to report to the agency any exposure of an identified occupationally exposed individual, or an identified member of the public, to sources of radiation, the licensee [~~or registrant~~] shall also notify the individual and provide a copy of the report submitted to the agency, to the individual. Such notice shall be transmitted at a time not later than the transmittal to the agency, and shall comply with the provisions of §289.203(d)(1) [~~22.13(a) of TRCR Part 22 as adopted by reference in §289.114~~] of this title.

(bbb) Reports of leaking or contaminated sealed sources. The licensee shall immediately notify the agency if the test for leakage or contamination required in accordance with §289.201(g) of this title indicates a sealed source is leaking or contaminated. A written report of a leaking or contaminated source shall be submitted to the agency within five [~~5~~] days. The report shall include the equipment involved, the test results and the corrective action taken.

(ccc) Vacating premises.

(1) Each licensee [~~, registrant,~~] or person possessing non-exempt sources of radiation shall, no less than 30 days before vacating and [~~or~~] relinquishing possession or control of premises, notify the agency, in writing, of the intent to vacate.

(2) The licensee or person possessing non-exempt radioactive material shall decommission the premises to a degree consistent with subsequent use as an unrestricted area and in accordance with the requirements of subsection (ddd) of this section or, for uranium recovery and byproduct material disposal facilities licensed in accordance with §289.260 of this title, subsection (eee) of this section [~~subsections (ddd) and (eee) of this section~~].

[~~(3) Notwithstanding the limits set forth in subsections (ddd) and (eee) of this section, contamination levels must be maintained in unrestricted areas so that no individual member of the public will receive an effective dose equivalent in excess of 100 mrem (1 mSv) above background per year.~~]

[~~(4) No licensee shall vacate a facility or land, or release a facility or land for unrestricted use, until the annual total effective dose equivalent to a member of the public resulting from radioactive material remaining from licensed activities (excluding radium and its decay products) does not exceed 25 mrem (0.25 mSv) per year above background. The concentration for radium in soil shall be equivalent to or below the limits in subsection (eee) of this section. Notwithstanding the limits in this paragraph, each licensee shall make every reasonable effort to maintain any contamination of soil or vegetation ALARA. The licensee shall conduct all necessary radiation surveys and modeling and shall provide reports and documentation to demonstrate that the requirements for release for unrestricted use have been met. The Agency may require the licensee to provide any other information necessary to demonstrate that the facilities and land are suitable for release for unrestricted use.~~]

(ddd) Radiological requirements for license termination.

(1) General provisions and scope.

(A) The requirements in this section apply to the decommissioning of facilities licensed in accordance with §289.252 of this title (relating to Licensing of Radioactive Material), §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities), §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography), and §289.258 of this title (relating to Licensing and Radiation Safety Requirements for Irradiators). The requirements do not apply to uranium recovery and byproduct material disposal facilities already subject to the requirements of §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities).

(B) The requirements in this section do not apply to the following:

(i) sites that have been decommissioned prior to the effective date of the rule in accordance with requirements identified in this section and in §289.252 of this title; or

(ii) sites that have previously submitted and received approval on a decommissioning plan by the effective date of the rule.

(C) After a site has been decommissioned and the license terminated in accordance with the requirements in the subsection, the agency will require additional cleanup only if, based on new information, it determines that the requirements of the subsection were not met and residual radioactivity remaining at the site could result in significant threat to public health and safety.

(D) When calculating TEDE to the average member of the critical group, the licensee shall determine the peak annual TEDE dose expected within the first 1,000 years after decommissioning.

(2) Radiological requirements for unrestricted use. A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and the residual radioactivity has been reduced to levels that are ALARA. Determination of the levels that are ALARA must take into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal.

(3) Alternate requirements for license termination.

(A) The agency may terminate a license using alternate requirements greater than the dose requirements specified in paragraph (2) of this subsection if the licensee does the following:

(i) provides assurance that public health and safety would continue to be protected, and that it is unlikely that the dose from all man-made sources combined, other than medical, would be more than the 1 mSv per year (100 mrem per year) limit specified in subsection (o) of this section, by submitting an analysis of possible sources of exposure;

(ii) reduces doses to ALARA levels, taking into consideration any detriments such as traffic accidents expected to potentially result from decontamination and waste disposal; and

(iii) has submitted a decommissioning plan to the agency indicating the licensee's intent to decommission in accordance with the requirements in §289.252(l)(7) of this title, and specifying that the licensee proposes to decommission by use of alternate requirements. The licensee shall document in the decommissioning plan how the advice of individuals and institutions in the community who may be affected by the decommissioning has been sought and addressed, as appropriate, following analysis of that advice. In seeking such advice, the licensee shall provide for the following:

(I) participation by representatives of a broad cross section of community interests who may be affected by the decommissioning;

(II) an opportunity for a comprehensive, collective discussion on the issues by the participants represented; and

(III) a publicly available summary of the results of all such discussions, including a description of the individual viewpoints of the participants on the issues and the extent of agreement and disagreement among the participants on the issues.

(B) The use of alternate requirements to terminate a license requires the approval of the agency after consideration of the agency's recommendations that will address any comments provided by the EPA and any public comments submitted in accordance with paragraph (4) of this subsection.

(4) Public notification and public participation. Upon receipt of a decommissioning plan from the licensee, or a proposal from the licensee for release of a site in accordance with paragraph (3) of this subsection, or whenever the agency deems such notice to be in the public interest, the agency will do the following:

(A) notify and solicit comments from the following:

(i) local and state governments in the vicinity of the site and any Indian Nation or other indigenous people that have treaty or statutory rights that could be affected by the decommissioning; and

(ii) the EPA for cases where the licensee proposes to release a site in accordance with paragraph (3) of this subsection; and

(B) publish a notice in the *Texas Register* and a forum, such as local newspapers, letters to state of local organizations, or other appropriate forum, that is readily accessible to individuals in the vicinity of the site, and solicit comments from affected parties.

(5) Minimization of contamination. Applicants for licenses, other than renewals, after the effective date of the rule shall describe in the application how facility design and procedures for operation will minimize, to the extent practical, contamination of the facility and the environment, facilitate eventual decommissioning, and minimize, to the extent practical, the generation of LLRW.

(eee) [~~(ddd)~~] Limits for contamination of soil, surfaces of facilities and equipment, and vegetation [~~Soil contamination limits~~].

(1) No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of surfaces of facilities or equipment in unrestricted areas to the extent that the contamination exceeds the limits specified in subsection (ggg)(6) of this section.

(2) [~~(1)~~] No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of soil in unrestricted areas, to the extent that the contamination exceeds, on a dry weight basis, the concentration limits specified in:

(A) subsection (ggg)(8) of this section; or

(B) the effluent concentrations in Table II, Column 2 [~~II~~] of subsection (ggg)(2)(F) of this section, with the units changed from microcuries per milliliter to microcuries per gram, for radionuclides not specified in subsection (ggg)(8) of this section or paragraph (4) [~~(3)~~] of this subsection.

(3) [~~(2)~~] Where combinations of radionuclides are involved, the sum of the ratios between the concentrations present and the limits specified in paragraph (2) [~~(1)~~] of this subsection shall not exceed one.

(4)[~~(3)~~] [~~Except for the requirements in §289.127 of this title and notwithstanding~~] Notwithstanding the limits specified in [~~imposed by~~] paragraph (2) [~~(1)~~] of this subsection, no licensee shall cause the concentration of radium-226 or radium-228 in soil in unrestricted areas, averaged over any 100 square meters (m^2), to [~~shall not~~] exceed the background level by more than:

(A) 5 picocuries per gram (pCi/g) (0.185 becquerel per gram (Bq/g)), averaged over the first 15 cm of soil below the surface; and

(B) 15 pCi/g (0.555 Bq/g), averaged over 15 cm thick layers of soil more than 15 cm below the surface.

(5) [~~(4)~~] No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of vegetation in unrestricted areas to exceed 5 pCi/g (0.185 Bq/g), based on dry weight, for radium-226 or radium-228. [~~in vegetation; and~~]

(6) [~~(5)~~] Notwithstanding the limits specified in paragraph (2) of this subsection, no licensee shall cause the concentration of natural uranium with no daughters present, based on dry weight and averaged over any 100 m^2 of area, to exceed the following limits[~~, based on dry weight, averaged over any 100 m^2 of area for natural uranium with no daughters present~~]:

(A) 30 pCi/g (1.11 Bq/g), averaged over the top 15 cm of soil below the surface; and

(B) 150 pCi/g (5.55 Bq/g), average concentration at depths greater than 15 centimeters below the surface so that no individual member of the public will receive an effective dose equivalent in excess of 100 mrem (1 mSv) per year.

[~~(eee) Surface contamination limits for facilities and equipment.~~]

[~~(1) Prior to vacating any facility or releasing areas or equipment for unrestricted use, each licensee shall ensure that radioactive contamination has been removed to ALARA levels. In no case shall the licensee vacate a facility or release areas or equipment for unrestricted use until radioactive surface contamination levels are below the limits specified in subsection (ggg)(6) of this section.~~]

[~~(2) In addition to meeting the surface contamination limits of paragraph (1) of this subsection, porous materials (e.g., concrete), that are to be released for unrestricted use, shall be evaluated to determine whether radioactive materials have penetrated to the interior of the material. If radioactive contamination has penetrated into the material, analysis of the average concentration, in pCi/gm, shall be made. The material may be released for unrestricted use if the radionuclide concentrations do not exceed the limits specified for soil in subsection (ddd) of this section.~~]

(fff) Exemption of specific wastes.

(1)-(3) (No change.)

(4) Any licensee may, upon agency approval of procedures required in paragraph (6) of this subsection, discard licensed material included in subsection (ggg)(7) of this section, provided that it does not exceed the concentration and total curie limits contained therein, in a Type I municipal solid waste site as defined in the Municipal Solid Waste Regulations of the authorized regulatory agency (31 Texas Administrative Code [~~TAC~~] Chapter 330), unless such licensed material also contains hazardous waste, as defined in Section 3(15)

of the Solid Waste Disposal Act, Health and Safety Code, Chapter 361. Any licensed material included in subsection (ggg)(7) of this section and which is a hazardous waste as defined in the Solid Waste Disposal Act may be discarded at a facility authorized to manage hazardous waste by the authorized regulatory agency.

(5)-(9) (No change.)

(ggg) Appendices.

(1) Protection factors for respirators. The following table contains protection factors for respirators[a] [~~respirators~~]:
Figure: 25 TAC §289.202(ggg)(1)
[~~Figure: 25 TAC §289.202(ggg)(1)~~]

(2)-(6) (No change.)

(7) Concentration and activity limits of nuclides for disposal in a Type I municipal solid waste site or a hazardous waste facility (for use in subsection (fff) of this section). The following table contains concentration and activity limits of nuclides for disposal in a Type I municipal solid waste site or a hazardous waste facility.
Figure: 25 TAC §289.202(ggg)(7)
[~~Figure: 25 TAC §289.202(ggg)(7)~~]

(8) (No change.)

(9) Cumulative occupational exposure form. The following, BRC Form 202-2, is to be used to document cumulative occupational exposure history: (Please find BRC Form 202-2 at the end of this section.)
Figure: 25 TAC §289.202(ggg)(9)

[~~(9) The following, TRC Form 21-2, is to be used to document cumulative occupational exposure history:~~]
[~~Figure: 25 TAC §289.202(ggg)(9)~~]

(10) Occupational exposure form. The following, BRC Form 202-3, is to be used to document occupational exposure record for a monitoring period: (Please find BRC Form 202-3 at the end of this section.)
Figure: 25 TAC §289.202(ggg)(10)

[~~(10) The following, TRC Form 21-3, is to be used to document occupational exposure record for a monitoring period:~~]
[~~Figure: 25 TAC §289.202(ggg)(10)~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907981
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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Subchapter F. LICENSE REGULATIONS

25 TAC §289.257

The Texas Department of Health (department) proposes an amendment to §289.257 concerning packaging and transportation of radioactive material, including low-level radioactive waste.

The amendment to §289.257 clarifies that if an inspection and maintenance program for radiography containers approved by the United States Nuclear Regulatory Commission (NRC) is maintained in accordance with industrial radiography requirements in another section, the requirements of this section are met. This requirement has been designated as an item of compatibility by the NRC and as an Agreement State, Texas must adopt it.

References to other sections of this chapter are clarified to reflect the *Texas Register* format. Definitions are modified to reflect changes made as a result of legislation in House Bill 1172 passed by the 76th Legislature. Language is added that clarifies transportation of radioactive material, including low-level radioactive waste, must be done in accordance with federal routing requirements. Other minor grammatical changes are made to the section for clarification.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as proposed.

Mrs. McBurney has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be protection of the public and the environment from unnecessary exposure to radiation by ensuring safe transport of radioactive materials through requirements for appropriate packaging and transportation routes. There will be no economic effects on micro-businesses or small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment. Because the amendment is clarifying and does not impose any additional requirements such as record keeping, regulatory limits, procedures, or processes, there are no economic effects associated with the section as proposed.

Comments on the proposal may be presented to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, Telephone (512) 834- 6688 or electronic mail at Ruth.Mcburney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 9:00 a.m., Friday, December 17, 1999, in Conference Room S402, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

The amendment is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which authorizes the board to adopt rules for the performance of every duty imposed by law on the board, the department and the commissioner of health.

This amendment affects Health and Safety Code, Chapter 401 and Chapter 12.

§289.257. Packaging and Transportation of Radioactive Material.

(a) Purpose.

(1) (No change.)

(2) The packaging and transport of radioactive material are also subject to the requirements of [§289.112 of this title (relating to Hearing and Enforcement Procedures), §289.114 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections),] §289.201 of this title (relating to General Provisions), §289.202 of this title (relating to Standards for Protection Against Radiation), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgements), §289.252 of this title (relating to Licensing of Radioactive Material), [and] §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities), and §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct material Disposal Facilities) and to the regulations of other agencies (e.g., the United States Department of Transportation (DOT) and the United States Postal Service) having jurisdiction over means of transport. The requirements of this section are in addition to, and not in substitution for, other requirements.

(b)-(c) (No change.)

(d) Definitions. The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise. To ensure compatibility with international transportation standards, all limits in this section are given in terms of dual units: The International System of Units (SI) followed or preceded by United States (U.S.) standard or customary units. The U.S. customary units are not exact equivalents, but are rounded to a convenient value, providing a functionally equivalent unit. For the purpose of this section, SI units shall be used.

(1)-(2) (No change.)

(3) BRC Forms 540, 540A, 541, 541A, 542, and 542A - Official agency forms referenced in subsection (s)(5) of this section which includes the information required by DOT in 49 Code of Federal Regulations (CFR) Part 172. BRC Form 541B contains additional information for LLRW shipments to a Texas LLRW disposal facility. Licensees need not use originals of these forms as long as any substitute forms are equivalent to the original documentation in respect to content, clarity, size, and location of information. Upon agreement between the shipper and consignee, BRC Forms 541 (and 541A and 541B) and BRC Forms 542 (and 542A) may be completed, transmitted, and stored in electronic media. The electronic media must have the capability for producing legible, accurate, and complete records in the format of the uniform manifest.

[(3) Authority - The Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA).]

(4)-(18) (No change.)

(19) Low-level radioactive waste (LLRW) - Radioactive material that meets the following criteria:

(A) LLRW is radioactive material that is:

(i) discarded or unwanted and is not exempt by rule adopted under the Texas Radiation Control Act (Act), Health and Safety Code, §401.106;

(ii) waste, as that term is defined in 10 CFR Part 61.2; and

(iii) subject to:

(I) concentration limits established in 10 CFR Part 61.55, or compatible rules adopted by the agency or the Texas Natural Resource Conservation Commission (TNRCC), as applicable; and

(II) disposal criteria established in 10 CFR, or established by the agency or TNRCC, as applicable.

(B) LLRW does not include:

(i) high-level radioactive waste as defined in 10 CFR Part 60.2;

(ii) spent nuclear fuel as defined in 10 CFR Part 72.3;

(iii) byproduct material defined in the Act, §401.003(3)(B);

(iv) naturally occurring radioactive material (NORM) waste that is not oil and gas NORM waste; or

(v) oil and gas NORM waste.

[(19) Low-level radioactive waste (LLRW) - Waste containing radioactive material that:]

[(A) is acceptable for disposal in a LLRW disposal facility;]

[(B) is subject to the disposal criteria and concentration limits established by the agency or the commission;]

[(C) is discarded or unwanted and is not exempt by agency rule adopted under Section 401.106; and]

[(D) does not include:]

[(i) irradiated reactor fuel, high level radioactive waste, or spent nuclear fuel as defined by 10 CFR Part 61;]

[(ii) the tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes; or]

[(iii) NORM waste or oil and gas NORM waste.]

(20)-(28) (No change.)

(29) Shipper - The licensed entity (i.e., the waste generator, waste collector, or waste processor) who offers LLRW for transportation, typically consigning this type of waste to a licensed waste collector, waste processor, or land disposal facility operator. This definition applies only to shipments of LLRW shipped to a [the] Texas LLRW disposal facility.

(30)-(32) (No change.)

[(33) BRC Forms 540, 540A, 541, 541A, 542, and 542A - Official agency forms referenced in subsection (s)(5) of this section which includes the information required by DOT in 49 CFR Part 172. BRC Form 541B contains additional information for LLRW shipments to the Texas LLRW disposal facility. Licensees need not use originals of these forms as long as any substitute forms are equivalent to the original documentation in respect to content, clarity, size, and location of information. Upon agreement between the shipper and consignee, BRC Forms 541 (and 541A and 541B) and BRC Forms 542 (and 542A) may be completed, transmitted, and stored in electronic media. The electronic media must have the capability for producing legible, accurate, and complete records in the format of the uniform manifest.]

(33) [~~(34)~~] Uniform Low-Level Radioactive Waste Manifest or uniform manifest - The combination of BRC Forms 540, 541, and, if necessary, 542, and their respective continuation sheets as needed, or equivalent.

(34) [~~(35)~~] Uranium - Natural, depleted, enriched:

(A) Natural uranium - Uranium with the naturally occurring distribution of uranium isotopes (approximately 0.711 weight percent uranium-235, and the remainder by weight essentially uranium-238).

(B) Depleted uranium - Uranium containing less uranium-235 than the naturally occurring distribution of uranium isotopes.

(C) Enriched uranium - Uranium containing more uranium-235 than the naturally occurring distribution of uranium isotopes.

(35) [~~(36)~~] Waste collector - An entity, operating under a NRC, agreement state, or agency license, whose principal purpose is to collect and consolidate waste generated by others, and to transfer this waste, without processing or repackaging the collected waste, to another licensed waste collector, licensed waste processor, or licensed land disposal facility.

(36) [~~(37)~~] Waste description - The physical, chemical and radiological description of a LLRW as called for on BRC Form 541.

(37) [~~(38)~~] Waste generator - An entity, operating under a NRC, agreement state, or agency license, who:

(A) possesses any material or component that contains radioactivity or is radioactively contaminated for which the licensee foresees no further use; and

(B) transfers this material or component to a licensed land disposal facility or to a licensed waste collector or processor for handling or treatment prior to disposal. A licensee performing processing or decontamination services may be a waste generator if the transfer of LLRW from its facility is defined as residual waste.

(38) [~~(39)~~] Waste processor - An entity, operating under a NRC or agreement state license, whose principal purpose is to process, repackage, or otherwise treat LLRW or waste generated by others prior to eventual transfer of waste to a licensed LLRW land disposal facility.

(39) [~~(40)~~] Waste type - A waste within a disposal container having a unique physical description (i.e., a specific waste descriptor code or description; or a waste sorbed on or solidified in a specifically-defined [~~specifically~~ ~~defined~~] media).

(e) Transportation of radioactive material.

(1) Each licensee who transports radioactive material outside the site of usage as specified in the agency license, transports on public highways, or delivers radioactive material to a carrier for transport, shall comply with the applicable requirements of the DOT regulations in 49 CFR Parts 170-189 and 397 appropriate to the mode of transport. The licensee shall comply with the following, particularly noting DOT regulations as applicable in the following areas:

(A) Packaging - 49 CFR Part 173: Subparts A, B, and I.

(B) Marking and labeling - 49 CFR Part 172: Subpart D, §§172.400 - 172.407, §§172.436 - 172.440, and Subpart E.

(C) Placarding - 49 CFR Part 172: Subpart F, especially §§172.500 - 172.519, §172.556, and Appendices B and C.

(D) Accident reporting - 49 CFR Part 171: §171.15 and §171.16.

(E) Shipping papers and emergency information - 49 CFR Part 172: Subparts C and G.

(F) Hazardous material employee training - 49 CFR Part 172: Subpart H.

(G) Hazardous material shipper/carrier registration - 49 CFR Part 107: Subpart G.

(H) Routing - 49 CFR Part 397: Subpart D.

(2) (No change.)

(f) (No change.)

(g) General license.

(1) NRC-approved package.

(A)-(C) (No change.)

(D) For radiography containers, a program for transport container inspection and maintenance limited to radiographic exposure devices, source changers, or packages transporting these devices and meeting the requirements of §289.255(i)(2)(B) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography), is deemed to satisfy the requirements of subparagraph (B) of this paragraph.

(2)-(4) (No change.)

(h)-(q) (No change.)

(r) Fees.

(1) Each shipper shall be assessed a fee for shipments of LLRW originating in Texas or out-of-state being shipped to a licensed Texas LLRW disposal facility and these fees shall be:

(A) (No change.)

(B) collected by the Commission [~~Authority~~] and deposited to the credit of the radiation and perpetual care fund; and

(C) (No change.)

(2)-(3) (No change.)

(s) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907898
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Chapter 337. WATER HYGIENE

Subchapter D. REGISTRATION OF PROFESSIONAL SANITARIANS

25 TAC §§337.181, 337.183-337.187

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Health (department) proposes the repeal of §§337.181; and 337.183 - 337.187 concerning the registration of sanitarians. Specifically, the repealed sections cover definitions; sanitarian/code enforcement officers' advisory committee; fees; certificates; application for registration; reciprocity; and examinations. The existing rules for registration of sanitarians found in Chapter 337 on Water Hygiene are being repealed and proposed as new rules in Chapter 265 on General Sanitation which is the more appropriate place.

Mr. Elías Briseño, R.S., Director, General Sanitation Division, has determined that for each year of the first five years the proposed repeal is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Briseño also has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be the further protection of the public health through better educated, trained and skilled persons practicing the field of sanitation in Texas. There will be no adverse economic effect on micro-businesses and/or small businesses and persons who may be required to comply with the repeal. The finding of no adverse economic effect on micro-businesses and/or small businesses is based on proper business management practices by those entities required to comply with the repeal. There will be no effect on local employment.

Comments on the proposal may be sent to Elías Briseño, R.S., Director, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 834-6635. Comments on the proposed repeal will be accepted for 30 days following publication in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeals affect Texas Civil Statutes, Article 4477-3, and the Health and Safety Code, Chapter 12.

§337.181. Definitions.

§337.183. Fees.

§337.184. Certificates.

§337.185. Application for Registration.

§337.186. Reciprocity.

§337.187. Examinations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907900

Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

Part 1. TEXAS DEPARTMENT OF INSURANCE

Chapter 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

Subchapter Y. STANDARDS FOR LONG-TERM CARE INSURANCE COVERAGE UNDER INDIVIDUAL AND GROUP POLICIES

28 TAC §§3.3818, 3.3829, 3.3830, 3.3839

The Texas Department of Insurance proposes amendments to §§3.3818, 3.3829, 3.3830, and 3.3839, concerning standards for group and individual long-term care insurance policies and certificates. These amendments address coverage and benefit level criteria, disclosure provisions, application requirements, and standards for marketing. The department proposes these amendments in response to and after a study of a petition filed by the National Long Term Care Coalition (a group of large employers) and Metropolitan Life Insurance Company for a new benefit level criteria for long-term care policies and certificates.

An insurer or other qualified entity (hereafter referred to as "insurer") that offers long-term care coverage in Texas must use physical and mental standards to determine a covered individual's eligibility for long-term care benefits, services, or coverage. The physical and mental standards used in Texas, and required by federal law, are based on an individual's inability to perform "activities of daily living" (ADL) or "impairment of cognitive ability." Present rules provide that an individual covered under a long-term care policy or certificate qualifies for benefits or services when he or she reaches a state in which the individual cannot perform, without assistance, any two of the following six ADL functions: bathing, continence, dressing, eating, toileting, and transferring. An individual also qualifies for benefits or services under a long-term care policy or certificate if he or she is certified as being cognitively impaired. Cognitive impairment is reached when an individual's intellectual capacity has deteriorated to the point whereby that person requires substantial supervision to protect himself/herself or others.

The proposed amendments to §3.3818 would allow, under certain circumstances, a new benefit level for long-term care coverage. Currently long-term care benefits are paid when a covered individual is either unable to perform two ADL or has cognitive impairment. Under proposed §3.3818, an insurer will be allowed to offer long-term care coverage which provides, in the same policy and/or certificate, benefits based on a covered individual's inability to perform, without assistance, two ADL, three ADL, and cognitive impairment. The insurer may offer such a policy and/or certificate only if all conditions are met.

The proposed amendment to §3.3829 requires that a long-term care insurance policy and/or certificate which includes a

three ADL benefit level shall disclose, within a common location and in equal prominence, a description of benefits payable for two ADL, three ADL, and cognitive impairment. The proposed amendment to §3.3830 provides that an application for a long-term care policy or certificate containing coverage activated due to an individual's inability to perform three ADL shall reflect, in equal prominence, the benefit levels payable for the inability to perform two ADL, three ADL, and cognitive impairment.

The proposed amendment to §3.3839 requires that when marketing long-term care coverage containing a three ADL benefit, an insurer provide in the marketing material clear and complete information by disclosing, in a common location and in equal prominence, benefits payable for two ADL, three ADL, and cognitive impairment.

Ana Smith-Daley, Deputy Commissioner, Life/Health Division, has determined that for each year of the first five years the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments. There will be no adverse effects on local employment or the local economy.

Ms. Smith-Daley has determined that for each year of the first five years these proposed amendments are in effect the anticipated public benefits will be: greater availability of long-term care coverage, greater flexibility and innovation in the development of long-term care coverage, increased public understanding and comparison of long-term care coverage, and adequate disclosures are furnished to help applicants make an informed decision before they obtain long-term care coverage.

The proposed amendments do not require insurers to offer a policy or certificate with benefits payable for the inability to perform three ADL. If an insurer offers such coverage it is anticipated that the expenses associated with the proposed amendments will be those related to the normal cost of offering any long-term care policy or certificate including development of a policy and certificate and marketing that complies with the Insurance Code and any applicable rule. Any insurer that elects to provide coverage containing a benefit for the inability to perform three ADL will charge a premium that is actuarially derived and sufficient to provide for the costs associated with the offering of the coverage and comply with the Insurance Code and rules relating to loss ratio and other rate requirements.

The various costs associated with the proposal have been estimated from discussions with industry and departmental information. The cost associated with offering coverage that complies with these amendments has been estimated to be a maximum of $25,000 to design and print the policy and/or certificate forms and marketing materials, actuarial and administrative costs, and reprogram computer systems as necessary to offer and administer the coverage.

Additional costs required by the proposal that are not associated with the normal cost of offering any long-term care policy or certificate are: a written rejection or acknowledgement that when an insurer offers coverage containing two ADL, three ADL, and cognitive impairment, it also offers coverage containing only the two ADL and cognitive impairment provisions; and disclosures which provide, in a common location and in equal prominence, a description of the benefit levels for two ADL, three ADL, and cognitive impairment.

The department has determined that the most cost efficient method for providing a rejection or acknowledgement of offer will be through the application. The estimated cost for including the written rejection or acknowledgement of offer in each application will be approximately $.10. The department has estimated the cost of the required disclosure to be approximately $.50 per marketing brochure and $.25 per applicant for the necessary disclosure in the policy, certificate, and application.

Ms. Smith-Daley has also determined that these proposed amendments will have no adverse economic effect on small businesses or micro-businesses. Any insurer that qualifies as a small businesses or micro-businesses will have the same opportunity as a large business to decide whether or not to offer the proposed benefit level. The total cost to entities is not dependent upon the size of the business, but rather is dependent upon the number of applicants and potential applicants to whom the business must provide the required disclosures or obtain the written rejection or acknowledgment of offer. The cost per hour of labor would not vary between the smallest, micro and largest business, assuming the small business, micro-business and the largest business have to provide the required disclosure and obtain the written rejection or acknowledgement of offer from the same percentage of applicants or potential applicant population. Regardless of the fiscal effect, the department does not believe it legal or feasible to waive the requirements of the proposed amendments for small businesses or micro-businesses. To do so would create an unequal opportunity for small businesses and micro-businesses over large businesses as well as allow a differentiation between those applicants and potential applicants for long term care coverage from small businesses and micro-businesses compared to those applicants and potential applicants of large businesses. This would not provide the same level of consumer protection for the applicants and potential applicants of small and micro-businesses since they would not be afforded the written rejection or acknowledgement of offer and required disclosure provisions that are required of large businesses.

Comments on the proposal must be submitted in writing by 5:00 p.m. on the 30th day after publication of the proposed amendments in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be submitted to Ana Smith-Daley, Deputy Commissioner, Life/Health Division, Mail Code 106-1A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104.

The amendments are proposed under the Insurance Code Articles 3.70-12, 3.70-1, 3.51-6, 21.21, and §36.001 (former Article 1.03A) and §2001.021 of the Government Code. Article 3.70-12 provides that the commissioner shall establish specific standards for provisions of long-term care insurance policies and standards for full and fair disclosure and for the marketing of long-term care policies or certificates. It also authorizes the commissioner to issue any additional rules that are reasonably necessary and proper to carry out the minimum standards for long-term care insurance policies set forth in Article 3.70-12. Article 3.70-1 provides that the commissioner shall adopt rules and regulations establishing minimum standards for benefits for long-term care coverage under individual and group policies and certificates of accident and sickness insurance delivered or issued for delivery in this state including group coverages delivered or issued for delivery by companies subject to Chapter 20 of the Texas Insurance Code. Article 3.51-6 authorizes the commissioner to issue such rules and regulations as may be

necessary to carry out provisions that relate to group coverage. Article 21.21 provides that the commissioner may promulgate rules to protect the public from unfair or deceptive acts or practices. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute. Section 2001.021 of the Government Code allows interested individuals or entities to petition a state agency to adopt requested rules.

The following articles are affected by this proposal: Ins. Code Articles 3.51-6, 3.70-1, 3.70-12, and 21.21

§3.3818. Standards for Eligibility for Benefits.

(a) A long-term care insurance policy or certificate shall contain provisions conditioning eligibility for benefits or services upon the occurrence of the following events:

(1) the inability to perform, without assistance, any two activities of daily living, as set forth by the insurer; provided, however, that such activities of daily living shall [~~must~~] include at a minimum those which are set forth and defined in §3.3804 of this title (relating to Definitions); or

(2) the impairment of cognitive ability. For purposes of this subchapter, the term "impairment of cognitive ability" shall not be defined more restrictively than the deterioration or loss in intellectual capacity requiring substantial supervision for protection of self or [~~and~~] others, as established by the clinical diagnosis of any licensed practitioner in this state authorized to make such a diagnosis. Such diagnosis shall include the patient's history and physical, neurological, psychological and/or psychiatric evaluations, and laboratory findings.

(b) Any insurer or other entity that offers a long-term care insurance policy or certificate that complies with subsection (a) of this section may also offer a long-term care policy or certificate that provides coverage based on the inability to perform without assistance any three activities of daily living, provided:

(1) the policy or certificate meets the requirements of subparagraphs (A) through (D) of this paragraph:

(A) the policy and certificate shall provide coverage based on meeting the eligibility requirements of subsection (a)(1) of this section,

(B) the coverage based on the inability to perform, without assistance, any three activities of daily living shall:

(i) be identical to the coverage provided under subparagraph (A) of this paragraph;

(ii) provide a level of benefits for facility coverage that is higher than the level of benefits payable for facility coverage under subparagraph (A) of this paragraph;

(iii) provide a level of benefits for non-facility coverage that is not less than the level of benefits payable for non-facility coverage under subparagraph (A) of this paragraph; however, in complying with §3.3815(c) of this title (relating to Standards for Home Health and Adult Day Care Benefits), home health or adult day care services coverage must be a dollar amount equivalent to at least one-half of one year's coverage available for the nursing home benefit associated with the corresponding number of activities of daily living.

(C) the activities of daily living shall include those set forth and defined in §3.3804 of this title for coverage provided under subparagraphs (A) and (B) of this paragraph; and

(D) coverage provided for impairment of cognitive ability shall be identical to the coverage provided under subparagraph (A) of this paragraph and the benefit level shall not be less than the applicable benefit level payable under subparagraph (B)(ii) or (B)(iii) of this paragraph; and

(2) the insurer or other entity shall offer the prospective insured, or the group policyholder if the group policy will be issued to an employer, labor union, or continuing care retirement center, the option to purchase a policy or certificate that provides benefits set out in subsection (a) of this section and obtain either: a written rejection of such offer or written acknowledgement of such offer. Written rejection or acknowledgment of offer may be by a rejection or acknowledgment receipt, attached to or made part of the application, or by a certificate of rejection or offer signed by the prospective insured or group policyholder if the group policyholder will be an employer, labor union, or continuing care retirement center.

(c) For purposes of only subsection (b)(1)(B) of this section, the term "facility," to the extent coverage for care at any of the following is provided in the policy or certificate, means an assisted living facility, skilled nursing facility, extended care facility, intermediate care facility, convalescent nursing home, or maintenance or personal care facility.

§3.3829. Required Disclosure Provisions.

(a) - (h) (No change.)

(i) A long-term care insurance policy and certificate which includes benefit provisions under §3.3818(b) of this title (relating to Standards for Eligibility for Benefits) shall disclose, within a common location and in equal prominence, a description of all benefit levels payable for the coverage described in §3.3818(b). Criteria utilized to determine eligibility for benefits shall be disclosed in all long-term care insurance policies and certificates, in the manner prescribed by §3.3818 [~~of this title (relating to Standards for Eligibility~~].

(j) - (k) (No change.)

§3.3830. Requirements for Application Forms and Replacement Coverage.

(a) - (f) (No change.)

(g) An application for a long-term care policy or certificate that contains benefits under §3.3818(b) of this title (relating to Standards for Eligibility for Benefits) shall in equal prominence reflect the benefit levels payable for the inability to perform two activities of daily living, three activities of daily living, and cognitive impairment.

§3.3839. Standards for Marketing.

(a) - (b) (No change.)

(c) The marketing of a long-term care insurance policy or certificate which includes benefits provisions under §3.3818(b) of this title (relating to Standards for Eligibility for Benefits) shall disclose within a common location and in equal prominence a description of all benefit levels payable for coverage described in §3.3818(b).

(d) [~~(c)~~] In addition to the practices prohibited in the Insurance Code, Article 21.21, the following acts and practices in the marketing of long-term care policies or certificates in this state are prohibited.

(1) Twisting-Knowingly making any misleading representation or incomplete or fraudulent comparisons of any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance with another insurer.

(2) High pressure tactics-Employing any method of marketing having the effect of or tending to induce the purchase of insurance through force, fright, threat, whether explicit or implied, or undue pressure to purchase or recommend the purchase of insurance.

(3) Cold lead advertising-Making use directly or indirectly of any method of marketing which fails to disclose in a conspicuous manner that a purpose of the method of marketing is solicitation of insurance and that contact will be made by an insurance agent or insurance company.

(4) Misrepresentation-Selling, marketing, offering, or advertising any insurance policy, certificate, or rider to such policy or certificate, which substantially meets the definition of long-term care insurance found in the Insurance Code, Article 3.70-12, §2, but which provides benefits for a period of fewer than 12 months.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907990
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Chapter 111. CONTROL OF AIR POLLUTION FROM VISIBLE EMISSIONS AND PARTICULATE MATTER

Subchapter A. VISIBLE EMISSIONS AND PARTICULATE MATTER

Division 2. INCINERATION

30 TAC §§111.121, 111.123, 111.125, 111.127, 111.129

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §111.121, concerning Single-, Dual-, and Multiple-Chamber Incinerators; §111.123, concerning Medical Waste Incinerators; §111.125, concerning Testing Requirements; §111.127, concerning Monitoring and Recordkeeping Requirements; and §111.129, concerning Operating Requirements. The commission proposes these revisions to 30 TAC Chapter 111, concerning Control of Air Pollution from Visible Emissions and Particulate Matter; Subchapter A, concerning Visible Emissions and Particulate Matter; Division 2, concerning Incineration, in order to delete the current requirements for oxygen (O_2) and carbon monoxide (CO) continuous emissions monitoring systems (CEMS) for incinerators that qualify for exemptions in 30 TAC Chapter 106 (Exemptions from Permitting), §106.491 (concerning Dual Chamber Incinerators), and §106.494 (concerning Pathological Incinerators).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The rules concerning incineration in Chapter 111, Division 2 currently require most incinerators burning solid waste or pathological waste to be equipped with CEMS. Incinerators burning more than 100 pounds per hour must be equipped with O_2 CEMS and a continuous temperature monitor/recorder. In addition, incinerators burning more than 225 pounds per hour must be equipped with CO CEMS. The O_2 and CO monitoring requirements are considered by several affected parties to be cost prohibitive and not contributing to an environmental benefit that justifies the additional cost.

On January 13, 1999, a representative in the Texas Legislature sent a letter to the executive director suggesting that the commission initiate rulemaking to exempt from monitoring requirements those incinerators which can meet the exemption from permitting found in §106.491. Based on verbal discussions among the air permits staff regarding the engineering and economics impact (for questions, contact David Ferrell of the Air Permits Division at (512) 239-1265), the executive director sent a reply on February 16, 1999, agreeing to initiate this rulemaking.

On September 24, 1998, the commission received a letter from FM Systems, Incorporated of Wheat Ridge, Colorado requesting the commission allow pathological incinerators (for dead animals) to be permitted without the requirement for an oxygen monitoring system. FM Systems, Incorporated proposed a temperature chart recorder as a substitute for the oxygen monitor for the incinerators in the 100-200 pound per hour range. On April 9, 1999, the commission received a letter from FC Industries, Incorporated (FC Industries) (who represented three incinerator manufacturers: Therm-Tec, Inc., of Sherwood, Oregon; Shenandoah Manufacturing of Harrisonburg, Virginia; and National Incinerators of Corsicana, Texas) requesting that continuous monitoring and recording of secondary chamber temperature and oxygen on animal units burning more than 100 pounds per hour should be eliminated entirely. FC Industries also stated that the cost for a good quality, low maintenance oxygen monitor and recorder would be approximately $10,000, which represents an additional cost over and above the cost of the incinerator of approximately 25-30%. FC Industries stated that the temperature and residence time requirements for secondary incinerator chambers specified in commission rules ensures a complete burnout of smoke and odor and, therefore, the oxygen monitor/recorder requirements provide no environmental benefit that justifies the additional cost. FC Industries finally stated that Texas is the only state which requires a continuous oxygen monitor/recorder for animal incinerators. On April 13, 1999, the commission received a letter from Therm-Tec, Inc. of Sherwood, Oregon requesting the commission review the requirement for a continuous oxygen monitor for small pathological incinerators. Therm-Tec, Inc. stated that the oxygen monitoring requirement imposes a major cost for an incinerator operator, with an initial cost as high as 30% of the total project cost, with no real gain in the control of pollution. It stated that good combustion conditions are maintained through the temperature and residence time requirements for the secondary chamber exhaust gas. The air permits staff (see David Ferrell of the Air Permits Division at (512) 239-1265) discussed the engineering and economic analysis impacts and agree these changes can be made without sacrificing air quality.

SECTION-BY-SECTION DISCUSSION

Proposed amendments to §§111.121, 111.125, 111.127, and 111.129 address the concerns raised by these affected parties by deleting the O_2 CEMS requirements for units burning between 100 and 500 pounds per hour, and the CO CEMS requirements for units burning between 225 and 500 pounds per hour. These affected units are those dual chamber incinerators which can meet the exemptions from permitting found in §106.491 and §106.494. These proposed amendments will not delete the requirement to continuously monitor the secondary chamber exhaust gas temperature for units burning more than 100 pounds per hour because temperature is critical in ensuring complete combustion and a continuous temperature monitor can reliably monitor complete combustion at a reasonable capital cost of approximately $2,000.

Section 111.129 states that "except in the case of incinerators with continuous opacity or carbon monoxide monitors, or equivalent monitors approved by the executive director . . ., the incinerator shall be limited in hours of operation from one hour after sunrise to one hour before sunset . . . ." Opacity cannot be effectively monitored through visual methods during darkness; therefore, the existing rule requires a CO CEMS or a continuous opacity monitoring system (COMS). The existing rule language referring to the monitoring requirements found in §111.127 is vague, and can be implied to allow units burning less than 100 pounds per hour to burn during nighttime without a COMS or a CO CEMS. While these units are considered to be relatively small, there is no reason to allow nighttime operation when the opacity cannot be visually monitored. Therefore, this proposal clarifies the commission rule by specifying in §111.121(6) that all units, not just those burning more than 100 pounds per hour, must either operate during daylight hours (one hour after sunrise until one hour before sunset), or install a COMS, CO CEMS, or an equivalent monitor approved by the executive director.

Proposed amendments to the existing Chapter 111, Division 2 would be concurrent with a proposed new Division 2, concerning Hospital and Medical/Infectious Waste Incinerators, in 30 TAC Chapter 113, concerning Hazardous Air Pollutants and Stationary Facility Performance Standards; Subchapter D, concerning Designated Facilities and Pollutants, §§113.2070-113.2079. In a separate rulemaking package, the new Division 2 in Subchapter D of Chapter 113 will replace the current medical waste incinerator rules found in Chapter 111 with the hospital and medical/infectious waste incinerator rules required by Title 40 Code of Federal Regulations (CFR), Part 60, Subpart Ce, concerning Hospital/Medical/Infectious Waste Incinerator Emission Guidelines.

Sections 111.121, 111.125, 111.127, and 111.129 are proposed to be amended in several places to reflect the proposed movement of medical waste incineration requirements from Chapter 111 to Chapter 113. Existing language in §111.123 would be replaced with a statement that the requirements for medical waste incinerators have been moved to Chapter 113, Subchapter D, Division 2.

Section 111.121(6) is proposed for deletion and existing paragraph (7) would be renumbered because the compliance dates established in the existing paragraph (6) have long since passed and are thus no longer necessary. The new paragraph (6) will be amended to specify that the operating requirements specified in §111.129(1), concerning operations during daylight hours, are applicable to incinerators which can claim permit exemptions found in §106.491 and §106.494. This clarifies the commission rule that all units, not just those burning more than 100 pounds per hour, must either operate during daylight hours or install a COMS or a CO CEMS.

Section 111.127(a) would be amended to delete the requirement for continuous monitoring for O_2 or CO for units meeting the exemption in §106.491. These units can burn up to 500 pounds per hour of waste which is generated on-site. Such waste includes paper, wood, cardboard cartons, rags, garbage (animal and vegetable wastes as defined in 30 TAC Chapter 101, concerning General Rules), and combustible floor sweepings containing overall not more than 10% treated papers, plastic, or rubber scraps. Subsection (a) would also be amended to delete the requirement for continuous monitoring for O_2 for units meeting the exemption in 106.494. These units can burn up to 200 pounds per hour of pathological waste which is generated on-site.

Numerous editorial changes are incorporated to ensure that the incineration rules in Chapter 111 are consistent with the Guiding Principles and policies of the commission, and are consistent in format, style, and tone per commission guidelines. Section 111.125(2) will be amended to allow the use of two additional United States Environmental Protection Agency (EPA) test methods (Methods 26 and 26A) to test hydrogen chloride emissions. The current test method specified is contained in Texas Air Control Board Sampling Procedures Manual, dated July 1985. The two additional test methods will provide greater flexibility for the owners/operators in testing their CO emissions.

FISCAL NOTE

Bob Orozco, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are in effect there will be no significant fiscal implications for units of state and local government as a result of administration or enforcement of the proposed amendments to Chapter 111. The proposed amendments are anticipated to produce cost saving to units of state and local government which operate or anticipate operating small dual-chamber incinerators or pathological incinerators that can qualify for an exemption from permitting found in Chapter 106.

Specifically, the proposed amendments to Chapter 111 would delete the current requirements for O_2 CEMS for incinerators that qualify for exemptions in §106.491 and §106.494 and burn between 100 and 500 pounds per hour. The proposed amendments would also delete the CO CEMS requirements for the same exempt incinerators burning between 225 and 500 pounds per hour. The existing requirement to continuously monitor and record the secondary chamber exhaust gas temperature is retained because temperature is critical in ensuring complete combustion and it is anticipated that this can be done at reasonable cost. The proposed amendments allow dual- chamber incinerators to burn up to 500 pounds per hour of waste generated on-site, such as paper, wood, cardboard cartons, rags, and other combustible materials containing not more than 10% treated papers, plastic, or rubber scraps. Pathological incinerators can burn up to 200 pounds per hour of pathological waste which is generated on-site. The proposed amendments do not change the current emissions standards, but instead change the method of monitoring those emissions. The amended monitoring requirements are sufficient to verify good combustion practices in the affected units. The proposed amendments also clarify that all incinerators that are not equipped with a COMS, CO CEMS, or equivalent monitors approved by the executive director, are limited to operating during daylight hours (one hour

after sunrise to one hour before sunset). In addition, the proposed amendments allow two additional methods to test hydrogen chloride emissions.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed amendments to Chapter 111 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be a positive fiscal impact on owners and operators of the affected incinerators because regulatory requirements are reduced and costs associated with compliance are reduced for persons who own and operate or anticipate purchasing the types of incinerators affected by the proposed amendments.

Owners and operators of dual-chamber incinerators affected by the proposed amendments include small businesses, manufacturing operations, grocery stores, retail stores, restaurants, and schools that incinerate trash and cardboard. Owners and operators of pathological incinerators affected by the proposed amendments include animal feeding operations, veterinary hospitals, hospitals, and animal shelters.

The purpose of the proposed amendments is to reduce the regulatory requirements on incinerators which qualify for exemption from permitting in accordance with the criteria in §106.491 and 106.494.By deleting the requirements for a CEMS, initial capital costs for persons purchasing and operating small dual-chamber incinerators that can qualify for exemption are reduced by approximately 30%. The cost of a continuous oxygen monitoring/recording system is approximately $10,000. In addition, deletion of the requirement for a continuous oxygen monitoring/recording system is anticipated to reduce annual operating costs for the incinerator by approximately $3,000 per year.

There are no additional economic costs anticipated to any person required to comply with the proposed amendments to Chapter 111 because the proposed amendments reduce regulatory requirements and the costs associated with complying with those requirements. In addition, the proposed amendments do not impose any new regulatory requirements beyond those which currently exist. It is anticipated that the proposed reduction in regulatory requirements will make the purchase of these types of incinerators more economical and will have a positive fiscal impact on current and future owners and operators and these facilities.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSES

Small businesses and micro-businesses are anticipated to be more likely to own and operate an incinerator that can meet the permit exemption requirements. No adverse economic effects are anticipated to any small business or micro-business as a result of implementing the proposed amendments because the proposed amendments reduce regulatory requirements and reduce the cost associated with the operation of incinerators affected by these rules. In addition, the proposed amendments do not add any additional regulatory requirements to small businesses not already required by state or federal law. It is anticipated that there will be cost savings to certain small businesses as a result of implementing the proposed amendments.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 and 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 proposed amendments to Chapter 111 are not anticipated to 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 because the proposed amendments delete current regulatory requirements which are anticipated to have positive economic benefits in affected facilities. The positive economic benefits are realized through the elimination of the requirement to purchase and operate continuous oxygen and carbon monoxide monitoring systems, while at the same time monitoring good combustion with the existing continuous temperature monitoring requirement. The proposed amendments do not change current emissions standards nor the amount of emissions produced by the affected parties. The proposed amendments represent only a change in the method of monitoring those emissions, and as such, the amended monitoring requirements are sufficient to verify good combustion practices of the affected units and protection of the public health and safety. In addition, the proposed amendments are not a "major environmental rule" because they do not meet any of the four applicability requirements of a "major environmental rule." Specifically, the proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are adopted solely under the general powers of the commission. The commission invites public comment on the draft Regulatory Impact Analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The rules in Chapter 111, Subchapter A, Division 2 currently require most incinerators burning solid waste to be equipped with CEMS. Incinerators burning more than 100 pounds per hour must be equipped with O_2 CEMS and a continuous temperature monitor/recorder. In addition, incinerators burning more than 225 pounds per hour must be equipped with CO CEMS. The O_2 and CO monitoring requirements are considered by the affected parties to be cost prohibitive and not contributing to an environmental benefit that justifies the additional cost. The proposed amendments to §§111.121, 111.123, 111.125, 111.127, and 111.129 address the concerns raised by above mentioned persons by deleting the O_2 and CO CEMS requirements for certain dual- chamber incinerators which can meet the permit exemptions found in §106.491 and 106.494. These proposed amendments will not delete the requirement to continuously monitor the secondary chamber exhaust gas temperature for incinerators which burn more than 100 pounds per hour because temperature is critical in ensuring complete combustion and can be monitored at a significantly lower capital cost of approximately $2,000, than with an O_2 or CO CEMS capital cost of approximately $10,000.

This proposal also clarifies the commission rule that all units, not just those burning more than 100 pounds per hour, must

either operate during daylight hours, or install a COMS or CO CEMS. The current rule language is vague and can be implied to allow that units burning no more than 100 pounds per hour can operate at night without installing either a COMS or CO CEMS. While these units are considered relatively small, it has not been the commission's intent to allow nighttime operation when the opacity cannot be visually monitored. Therefore, the rule language is proposed to clarify that all units, no matter what the burn rate, must either monitor opacity with a CO CEMS or COMS, or restrict operations to daylight hours only.

Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because this rulemaking will result in a cost savings for units that can qualify for the exemptions from permitting found in §106.491 and §106.494. The cost savings for parties purchasing these incinerators will include an approximate reduction in initial capital cost of 25-30% and an approximate reduction in annual operating cost of $3,000.

Also, the following exception to the application of Chapter 2007 of the Texas Government Code listed in §2007.043(b) applies to these rules: II. B. 5. Adoption of these proposed rule amendments will make the existing rules less stringent for any party which purchases and operates small dual-chamber incinerators that can qualify for the exemptions from permitting found in §106.491 or §106.494. Under existing rules, affected parties which incinerate more than 100 pounds per hour of waste must install, maintain, and operate continuous emissions monitoring systems for O_2 content and temperature of the exhaust gas stream. In addition, affected parties which incinerate more than 225 pounds per hour must install, maintain, and operate a CEMS to monitor CO emissions in the exhaust gas stream. Affected parties which incinerate less than 100 pounds per hour are not required to install and operate a CEMS for O_2 or CO, nor continuous monitor/recorders for temperature. The proposed rules will require only continuous monitoring and recording of the exhaust gas temperature for those incinerators which incinerate more than 100 pounds per hour. The requirement for an oxygen and CO CEMS remains the same for incinerators which cannot meet either of the permit exemptions, i.e., for units burning more than 500 pounds per hour for non-pathological waste incinerators and more than 225 pounds per hour for pathological waste incinerators.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that of this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). Although there is no analogous federal requirement at this time, §7429 of the Federal Clean Air Act Amendments of 1990 requires EPA to establish performance standards and other requirements for each category of solid waste incineration unit. In addition 40 CFR Part 51, concerning Requirements for Preparation, Adoption, and Submittal of Implementation Plans, requires that states adopt rules to ensure that they attain and maintain the national ambient air quality standards (NAAQS). These proposed rules involve emissions of two of the NAAQS, particulate and carbon monoxide, and do not propose an increase in emissions which would violate the NAAQS. The proposed rules do not change current emissions standards nor the amount of emissions produced by the affected parties. The proposed rules represent only a change in the method of monitoring those emissions, and as such the amended monitoring requirements are sufficient to verify good combustion practices of the affected units and protection of the public health and safety. Therefore, the proposed rules are consistent with 40 CFR Part 51. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on January 5, 2000, at 10:00 a.m. in Room 5108 of TNRCC Building F, located at 12100 Park 35 Circle. Visitor parking is located in the lots surrounding Buildings A and F, and there is no need to make reservations or pre-register. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearings; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the commission at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS Written comments may be submitted to Lola Brown, Office of Environmental, Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log No. 99012-111-AI. Comments must be received by 5:00 p.m., January 7, 2000. For further information, please contact Alan Henderson, Policy and Regulations Division, (512) 239-1510. Copies of the proposed amendments may be obtained by calling Ms. Brown at (512) 239-0348 or by accessing the "proposals/adoptions" portion of the commission's web site at www.tnrcc.state.tx.us/oprd.

STATUTORY AUTHORITY

These amendments are proposed under the Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under the TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air, which the new proposed rule will accomplish by regulating air emissions from incinerators. The

amendments are also proposed under TCAA, §382.016, which authorizes the commission to require monitoring requirements and examination of records and therefore is consistent with the referenced requirements.

The proposed amendments implement Texas Health and Safety Code, TCAA, §382.011, General Powers and Duties; §382.002, Policy and Purpose; and §382.016, Monitoring Requirements, Examination of Records.

§111.121. Single-, Dual-, and Multiple-Chamber Incinerators.

No person shall cause, suffer, allow, or permit the burning of domestic, municipal, commercial, or industrial solid waste as defined in §101.1 of this title (relating to Definitions) in a single-, dual-, or multiple-chamber incinerator, unless the conditions listed in paragraphs (1)-(6)[~~(7)~~] of this section are met. For purposes of this section, the term "commercial waste" shall be defined as waste material generated from retail and wholesale establishments. The requirements of this section do not apply to hazardous waste incinerators, or hospital and medical/infectious waste incinerators.

(1) Particulate emissions shall not exceed 0.18 gram per dry standard cubic meter (g/dscm) or 0.08 grain per dry standard cubic foot (gr/dscf), front-half of sampling train only, when corrected for 7.0% oxygen (O_2) in the stack gas according to the formula:
Figure: 30 TAC §111.121(1) (No change.)

(2) Hydrogen chloride (HCl) emissions greater than 1.8 kilograms (4 pounds) per hour require a control device with a minimum removal efficiency of 95%.

(3) Carbon monoxide (CO) emissions shall not exceed 120 parts per million by volume dry basis, when corrected to 7.0% O_2 [~~oxygen (O_2)~~] in the stack gas as specified in paragraph (1) of this section. CO and O_2 shall be measured at the same location. Upon the approval of the executive director of the Texas Natural Resource Conservation Commission (TNRCC) [~~Texas Air Control Board (TACB)~~], a total hydrocarbon (THC) standard may be chosen as an alternative to the CO standard. In such cases, the emissions shall not exceed 20 parts per million, when corrected to 7.0% O_2 [~~oxygen~~] in the stack gas as specified in paragraph (1) of this section. THC and O_2 shall be measured at the same location.

(4) Oxygen content shall be maintained at greater than 4.0% by volume of the emissions of the incinerator, measured at the exit of the incinerator, or at an alternate location approved by the executive director or a designated representative of the TNRCC [~~TACB~~]. Incinerators subject to the requirements of this section may operate at O_2 [~~oxygen~~] concentrations less than 4.0% by volume if compliance with paragraph (3) of this section can be continuously demonstrated at a lower O_2 [~~oxygen~~] concentration.

(5) Visible emissions shall not exceed an opacity of 5.0% averaged over any six-minute period.

[~~(6) Compliance with the requirements of this section shall be as soon as practicable, but no later than July 31, 1990, except in the case of industrial solid waste incinerators, which shall be in compliance as soon as practicable, but no later than December 31, 1992.~~]

(6) [~~(7)~~] Incinerators burning not more than 100 pounds per hour of domestic, municipal, commercial, or industrial solid waste, based on the total weight of materials burned, shall be subject to an opacity limit of 5.0% averaged over a six-minute period, [~~and~~] the requirements of §111.127(d) of this title (relating to Monitoring and Recordkeeping Requirements), and the operating requirements of §111.129(1) of this title (relating to Operating Requirements); but shall be otherwise exempt from the provisions of this section and §§[~~111.123,~~] 111.125, 111.127, and 111.129 of this title (relating to Incineration).

§111.123. Medical Waste Incinerators.

All requirements for medical waste incinerators are in §§113.2070-113.2079 of this title (relating to Hospital and Medical/Infectious Waste Incinerators). [~~No person shall cause, suffer, allow, or permit the burning of medical waste, as defined in §101.1 of this title (relating to Definitions), unless the incinerator meets the following requirements.~~]

[~~(1) On-site medical waste incinerators burning not more than 100 pounds per hour of waste must:~~]

[~~(A) be equipped with a secondary chamber which maintains a temperature of 1,400 degrees Fahrenheit or higher, measured at the exit of the secondary chamber and recorded continuously;~~]

[~~(B) not exceed visible emissions of 5.0% opacity averaged over any six-minute period;~~]

[~~(C) maintain written records as specified in §111.127(b) of this title (relating to Monitoring and Recordkeeping Requirements);~~]

[~~(D) limit hours of operation as specified in §111.129(1) of this title (relating to Operating Requirements);~~]

[~~(E) post current manufacturer's operating procedures as specified in §111.129(2); and~~]

[~~(F) comply with the requirements of this section, as soon as practicable, but no later than December 31, 1991.~~]

[~~(2) On-site medical waste incinerators burning more than 100 but no more than 225 pounds per hour of waste must:~~]

[~~(A) be equipped with a secondary chamber which retains all combustion gases for 1.0 second or longer at a temperature of 1,600 degrees Fahrenheit or higher, measured at the exit of the secondary chamber and recorded continuously;~~]

[~~(B) limit particulate emissions to 0.18 gram per dry standard cubic meter (g/dscm) or 0.08 grain per dry standard cubic foot (gr/dscf), front-half of sampling train only, when corrected for 7.0% oxygen in the stack according to the formula specified in §111.121(1) of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators);~~]

[~~(C) maintain an oxygen content at greater than 4.0% by volume of the emissions of the secondary chamber, measured at the exit of the secondary chamber or at an alternate location approved by the executive director or a designated representative of the TACB;~~]

[~~(D) not exceed visible emissions of 5.0% opacity averaged over any six-minute period;~~]

[~~(E) maintain written records as specified in §111.127(b);~~]

[~~(F) limit hours of operation as specified in §111.129(1);~~]

[~~(G) post current manufacturer's operating procedures as specified in §111.129(2); and~~]

[~~(H) comply with the requirements of this section as soon as practicable but no later than July 31, 1992.~~]

[~~(3) On-site medical waste incinerators burning more than 225 pounds per hour of waste, and commercial medical waste~~

incinerators, as defined in §101.1 of this title (relating to Definitions), must:]

[(A) be equipped with a secondary chamber which retains all combustion gases for 1.0 second or longer at a temperature of 1,800 degrees Fahrenheit or higher, measured at the exit of the secondary chamber and recorded continuously;]

[(B) limit particulate emissions to 0.07 g/dscm or 0.03 gr/dscf, front-half of the sampling train only, when corrected for 7.0% oxygen in the stack gas as specified in §111.121(1);]

[(C) for hydrogen chloride emissions greater than 1.8 kilograms (four pounds) per hour, a control device with a minimum removal efficiency of 95% is required;]

[(D) limit carbon monoxide emissions to 100 parts per million by volume dry basis, when corrected to 7.0% oxygen inn the stack gas as specified in §111.121(1). CO and O_2 shall be measured at the same location;]

[(E) maintain an oxygen content at greater than 4.0% by volume of the emissions of the secondary chamber, measured at the exit of the secondary chamber or at an alternate location approved by the executive director or a designated representative of TACB;]

[(F) not exceed visible emissions of 5.0% opacity averaged over any six-minute period;]

[(G) maintain written records as specified in §111.127(b);]

[(H) post current manufacturer's operating procedures as specified in §111.129(2); and]

[(I) comply with the requirements of this section as soon as practicable, but no later than July 31, 1990, for commercial medical waste incinerators, and December 31, 1992, for on-site medical waste incinerators.]

§111.125. Testing Requirements.

Upon the request of the executive director or a designated representative of the Texas Natural Resource Conservation Commission (commission)[(Texas Air Control Board], or a representative of the United States Environmental Protection Agency, or the local air pollution control agency, compliance with §111.121 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators) [and §111.123 of this title (relating to Medical Waste Incinerators)] shall be demonstrated by application of the test methods included in paragraphs (1)-(4) of this section, as appropriate. Compliance with §111.124 of this title (relating to Burning Hazardous Waste Fuels in Commercial Combustion Facilities) shall be demonstrated by application of the test methods included in paragraphs (1)-(5) of this section. Test reports prepared to demonstrate compliance with §111.124 of this title shall clearly document the operating conditions and waste feed composition existing during the test. [:]

(1) Particulate [particulate] matter. Test Method 5 (40 Code of Federal Regulations (CFR) 60, Appendix A) modified to include particulate caught by impinger train;

(2) Hydrogen [hydrogen] chloride. Test Method 26 or 26A (40 CFR 60, Appendix A), or Test Method [method] outlined in Chapter 5 [of the latest edition] of the TNRCC [Texas Air Control Board] "Sampling Procedures Manual," dated July 1985; ["]

(3) Carbon [carbon] monoxide. Test Method 10, 10A, or 10B (40 CFR [Code of Federal Regulations] 60, Appendix A) or, for [nonmedical waste incinerators,] total hydrocarbons: Test Method 25A (40 CFR [Code of Federal Regulations] Part 50, Appendix A);

(4) Opacity [opacity]. Test Method 9 (40 CFR [Code of Federal Regulations,] Part 60, Appendix A);

(5) Destruction [destruction] and removal efficiency. Destruction and removal efficiency, measuring principal organic hazardous constituent (POHC) mass feed rate to the commercial combustion facility, measuring the mass emission rate of POHC in the stack gas, and analyzing the POHC sample obtained from the stack gas, using the following test methods, respectively: Method 8240 of SW-846 "Test Methods for Evaluating Solid Waste," Method 0030 (VOST) of SW-846, Method 5040 of SW-846; or

(6) Alternative [alternative] methods. Equivalent test methods approved by the executive director.

§111.127. Monitoring and Recordkeeping Requirements.

(a) [Incinerators burning not more than 100 pounds per hour of medical waste as specified in §111.123 of this title (relating to Medical Waste Incinerators) shall install, calibrate, maintain, and operate a monitoring device that continuously measures and records the temperature of the exhaust gas of the incinerator.] Except for incinerators which can qualify for exemptions from permitting found in §106.491 of this title (relating to Dual Chamber Incinerators), and §106.494 of this title (relating to Pathological Waste Incinerators), [All] incinerators burning more than 100 pounds per hour of waste as specified in §111.121 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators) [and §111.123] shall install, calibrate, maintain, and operate a monitoring device that continuously measures and records the oxygen (O_2) content and temperature of the exhaust gas of the incinerator. Incinerators which qualify for exemptions from permitting in §106.491 and §106.494 of this title, and which burn more than 100 pounds per hour, shall install, calibrate, maintain, and operate a monitoring device that continuously measures and records the temperature of the exhaust gas of the incinerator. The monitoring device for incinerators equipped with a wet scrubbing device shall continuously measure and record the pressure drop of the gas flow through the wet scrubbing device. Except for incinerators which can qualify for exemptions from permitting found in §106.491 and §106.494 of this title, incinerators [Commercial medical waste incinerators and incinerators] burning more than 225 pounds per hour of domestic, municipal, commercial, [medical,] or industrial solid waste shall be equipped with continuous emissions monitors which measure and record in-stack carbon monoxide (CO) in addition to the other requirements of this section. A [For nonmedical incinerators, a] total hydrocarbon (THC) monitor may be substituted for the CO [carbon monoxide] monitor if a THC [total hydrocarbon] standard is established in accordance with [pursuant to] §111.121(3) of this title. For municipal incinerators built prior to 1990 and burning less than 2,000 pounds per hour of municipal solid waste, a stack test for CO [carbon monoxide] may be performed to establish O_2 [oxygen] and temperature requirements necessary to maintain minimum CO [carbon monoxide] emissions, and monitoring of these parameters may be substituted for the CO [carbon monoxide] monitoring device. The O_2 [oxygen], THC [total hydrocarbon], and CO [carbon monoxide] monitoring devices described in this section must be certified for use following procedures outlined in 40 Code of Federal Regulations (CFR) 60, Appendix B, Performance Specifications 3 and 4, respectively. Such certification must be approved by the executive director or a designated representative of the Texas Natural Resource Conservation Commission (TNRCC) [Texas Air Control Board (TACB)]. Compliance determinations may be made based on results of monitoring with a certified monitor. Compliance with the CO [carbon monoxide] and/or THC [total hydrocarbon] requirements specified in §111.121(3) of this title and §111.124(4) [§§111.121(3), 111.123(3)(D), and 111.124(4)] of this title (relating to Burning

Hazardous Waste Fuels in Commercial Combustion Facilities) may be demonstrated using a rolling hourly average. The rolling hourly average shall be defined as the arithmetic mean of the 60 most recent one-minute concentrations measured by the continuous monitoring system.

(b) The owner or operator of an incinerator or commercial combustion facility subject to the requirements of §§111.121, [~~and 111.123-~~] 111.124, and 111.125 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators; [~~Medical Waste Incinerators;~~] Burning Hazardous Waste Fuels in Commercial Combustion Facilities; and Testing Requirements), respectively, shall maintain written records of all monitoring and testing results, hours of operation, and quantity of waste burned. Such records shall be retained for a period of not less than two years before being destroyed. Such records shall be made available upon request by authorized representatives of the TNRCC [~~TACB~~], United States Environmental Protection Agency (EPA), or local air pollution control agencies. Alternately, for facilities other than commercial combustion facilities, in the absence of records verifying waste quantities burned, the design capacity of the unit will be used to determine applicable controls.

(c) The owner or operator of a commercial combustion facility subject to the requirements of §111.124 of this title [~~(relating to Burning Hazardous Waste Fuels in Commercial Combustion Facilities)~~] shall install, calibrate, maintain, and operate a monitoring device that continuously measures and records the waste feed rate, combustion gas velocity, opacity, O_2 [~~oxygen~~] content, CO [~~carbon monoxide (CO)~~] content, THC [~~(total hydrocarbon (THC)~~] content, and temperature of the exhaust gas of the combustion device. CO and THC shall be corrected to 7.0% O_2, [~~oxygen~~] reported on a dry basis, and measured in the same location. The O_2, [~~oxygen~~] THC, CO, combustion gas velocity, and opacity devices must be certified for use following procedures outlined in 40 CFR Part 60. Such certification must be approved by the executive director or his designated representative of the TNRCC [~~TACB~~]. Compliance determinations may be made based on results of monitoring with a certified monitor.

(d) Upon the request of the executive director or a designated representative of the TNRCC [~~TACB~~], EPA, or local air pollution control agency, the owner or operator of an incinerator which is exempt from the requirements specified in §111.121 of this title [~~(relating to Single-, Dual-, and Multiple-Chamber Incinerators)~~] and whose incinerator has the capacity to burn more than 100 pounds per hour shall maintain written records of the amount of waste burned. Such records shall be retained for a period of not less than two years before being destroyed.

§111.129. Operating Requirements.

The owner or operator of incinerators or commercial combustion facilities subject to the requirements of §§111.121, [~~111.123-~~] 111.124, 111.125, and 111.127 of this title (relating to Single-, Dual-, or Multiple-Chamber Incinerators; [~~Medical Waste Incinerators;~~] Burning Hazardous Waste Fuels in Commercial Combustion Facilities; Testing Requirements; and Monitoring and Recordkeeping Requirements), respectively, shall meet the following operating requirements.

(1) Except in the case of incinerators with continuous opacity or carbon monoxide monitors, or equivalent monitors approved by the executive director or a designated representative of the Texas Natural Resource Conservation Commission [~~Texas Air Control Board~~], the incinerator shall be limited in hours of operation from one hour after sunrise to one hour before sunset.

(2) Current manufacturer's operating procedures shall be posted on or near each incinerator or the incinerator control room, and the incinerator shall be operated in accordance with those procedures.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907865
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: February 24, 2000
For further information, please call: (512) 239-0348

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Chapter 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§288.1-288.6, 288.20-288.22, and 288.30, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed amendments is to clarify the rules and incorporate recent legislative changes. Additional changes have been proposed to improve readability, clarify the intent of the rules, and to incorporate minor style changes for consistency with the required *Texas Register* format.

SECTION BY SECTION ANALYSIS

The definition of Wholesale Public Water Supplier in §288.1, Definitions, is proposed to be amended to clarify that individuals and entities, who merely convey water for which they do not own the water right, are not wholesale public water suppliers. This change is needed to make clear that it is the owner of the conveyed water who may have to develop either a water conservation plan or a drought contingency plan because of other provisions of this chapter or because of other rules.

Proposed amendments to §288.2(b) would clarify that a water conservation plan is to be prepared consistent with Texas Water Development Board requirements under 31 TAC §363.15, concerning Required Water Conservation Plan.

Proposed amendments to §288.3(4) would add information concerning accounting for water loss to what must be included in a water conservation plan.

Proposed amendments to §288.4 improve the readability of the subsection and update the name of the Natural Resource Conservation Service.

Proposed amendments to §288.5(1)(F) delete the word "wholesale" before the words "water supply contract" to eliminate redundancy.

Proposed amendments to §288.5(1)(G) would clarify that reservoir systems operations plans can recognize multiple objectives, rather than just the maximization of water supply. The commission understands that in developing an operations plan for

reservoirs, trade-offs among several goals, such as maximization of supply, cost of production, and water quality must be considered. The commission's intent in this provision is that in a plan for coordinated operations of reservoirs, optimization of water supplies be considered as a significant goal, along with other goals of the system.

Proposed amendments to §288.6 clarify that the subsection applies only to the subchapter.

Proposed amendments to §288.20(a) and §288.22(a) renumber and combine several subsections.

Proposed amendments to §288.20(a)(1)(F) would eliminate the requirement that municipal-use drought contingency plans have an assessment of water management strategies to be used when flows are at 75% and 50% of normal. Texas Water Code (TWC), §11.1272 requires the commission to develop rules for drought contingency plans for wholesale and retail water suppliers and irrigation districts. That statute also requires that the plans must be consistent with the appropriate approved regional water plan. Senate Bill (SB) 1, 75th Legislature, 1997, specifically required regional plans to have water management strategies to be used when flows are at 75% and 50% of normal. In order to meet the legislative directive that the local drought contingency plans be consistent with the regional plans, the current rules for the local drought contingency plans include the requirement for water management strategies for those flow conditions. However, SB 657, 76th Legislature, 1999, eliminated the requirement that regional water plans have water management strategies for when flows are 75% and 50% of normal. Accordingly, the commission is proposing the elimination of this requirement so that local drought contingency plans will be consistent with the appropriate approved regional water plan as required by TWC, §11.1272. However, the rules still require the water plans to address the drought of record.

Proposed amendments to §288.20(b) clarify the subsection by adding "wholesale or retail" before "water supplier."

RULE REVIEW

Concurrently, the commission proposes the review of Chapter 288, in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The proposed notice of review can be found in the Review of Agency Rules section of this issue of the *Texas Register*.

FISCAL NOTE

Jeff Grymkoski, Director, Strategic Planning and Appropriations, has determined that for the first five-year period the sections as proposed are in effect, there will be no significant fiscal implications as a result of administering and enforcing these sections for state or local government. The proposed amendments would make the rules for developing local drought contingency plans consistent with the provisions of SB 657, 76th Legislature, 1999 (an Act relating to the development of water management strategies for periods of drought).

Specifically, the proposed rules would eliminate the requirement that local drought contingency plans address management strategies for when flows are 75% and 50% of normal. The rules, however, retain the requirement that water planning strategies must address the drought of record.

It is anticipated that units of local governments who supply wholesale and retail public water and irrigation districts would experience some administrative savings due to the elimination of the requirement to develop water management strategies for flows that are 75% and 50% of normal. However, these savings are not anticipated to be significant.

PUBLIC BENEFIT

Mr. Grymkoski has also determined that for the first five years the proposed sections are in effect, the anticipated public benefit anticipated as a result of enforcement of, and compliance with, these amendments will be decreased cost to prepare local drought contingency plans and clarified and simplified rules.

SMALL BUSINESS OR MICRO-BUSINESS ANALYSES

The only small businesses or micro-businesses affected by the proposed rules are investor-owned utilities, who may experience some cost savings due to the elimination of the requirement to develop water management strategies for use when flows are 75% and 50% of normal.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the amendments under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed amendments is to clarify the definition of wholesale public water supplier; to clarify that reservoir systems operations plans must include the maximization of water supplies as one of the significant goals of the plan; and to parallel the requirements of drought contingency plans as directed by changes to TWC, §11.1272 by eliminating of the requirements that drought contingency plans for municipal uses have water management strategies to be used when flows are at 75% and 50% of normal. The rules will substantially advance these specific purposes and promulgation and enforcement of these rules will not significantly burden private real property because private real property is not affected by these rules.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule." The proposed amendments are to eliminate a requirement in existing rules, and to clarify the intent of existing rules, not to protect the environment or reduce the risks to human health form environmental exposure. The proposed rules will have only a minimal impact so that there will be no material effect on the items listed in the definition. In addition, the proposed rules do not meet any of the four applicability requirements listed in §2001.0225(a) in that the water conservation and drought contingency plan rules are specifically required by Texas Water Code, §11.1271 and §11.1272; the proposed amendments do not exceed any express requirements of state law; and the proposed amendments do not involve any delegation agreements or contracts.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in Texas Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31

TAC §505.11. Therefore, the proposed rules are not subject to the CMP.

SUBMITTAL OF COMMENTS

No public hearing is scheduled regarding the proposed rules, unless one is requested. Comments regarding the proposal should reference Rule Log Number 99037-288-WT and may be submitted to Lisa Martin, TNRCC Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00, p.m., January 3, 2000. For further information or questions concerning this proposal, please contact Todd Chenoweth, Policy and Regulations Division, (512) 239-4483, or Ray Pizarro, Policy and Regulations Division, (512) 239-2588.

Subchapter A. WATER CONSERVATION PLANS

30 TAC §§288.1-288.6

STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.103, which provides the commission with the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; §5.120, which requires the commission to administer the law so as to promote the judicious use and maximum conservation of water; and §11.1271, which requires the commission by rule to require submission of certain water conservation plans, and §11.1272, which requires the commission by rule to require submission of certain drought contingency plans.

The proposed amendments implement TWC, §§5.120, 11.1271, and 11.1272.

§288.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Conservation–Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(2) Drought contingency plan–A strategy or combination of strategies for temporary supply [~~management~~] and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

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

(5) Irrigation water use efficiency–The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, [~~and~~] salinity management, and leaching requirements associated with irrigation.

(6)-(10) (No change.)

(11) Regional Water Planning Group–A group established by the Texas Water Development Board to prepare a regional water plan under [~~pursuant to~~] Texas Water Code, §16.053.

(12) Retail Public Water Supplier–An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants [~~as an incident of that employee service or tenancy~~] when that water is not resold to or used by others.

(13)-(14) (No change.)

(15) Wholesale Public Water Supplier–An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to this water which is conveyed, whether or not for a delivery fee.

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers shall provide information, where applicable, in response to the following.

(1) Minimum requirements. All water conservation plans for municipal uses by public drinking water suppliers shall include the following elements:

(A)-(H) (No change.)

(I) a means of implementation and enforcement which shall be evidenced by:

(i) (No change.)

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan; and [~~.~~]

(J) (No change.)

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten years subsequent to the effective date of the plan shall include the following elements:

(A) (No change.)

(B) a record management system to record water pumped, water deliveries, water sales, and water losses which allows for the desegregation of water sales and uses into the following user classes:

(i)-(iii) (No change.)

(iv) industrial; and [~~.~~]

(C) (No change.)

(3) Additional conservation strategies. Any combination of the following strategies shall be selected by the water supplier, in addition to the minimum requirements in paragraphs (1) and (2) of this subsection [~~above~~], if they are necessary to achieve the stated water conservation goals of the plan. The commission may require that any of the following strategies be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan:

(A)-(H) (No change.)

(b) A water conservation plan prepared in accordance with 31 TAC §363.15 (relating to Required Water Conservation Plan) [~~rules~~] of the Texas Water Development Board and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements pursuant to a memorandum of understanding between the commission and the Texas Water Development Board.

§288.3. Water Conservation Plans for Industrial or Mining Use.

A water conservation plan for industrial or mining uses of water shall provide information, where applicable, in response to each of the following elements:

(1)-(3) (No change.)

(4) leak-detection, repair, and accounting for water loss in the water distribution system [~~water loss accounting for water transmission, delivery, and distribution system~~];

(5)-(6) (No change.)

§288.4. Water Conservation Plans for Irrigation Use.

(a) A water conservation plan for irrigation uses of water shall provide information[~~, where applicable,~~] in response to [~~each of~~] the following applicable subsections.

(1) For an individual user:

(A)-(B) (No change.)

(C) a description of the device(s) and/or methods within an accuracy of plus or minus 5.0% [~~5%~~], to be used in order to measure and account for the amount of water diverted from the source of supply;

(D)-(F) (No change.)

(G) scheduling the timing and/or measuring the amount of water applied[~~,~~] (for example, soil moisture monitoring);

(H)-(J) (No change.)

(2) For a system providing irrigation water to more than one user:

(A) a system inventory for the supplier's:

(i) (No change.)

(ii) management practices, including the supplier's operating rules and regulations, water pricing policy, and a description of practices and/or devices used to account for water deliveries; and

(iii) (No change.)

(B) specification of water conservation goals, including maximum allowable losses for the storage and distribution system;

(C)-(H) (No change.)

(I) any other water conservation practice, method, or technique which the supplier shows to be appropriate for achieving conservation; and

(J) (No change.)

(b) A water conservation plan prepared in accordance with the rules of the Natural Resource [~~Soil~~] Conservation Service, the State Soil and Water Conservation Board, or other federal or state agency and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements pursuant to a memorandum of understanding between the commission and that agency.

§288.5. Water Conservation Plans for Wholesale Water Suppliers.

A water conservation plan for a wholesale water supplier shall provide information, where applicable, in response to each of the following paragraphs.

(1) Minimum requirements. All water conservation plans for wholesale water suppliers shall include the following elements:

(A)-(E) (No change.)

(F) a requirement in every [~~wholesale~~] water supply contract entered into or renewed after official adoption of the water conservation plan, and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements of this chapter. If the customer intends to resell the water, then the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with applicable provisions of this chapter;

(G) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin. The reservoir systems operations plans shall include optimization of water supplies as one of the significant goals of the plan [~~in order to optimize available water supplies~~];

(H) a means for implementation and enforcement, which shall be evidenced by: a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier; and a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(I) (No change.)

(2) Additional conservation strategies. Any combination of the following strategies shall be selected by the water wholesaler, in addition to the minimum requirements of paragraph (1) of this section [~~above~~], if they are necessary in order to achieve the stated water conservation goals of the plan. The commission may require by commission order that any of the following strategies be implemented by the water supplier if the commission determines that the strategies are necessary in order for the goals of the water conservation plan to be achieved:

(A)-(D) (No change.)

§288.6. Water Conservation Plans for Any Other Purpose or Use.

A water conservation plan for any other purpose or use not covered in this subchapter [~~chapter~~] shall provide information where applicable about those practices, techniques, and technologies that will be used to reduce the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907968
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: March 29, 2000

For further information, please call: (512) 239-1966

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Subchapter B. DROUGHT CONTINGENCY PLANS

30 TAC §§288.20-288.22

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, which provides the commission with the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; §5.120, which requires the commission to administer the law so as to promote the judicious use and maximum conservation of water; and §11.1272, which requires the commission by rule to require submission of certain drought contingency plans.

The proposed amendments implement Texas Water Code, §5.120 and §11.1272.

§288.20. Drought Contingency Plans for Municipal Uses by Public Water Suppliers.

(a) A drought contingency plan for a retail public water supplier, where applicable, shall provide information in response to each of the following. [:]

(1) Minimum requirements. Drought contingency plans shall include the following minimum elements. [:]

(A) [~~Public involvement.~~] Preparation of the plan shall include provisions [~~Provision shall be made~~] to actively inform the public and affirmatively provide opportunity for public input [~~into the preparation of the plan~~]. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(B) [~~Public Education.~~] Provisions [~~Provision~~] shall be made for a program of continuing public education and information regarding the drought contingency plan.

(C) [~~Coordination with Regional Water Planning Groups.~~] The drought contingency plan must document coordination with the Regional Water Planning Groups for the service area of the retail public water supplier [~~in order~~] to insure consistency with the appropriate approved regional water plans.

(D) The drought contingency plan shall include a description of the information to be monitored by the water supplier, and specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria . [;]

(E) The drought contingency plan must include drought or emergency response stages providing for the implementation of measures in response to at least the following situations:

(i)-(iv) (No change.)

(F) The drought contingency plan must include the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(i) curtailment of non-essential water uses; and

(ii) utilization of alternative water sources and/or alternative delivery mechanisms with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.).

[~~(F) an assessment of water management strategies to be used when flows are at 75 percent of normal and when flows are at 50 percent of normal;~~]

(G) The drought contingency plan must include the procedures to be followed for the initiation or termination of each drought response stage, including procedures for notification of the public.

[~~(G) a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of drought response stages;~~]

[~~(H) procedures for notification of the public of the initiation or termination of drought response stages;~~]

[~~(I) specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:~~]

~~*(i)* curtailment of non-essential water uses; and~~]

~~*(ii)* utilization of alternative water sources and/or alternative delivery mechanisms with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.)~~]

(H) [~~(J)~~] The drought contingency plan must include procedures for granting variances to the plan. [~~; and~~]

(I) [~~(K)~~] The drought contingency plan must include procedures for the enforcement of any mandatory water use restrictions, including specification of penalties (e.g., fines, water rate surcharges, discontinuation of service) for violations of such restrictions.

(2)-(3) (No change.)

(b) A wholesale or retail [~~The~~] water supplier shall notify the executive director within five business days of the implementation of any mandatory provisions of the drought contingency plan.

(c) The retail public water supplier shall review and update, as appropriate, the drought contingency plan, at least every five years, based on new or updated information, such as the adoption or revision of the regional water plan.

§288.21. Drought Contingency Plans for Irrigation Use.

(a) A drought contingency plan for an irrigation use, where applicable, shall provide information in response to each of the following. [:]

(1) Minimum requirements. Drought contingency plans for irrigation water suppliers shall include policies and procedures for the equitable and efficient allocation of water on a pro rata basis during times of shortage in accordance with Texas Water Code, §11.039. Such plans shall include the following elements as a minimum. [:]

(A) [~~User involvement.~~] Preparation of the plan shall include provisions [~~Provision shall be made~~] to actively inform and to affirmatively provide opportunity for users of water from the irrigation system to provide input into the preparation of the plan and to remain informed of the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the water users and providing written notice to the water users concerning the proposed plan and meeting.

(B) [~~Coordination with Regional Water Planning Groups.~~] The drought contingency plan must document coordination with the Regional Water Planning Groups [~~in order~~] to insure consistency with the appropriate approved regional water plans.

(C) The drought contingency plan shall include water supply criteria and other considerations for determining when to initiate or terminate water allocation procedures, accompanied by an explanation of the rationale or basis for such triggering criteria. [~~;~~]

(D) The drought contingency plan shall include methods for determining the allocation of irrigation supplies to individual users. [~~;~~]

(E) The drought contingency plan shall include a description of the information to be monitored by the water supplier and the procedures to be followed for the initiation or termination of water allocation policies. [~~;~~]

(F) The drought contingency plan shall include procedures for use accounting during the implementation of water allocation policies. [~~;~~]

(G) The drought contingency plan shall include policies and procedures, if any, for the transfer of water allocations among individual users within the water supply system or to users outside the water supply system. [~~; and~~]

(H) The drought contingency plan shall include procedures for the enforcement of water allocation policies,including specification of penalties for violations of such policies and for wasteful or excessive use of water.

(2)-(3) (No change.)

(b) (No change.)

§288.22. Drought Contingency Plans for Wholesale Water Suppliers.

(a) A drought contingency plan for a wholesale water supplier shall include the following minimum elements. [~~:~~]

(1) [~~Public involvement.~~] Preparation of the plan shall include provisions [~~Provision shall be made~~] to actively inform the public and to affirmatively provide opportunity for user input in the preparation of the plan and for informing wholesale customers about the plan. Such acts may include, but are not limited to, having a public meeting at a time and location convenient to the public and providing written notice to the public concerning the proposed plan and meeting.

(2) [~~Coordination with Regional Water Planning Groups.~~] The drought contingency plan must document coordination with the Regional Water Planning Groups for the service area of the wholesale public water supplier [~~in order~~] to insure consistency with the appropriate approved regional water plans.

(3) The drought contingency plan shall include a description of the information to be monitored by the water supplier and specific criteria for the initiation and termination of drought response stages, accompanied by an explanation of the rationale or basis for such triggering criteria . [~~;~~]

(4) The drought contingency plan shall include a minimum of three drought or emergency response stages providing for the implementation of measures in response to water supply conditions during a repeat of the drought-of-record. [~~;~~]

(5) The drought contingency plan shall include [~~a description of the information to be monitored by the water supplier and~~] the procedures to be followed for the initiation or termination of drought response stages , including [~~;~~]

[~~(6)~~] procedures for notification of wholesale customers regarding the initiation or termination of drought response stages. [~~;~~]

(6) [~~(7)~~] The drought contingency plan shall include the specific water supply or water demand management measures to be implemented during each stage of the plan including, but not limited to, the following:

(A) pro rata curtailment of water deliveries to or diversions by wholesale water customers as provided in Texas Water Code , §11.039; and

(B) utilization of alternative water sources with the prior approval of the executive director as appropriate (e.g., interconnection with another water system, temporary use of a non-municipal water supply, use of reclaimed water for non-potable purposes, etc.). [~~;~~]

(7) [~~(8)~~] The drought contingency plan shall includea provision in every wholesale water contract entered into or renewed after adoption of the plan, including contract extensions, that in case of a shortage of water resulting from drought, the water to be distributed shall be divided in accordance with Texas Water Code, §11.039.

(8) [~~(9)~~] The drought contingency plan shall include procedures for granting variances to the plan. [~~; and~~]

(9) [~~(10)~~] The drought contingency plan shall include procedures for the enforcement of any mandatory water use restrictions, including specification of penalties (e.g., liquidated damages, water rate surcharges, discontinuation of service) for violations of such restrictions.

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907969
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: March 29, 2000
For further information, please call: (512) 239-1966

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Subchapter C. REQUIRED SUBMITTALS

30 TAC §288.30

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103, which provides the commission with the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; §5.120, which requires the commission to administer the law so as to promote the judicious use and maximum conservation of water; §11.1271, which requires the commission by rule to require submission of certain water conservation plans, and §11.1272, which requires the commission by rule to require submission of certain drought contingency conservation plans.

The proposed amendment implements Texas Water Code, §§5.120, 11.1271, and 11.1272.

§288.30. Required Submittals.

In addition to the water conservation and drought contingency plans required to be submitted with an application under §295.9 of this title (relating to Water Conservation and Drought Contingency Plans),water conservation and drought contingency plans are required as follows. [:]

(1) Water conservation plans. The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial, and other non-irrigation uses shall develop, submit, and implement a water conservation plan meeting the requirements of Subchapter A of this chapter (relating to Water Conservation Plans [~~Chapter~~]. The water conservation plan shall be submitted to the executive director not later than September 1, [,] 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(2) Water conservation plans. The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 10,000 acre-feet a year or more for irrigation uses shall develop, submit,and implement a water conservation plan meeting the requirements of Subchapter A of this chapter [~~Chapter~~]. The water conservation plan shall be submitted to the executive director not later than September 1, 1999. The requirement for a water conservation plan under this rule shall not result in the need for an amendment to an existing permit, certified filing, or certificate of adjudication.

(3) Drought contingency plans for retail public water suppliers. Retail public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter (relating to Drought Contingency Plans) [~~Chapter~~] to the executive director after adoption by its governing body. The retail public water system shall provide a copy of the plan to the Regional Water Planning Group for each region within which the water system operates. These drought contingency plans shall be submitted as follows. [:]

(A) For retail public water suppliers providing water service to 3,300 or more connections, the drought contingency plan shall be submitted to the executive director not later than September 1, 1999. Thereafter, any revised plans shall be submitted to the executive director within 90 days of adoption by the community water system. Any new retail public water suppliers providing water service to 3,300 or more connections shall prepare and adopt a drought contingency plan [~~plans~~] within 180 days of commencement of operation, and submit the plan to the executive director within 90 days of adoption. [~~; and~~]

(B) (No change.)

(4) Drought contingency plans for wholesale public water suppliers. Wholesale public water suppliers shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter [~~Chapter~~] to the executive director not later than September 1, 1999, after adoption of the drought contingency plan by the governing body of the water supplier. Thereafter, any new or revised plans shall be submitted to the executive director within 90 days of adoption by the governing body of the wholesale public water supplier. Wholesale public water suppliers shall also provide a copy of the drought contingency plan to the Regional Water Planning Group for each region within which the wholesale water supplier operates.

(5) Drought contingency plans for irrigation districts. Irrigation districts shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter [~~Chapter~~] to the executive director not later than September 1, 1999, after adoption by the governing body of the irrigation district. Thereafter, any new or revised plans shall be submitted to the executive director within 90 days of adoption by the governing body of the irrigation district. Irrigation districts shall also provide a copy of the plan to the Regional Water Planning Group for each region within which the irrigation district operates.

(6) Other submissions. A water conservation plan or drought contingency plan required to be submitted with an application in accordance with §295.9 of this title (relating to Water Conservation and Drought Contingency Plans) shall also be subject to review and approval by the commission.

(7) Existing permits. The holder of an existing permit, certified filing, or certificate of adjudication shall not be subject to enforcement actions nor shall the permit, certified filing, or certificate of adjudication be subject to cancellation, either in part or in whole, based on the non- attainment of goals contained within a water conservation plan submitted with an application in accordance with §295.9 of this title or by the holder of an existing permit, certified filing, or certificate of adjudication in accordance with the requirements of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on Novemeber 22, 1999.

TRD-9907970
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: March 29, 2000
For further information, please call: (512) 239-1966

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part 10. TEXAS WATER DEVELOPMENT BOARD

Chapter 355. RESEARCH AND PLANNING FUND

Subchapter B. ECONOMICALLY DISTRESSED AREAS FACILITY ENGINEERING

31 TAC §355.72

The Texas Water Development Board (board) proposes an amendment to 31 TAC §355.72, concerning the Research and Planning Fund.

The amendment to§355.72(b)(1) delete language related to the board's adoption of the model subdivision rules by reference and remove an unnecessary comma. This language is no longer necessary because the board has been directed to adopt model subdivision rules by the passage of Senate Bill 1421 and the amendments of Texas Water Code §16.343 by the recent

76th Legislature, 1999. The model subdivision rules are being concurrently proposed as 31 TAC Chapter 364.

Ms. Patricia Todd, Director of Accounting & Finance, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications on state and local government as a result of enforcement and administration of the section.

Ms. Todd has also determined that for the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be an updated rule that is consistent with relevant statutes. Ms. Todd has determined there will be no economic costs to small businesses or individuals required to comply with the amendment as proposed.

Comments on the proposed amendment will be accepted for 30 days following publication and may be submitted to Jonathan Steinberg, Assistant General Counsel, Border Project Management Division, Legal Services, (512) 475-2051, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, or by fax at (512) 463-5580.

The amendment is proposed under the authority of the Texas Water Code, §6.101 and Chapter 15, subchapter F, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State.

The statutory provisions affected by the proposed amendment is the Texas Water Code, §16.341.

§355.72. Criteria for Eligibility.

(a) (No change.)

(b) Political subdivisions must meet the appropriate requirements of this section before the board may provide financial assistance for facility planning.

(1) A county within which the political subdivision applying for assistance is wholly or partially located must have adopted the model subdivision rules required by the Texas Water Code, §16.343. [~~The board has adopted these model political subdivision rules by reference.~~] Copies of the model subdivision rules are available upon request from the Texas Water Development Board, Director, Border[~~,~~] Project Management Division, P.O. Box 13231, Austin, Texas 78711.

(2)-(7) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 17, 1999.

TRD-9907829

Suzanne Schwartz

General Counsel

Texas Water Development Board

Proposed date of adoption: January 20, 2000

For further information, please call: (512) 463-7981

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Chapter 364. MODEL SUBDIVISION RULES

The Texas Water Development Board (the board) proposes new 31 TAC §§364.1, 364.2, 364.11-364.18, 364.31-364.37, 364.51-364.57, 364.71, 364.72, 364.80, 364.81, 364.90 and 364.91, concerning Model Subdivision Rules.

The new sections will comprise new 31 TAC Chapter 364, Model Subdivision Rules. The new sections are intended to assure that minimum standards for safe and sanitary water supply and sewer services are met in residential areas of political subdivisions. The model rules must be adopted and enforced before a county or municipality can receive financial assistance from the board's Economically Distressed Areas Program (EDAP).

Subchapter A (§364.1 and §364.2) contains General Provisions related to the scope of the new chapter and procedures for adoption of the model rules.

Subchapter B contains the model rules for counties, consisting of four divisions: Division 1 (§§364.11-364.18) regarding general provisions, jurisdictional statements and definitions; Division 2 (§§364.31-364.37) setting out the minimum state standards for water supply and sewer services to certain subdivisions; Division 3 (§§364.51-364.57) providing requirements for processing and approval of subdivision plats; and Division 4 (§364.71 and §364.72) regarding enforcement responsibilities and authority.

Subchapter C contains the provisions relative to adoption of the requirements of the model rules as applicable to municipalities participating in the Economically Distressed Area Program, consisting of two divisions: Division 1 (§364.80 and §364.81) pertaining to municipalities that have not adopted any subdivision ordinances; and Division 2 (§364.90 and §364.91) pertaining to municipalities that have existing subdivision ordinances in effect.

Although not heretofore formally adopted as administrative rules of any state agency, the Model Subdivision Rules have existed in an approved form which political subdivisions participating in EDAP have been required to adopt and enforce since 1990.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five-year period these sections are in effect there will be no new fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Todd has also determined that for the first five years the sections as proposed are in effect the anticipated public benefit is a more consistent and objective consideration of proposed subdivisions to assure adequate water supply and sewer services. As a result of enforcing the sections, political subdivisions and their residents participating in the board's Economically Distressed Areas Program should experience fewer health and safety hazards resulting from inadequate water supply and sewer services. Though these requirements have been in effect since 1990 and should result in no new economic impacts on these individuals and small business owners, Ms. Todd has determined that individuals and small businesses involved in the land development business in EDAP eligible counties who are required to comply with the sections as proposed may experience some additional new costs due to a clarification of the requirement that all connections costs to existing water providers be paid prior to county approval of the plat. To the extent that counties have not enforced this requirement, the cost of compliance is that residential land developers getting plat approval from the county that adopts and enforces these rules and who intends to rely on water supply

or wastewater service from a retail public utility will have to have an agreement pursuant to which the developer has paid the costs of connecting each lot to the water or wastewater system. Total cost is dependent on the number of lots in the subdivision. Individual lots costs are dependent on whether water service only is being provided, wastewater service only is being provided, or both services are being provided. For water only service, the costs include the costs of meters, water district membership fees, water rights acquisition, and other costs and may range from a low of $215 per lot to a high of $580 per lot. If water and wastewater service is being provided the cost per lot may range from $390 to $1155. The cost for compliance has no basis in cost per employee, cost per hour of labor, or cost per $100 of sales. The cost will be the same for small businesses as large businesses and will be on a cost per lot basis, thus total cost will be dependent on the number of lots developed. The cost to individuals who are not residential real estate developers in counties eligible to participate in the Economically Distressed Areas Program is zero.

Comments on the proposed new sections will be accepted for 30 days following publication and may be submitted to Jonathan Steinberg, Assistant General Counsel, Border Project Management Division, Legal Services, (512) 475-2051, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, or by fax at (512) 463-5580.

Subchapter A. GENERAL PROVISIONS

31 TAC §§364.1, 364.2, 364.11-364.18, 364.31-364.37, 364.51-364.57, 364.71, 364.72, 364.80, 364.81, 364.90, 364.91

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.1. Scope of Chapter.

This chapter contains model rules which the Texas Water Development Board (board) is required to adopt in accordance with Texas Water Code, 16.343. Before an application for financial assistance from Economically Distressed Areas Program as specified in Chapter 355, subchapter B of this title or Chapter 363, subchapter E of this title may be considered by the board, the applicant shall provide documentation satisfactory in form and in substance that the municipality, if applicable, and county in which the applicant is located has adopted the necessary orders, ordinances, or other rules that meet the requirements of the model rules contained in subchapter B of this chapter.

§364.2. Purpose.

The model rules provide the criteria for assuring that an adequate supply of safe drinking water and adequate safe sewer facilities are available to residential areas in accordance with state standards established by the Texas Department of Health and the Texas Natural Resource Conservation Commission. The model rules prohibit the establishment of residential developments with lots of five acres or less without adequate water supply and sewer services, prohibit more than one single-family, detached dwelling to be located on each subdivision lot, and establish minimum setbacks to ensure proper operation of water supply and sewer services and to reduce the risk of fire hazards.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

TRD-9907854
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Subchapter B. MODEL RULES

Division 1. GENERAL AND ADMINISTRATIVE PROVISIONS

31 TAC §§364.11-364.18

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.11. Authority and Scope of Rules.

These rules are adopted by County, Texas, under the authority of the Local Government Code, Chapter 232 and Water Code, §16.350. Notwithstanding any provision to the contrary, these rules apply only to a subdivision which creates two or more lots of five acres or less intended for residential purposes. Lots of five acres or less are presumed to be for residential purposes unless the land is restricted to nonresidential uses on the final plat and in all deeds and contracts for deeds.

§364.12. Purpose.

It is the purpose of these rules to promote the public health of the county residents, to ensure that adequate water and wastewater facilities are provided in subdivisions within the jurisdiction of this county, and to establish the minimum standards for water and wastewater facilities.

§364.13. Effective Date.

These rules become effective on the ___ day of _____, _____.

§364.14. Repealer.

Provisions of Order(s) Number ____, adopted on the _____ day of _____, ___, are hereby repealed, except as to such sections which are retained herein.

§364.15. Plat Required.

(a) The owner of a tract of land located outside the corporate limits of a municipality that divides the tract in any manner that creates two or more lots of five acres or less intended for residential purposes must have a plat of the subdivision prepared. Lots of five acres or less are presumed to be for residential purposes unless the land is restricted to nonresidential uses on the final plat and all deeds and contracts for deeds.

(b) No subdivided land shall be sold or conveyed until the subdivider:

(1) has received approval of a final plat of the tract; and

(2) has filed and recorded with the county clerk of the county in which the tract is located a legally approved plat.

(c) A division of a tract is defined as including a metes and bounds description, or any description of less than a whole parcel, in

a deed of conveyance or in a contract for a deed, using a contract of sale or other executory contract, lease/purchase agreement, or using any other method to convey property.

§364.16. Supersession.

These rules supersede any conflicting regulations of the county.

§364.17. Severability.

If any part or provision of these regulations, or application thereof, to any person or circumstance is adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of these regulations or the application thereof to other persons or circumstances. The commissioners court hereby declares that it would have enacted the remainder of these regulations without any such part, provision or application.

§364.18. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commissioners court (or court) - The commissioners court of County, Texas.

(2) County - _____ County, Texas.

(3) Drinking water - All water distributed by any agency or individual, public or private, for the purpose of human consumption, use in the preparation of foods or beverages, cleaning any utensil or article used in the course of preparation or consumption of food or beverages for human beings, human bathing, or clothes washing.

(4) Engineer - A person licensed and authorized to practice engineering in the State of Texas under the Texas Engineering Practice Act.

(5) Final plat - A map or drawing and any accompanying material of a proposed subdivision prepared in a manner suitable for recording in the county records and prepared as described in these regulations.

(6) Lot - An undivided tract or parcel of land.

(7) Non-public water system - Any water system supplying water for domestic purposes which is not a public water system.

(8) OSSF - On-site sewage facilities as that term is defined in rules and/or regulations adopted by TNRCC, including, but not limited to, 30 TAC Chapter 285.

(9) Platted - Recorded with the county in an official plat record.

(10) Public water system - A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. This term includes any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or more at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.

(11) Purchaser - Shall include purchasers under executory contracts for conveyance of real property.

(12) Retail public utility - Any entity meeting the definition of a retail public utility as defined in Water Code §13.002.

(13) Sanitarian - A person registered as a Professional Sanitarian by the Texas Department of Health under the authority of Texas Civil Statutes, Article 4477-3.

(14) Sewerage facilities - The devices and systems which transport domestic wastewater from residential property, treat the wastewater, and dispose of the treated water in accordance with the minimum state standards contained or referenced in these rules.

(15) Subdivider - Any owner of land or authorized agent thereof proposing to divide or dividing land so as to constitute a subdivision.

(16) Subdivision - Any tract of land divided into two or more parts that results in the creation of two or more lots of five acres or less intended for residential purposes. A subdivision includes re-subdivision (replat) of land which was previously divided.

(17) TAC - Texas Administrative Code, as compiled by the Texas Secretary of State.

(18) TNRCC - Texas Natural Resource Conservation Commission.

(19) Water facilities - Any devices and systems which are used in the supply, collection, development, protection, storage, transmission, treatment, and/or retail distribution of water for safe human use and consumption.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

TRD-9907855
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Division 2. MINIMUM STANDARDS

31 TAC §§364.31-364.37

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.31. Scope of Standards.

The establishment of a residential development with two or more lots of five acres or less where the water supply and sewer services

do not meet the minimum standards of this division is prohibited. A subdivision with lots of five acres or less is presumed to be a residential development unless the land is restricted to nonresidential use on the final plat and all deeds and contracts for deeds.

§364.32. Water Facilities Development.

(a) Public water systems.

(1) Subdividers who propose to supply drinking water by connecting to an existing public water system must provide a written agreement with the retail public utility in substantially the form attached in Appendix 1A. The agreement must provide that the retail public utility has or will have the ability to supply the total flow anticipated from the ultimate development and occupancy of the proposed subdivision for a minimum of 30 years. The agreement must reflect that the subdivider has paid the cost of water meters and other necessary connection equipment, membership fees, water rights acquisition costs, or other fees associated with connection to the public water system so that service is immediately available to each lot.
Figure: 31 TAC §364.32(a)(1)

(2) Where there is no existing retail public utility to construct and maintain the proposed water facilities, the subdivider shall establish a retail public utility and obtain a Certificate of Convenience and Necessity (CCN) from the TNRCC. The public water system, the water quality and system design, construction and operation shall meet the minimum criteria set forth in 30 TAC §§290.38- 290.51 and §§290.101-290.120. If groundwater is to be the source of the water supply, the subdivider shall have prepared and provide a copy of a groundwater availability study which shall include an analysis of the long term (30 years) quantity and quality of the available groundwater supplies relative to the ultimate needs of the subdivision. If surface water is the source of supply, the subdivider shall provide evidence that sufficient water rights have been obtained and dedicated, either through acquisition or wholesale water supply agreement, that will provide a sufficient supply to serve the needs of the subdivision for a term of not less than 30 years.

(b) Non-public water systems. Where individual wells or other non-public water systems are proposed for the supply of drinking water to residential establishments, a test well or wells located so as to be representative of the quantity and quality of water generally available from the supplying aquifer shall be drilled by the subdivider and the produced waters sampled and submitted to a private laboratory for a complete chemical and bacteriological analysis of the parameters on which there are drinking water standards. The subdivider shall have prepared and provide a copy of a groundwater availability study which shall include an analysis of the long term (30 years) quantity of the available groundwater supplies relative to the ultimate needs of the subdivision. The water quality of the water produced from the test well must meet the standards of water quality required for community water systems as set forth in 30 TAC §§290.103, 290.105, 290.106 and 290.110, either:

(1) without any treatment to the water; or

(2) with treatment by an identified and commercially available water treatment system.

(c) Transportation of potable water. The conveyance of potable water by transport truck or other mobile device to supply the domestic needs of the subdivision is not an acceptable method, except on an emergency basis. Absence of a water system meeting the standards of these rules due to the negligence of the subdivider does not constitute an emergency.

§364.33. Wastewater Disposal.

(a) Organized sewerage facilities.

(1) Subdividers who propose the development of an organized wastewater collection and treatment system must obtain a permit to dispose of wastes from the TNRCC in accordance with 30 TAC Chapter 305 and obtain approval of engineering planning materials for such systems under 30 TAC Chapter 317 from the TNRCC.

(2) Subdividers who propose to dispose of wastewater by connecting to an existing permitted facility must provide a written agreement in substantially the form attached in Appendix 1B with the retail public utility. The agreement must provide that the retail public utility has or will have the ability to treat the total flow anticipated from the ultimate development and occupancy of the proposed subdivision for a minimum of 30 years. The agreement must reflect that the subdivider has paid the cost of all fees associated with connection to the wastewater collection and treatment system have been paid so that service is immediately available to each lot. Engineering plans for the proposed wastewater collection lines must comply with 30 TAC Chapter 317.
Figure: 31 TAC §364.33(a)(2)

(b) On-site sewerage facilities.

(1) On-site facilities which serve single family or multi-family residential dwellings with anticipated wastewater generations of no greater than 5,000 gallons per day must be designed by a registered professional engineer or registered professional sanitarian, permitted by the authorized agent of the TNRCC, and in all respects comply with 30 TAC Chapter 285.

(2) Proposals for on-site sewerage facilities for the on-site disposal of sewage in the amount of 5,000 gallons per day or greater must comply with 30 TAC Chapter 317.

(3) The TNRCC or its authorized agent shall review proposals for on-site sewage disposal systems and make inspections of such systems as necessary to assure that the system is in compliance with the Texas Health and Safety Code, Chapter 366 and rules in 30 TAC Chapter 285, and in particular §§285.4, 285.5 and 285.30-285.39. In addition to the unsatisfactory on- site disposal systems listed in 30 TAC §285.3(b), pit privies and portable toilets are not acceptable waste disposal systems for lots platted under these rules.

§364.34. Greywater Systems for Reuse of Treated Wastewater.

(a) Organized or municipal sewerage systems. Any proposal for sewage collection, treatment and disposal which includes greywater reuse shall meet minimum criteria of 30 TAC Chapter 210 and Chapter 285, subchapter H promulgated and administered by the TNRCC.

(b) On-site sewerage facilities. Any proposal for on-site sewage disposal which includes provisions for greywater use shall meet the minimum criteria of 30 TAC Chapter 285 contained within the "Construction Standards for On-Site Sewerage Facilities" promulgated by the TNRCC.

§364.35. Sludge Disposal.

The disposal of sludge from water treatment and sewerage facilities shall meet the criteria of 30 TAC Chapter 312 and Chapter 317.

§364.36. Setbacks.

In areas that lack a nationally recognized fire code as listed in Local Government Code, §235.002(b)(2) and lack water lines sized for fire protection, setbacks from roads and right-of-ways shall be a minimum of ten feet, setbacks from adjacent property lines shall be a minimum of five feet, and shall not conflict with separation or setback distances

required by rules governing public utilities, on-site sewerage facilities, or drinking water supplies. Setback lines required elsewhere in the orders or rules of the county shall control to the extent greater setbacks are therein required.

§364.37. Number of Dwellings Per Lot.

No more than one single family detached dwelling shall be located on each lot. A notation of this restriction shall be placed on the face of the final plat. This restriction shall be placed in all deeds and contracts for deeds for real estate sold within the subdivision. Proposals which include multi-family residential shall include adequate, detailed planning materials as required for determination of proper water and wastewater utility type and design.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Division 3. PLAT APPROVAL

31 TAC §§364.51-364.57

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.51. Applications for Plat Approval.

(a) Owner representation. An application for approval of a plat shall be filed with the county by the record owner of the property to be subdivided or the duly authorized agent of the record owner.

(b) Standards. Every plat creating two or more lots of five acres or less for residential use shall comply with the standards of Division 2 and the requirements of Division 3 of this subchapter.

§364.52. Final Engineering Report.

The final plat shall be accompanied by an engineering report bearing the signed and dated seal of a professional engineer registered in the State of Texas. The engineering report shall discuss the availability and methodology of providing water facilities and wastewater treatment to individual lots within the subdivision. A detailed cost estimate per lot acceptable to the county shall be provided for those unconstructed water supply and distribution facilities and wastewater collection and treatment facilities which are necessary to serve each lot of the subdivision. The plan shall include a construction schedule for each significant element needed to provide adequate water or wastewater facilities. If financial guarantees are to be provided under §364.54 of this title, the schedule shall include the start dates and completion dates.

(1) Public water systems.

(A) Where water supplies are to be provided by an existing public water system, the subdivider shall furnish an executed contractual agreement in substantially the form attached in Appendix 1A between the subdivider and the retail public utility to the effect that the retail public utility has or will have the ability to supply the total flow anticipated from the ultimate development and occupancy of the proposed subdivision for a minimum of 30 years and that the subdivider has provided for the payment of costs or fees for the connection of each individual lot to the public water system, including water meters, water acquisition fees, or other necessary expenses required by the retail public utility. Before final plat approval, plans and specifications for the proposed water facilities shall have been approved by all entities having jurisdiction over the proposed project which may include in addition to the county the TNRCC and the county health department. If groundwater is to be the source of the water supply, the final engineering report shall include a groundwater availability study which shall include comments regarding the long term (30 years) quantity and quality of the available groundwater supplies relative to the ultimate needs of the subdivision.

(B) Where there is no existing retail public utility to construct and maintain the proposed water facilities, the subdivider shall establish a retail public utility and obtain a Certificate of Convenience and Necessity (CCN) from the TNRCC and include evidence of the CCN issuance with the plat. Before final plat approval, plans and specifications for the proposed water facilities shall have been approved by all entities having jurisdiction over the proposed project. If groundwater is to be the source of the water supply, the final engineering report shall include a groundwater availability study which shall include an analysis of the long term (30 years) quantity and quality of the available groundwater supplies relative to the ultimate needs of the subdivision. If surface water is the source of supply then the final engineering report shall include evidence that sufficient water rights have been obtained and dedicated, either through acquisition or wholesale water supply agreement, that will provide a sufficient supply to serve the needs of the subdivision for a term of not less than 30 years.

(2) Non-public water systems. Where individual wells are proposed for the supply of drinking water to residences, the final engineering report shall include the quantitative and qualitative results of sampling the test wells in accordance with §364.32 of this title. The results of such analyses shall be made available to the prospective property owners. If the water quality of the test well required pursuant to §364.32(b) of this title does not meet the water quality standards as set forth in that section without treatment by an identified and commercially available water treatment system, then the final report must state the type of treatment system that will treat the water produced from the well to the specified water quality standards, the location of at least one commercial establishment within the county at which the system is available for purchase, and the cost of such system, the cost of installation of the system, and the estimated monthly maintenance cost of the treatment system. The engineer shall issue a statement concerning the availability of groundwater supplies to serve the fully developed subdivision over the next 30 years. Such statement may be based on information available from the Texas Water Development Board's Office of Planning. The description of the required sanitary control easement shall be included.

(3) Organized sewerage facilities.

(A) Where wastewater treatment is to be provided by an existing retail public utility, the subdivider shall furnish evidence of a contractual agreement in substantially the form attached in Appendix 1B between the subdivider and must provide that the retail public utility has or will have the ability to treat the total flow anticipated from the ultimate development and that the subdivider has paid the cost of all fees associated with connection to the wastewater collection and treatment system have been paid so that service is immediately available to each lot. Before final plat approval, an

appropriate permit to dispose of wastes shall have been obtained from the TNRCC and plans and specifications for the proposed wastewater collection and treatment facilities shall have been approved by all entities having jurisdiction over the proposed project.

(B) Where there is no existing retail public utility to construct and maintain the proposed sewerage facilities, the subdivider shall establish a retail public utility and obtain a CCN from the TNRCC. Before final plat approval, a wastewater treatment permit authorizing the treatment of the wastewater for the ultimate build-out population of the subdivision shall have been obtained from the TNRCC and plans and specifications for the proposed sewerage facilities shall have been approved by all entities having jurisdiction over the proposed project.

(4) On-site sewerage facilities. Where private on-site sewerage facilities are proposed, the final engineering report shall include planning materials required by 30 TAC §285.4(c), including the site evaluation described by 30 TAC §285.30 and all other information required by the county's OSSF order.

§364.53. Additional Information.

The county may, at its option, require additional information necessary to determine the adequacy of proposed water and wastewater improvements as part of the plat approval process. Such information may include, but not be limited to:

(1) layout of proposed street and drainage work;

(2) legal description of the property;

(3) existing area features;

(4) topography;

(5) flood plains;

(6) description of existing easements;

(7) layout of other utilities;

(8) notation of deed restrictions;

(9) public use areas; or

(10) proposed area features.

§364.54. Financial Guarantees for Improvements.

(a) Applicability. If an adequate public or non-public water system or sewerage facility is not available from a retail public utility, or are not constructed by the subdivider, to serve lots intended for residential purposes of five acres or less at the time final plat approval is sought, then the commissioners court shall require the owner of the subdivided tract to execute an agreement with the county in substantially the form attached in Appendix 2A secured by a bond, irrevocable letter of credit, or other alternative financial guarantee such as a cash deposit which meet the requirements set forth below. Figure: 31 TAC §364.54(a)

(b) Bonds. A bond that is submitted in compliance with paragraph (a) of this section shall meet the following requirements.

(1) The bond or financial guarantee shall be payable to the county judge of the county, in his official capacity, or the judge's successor in office.

(2) The bond or financial guarantee shall be in an amount determined by the commissioners court to be adequate to ensure proper construction or installation of the public or non-public water facilities, and wastewater facilities to service the subdivision, including reasonable contingencies, but in no event shall the amount of the bond be less than the total amount needed to serve the subdivision as established by the engineer who certifies the plat.

(3) The bond shall be executed with sureties as may be approved by the commissioners court. The county shall establish criteria for acceptability of the surety companies issuing bonds that include but are not limited to:

(A) registration with the Secretary of State and be authorized to do business in Texas;

(B) authorization to issue bonds in the amount required by the commissioners court; and

(C) rating of at least B from Best's Key Rating Guide; or if the surety company does not have any such rating due to the length of time it has been a surety company, the surety company must demonstrate eligibility to participate in the surety bond guarantee program of the Small Business Administration and must be an approved surety company listed in the current United States Department of Treasury Circular 570. Such bonds shall meet the criteria contained in the rules and regulations promulgated by the United States Department of Treasury.

(4) The bond shall be conditioned upon construction or installation of water and wastewater facilities meeting the criteria established by Division 2 of this subchapter and upon construction of facilities within the time stated on the plat, or on the document attached to the plat for the subdivision, or within any extension of time granted by the commissioners court.

(c) Letter of credit. A letter of credit that is submitted in compliance with paragraph (a) of this section shall meet the following requirements.

(1) Any letter of credit submitted as a financial guarantee for combined amounts greater than $10,000 and less than $250,000 must be from financial institutions which meet the following qualifications.

(A) Bank qualifications:

(i) must be federally insured;

(ii) Sheshunoff rating must be ten or better and primary capital must be at least 6.0% of total assets; and

(iii) total assets must be at least $25 million.

(B) Savings and loan association qualifications:

(i) must be federally insured;

(ii) tangible capital must be at least 1.5% of total assets and total assets must be greater than $25 million or tangible capital must be at least 3.0% of total assets if total assets are less than $25 million; and

(iii) Sheshunoff rating must be 30 or better.

(C) Other financial institutions qualifications:

(i) the letter of credit must be 110% collateralized by an investment instrument that would meet the qualifications for a county investment; and

(ii) the investment instrument must be registered in the county's name and the county must receive safekeeping receipts for all collateral before the letter of credit is accepted.

(2) Any letter of credit submitted as a financial guarantee for combined amounts greater than $250,000 must be from financial institutions which meet the following qualifications.

(A) Bank qualifications:

(i) must be federally insured;

(ii) Sheshunoff rating must be thirty or better and primary capital must be at least 7.0% of total assets; and

(iii) total assets must be at least $75 million.

(B) Savings and loan association qualifications:

(i) must be federally insured;

(ii) tangible capital must be at least 3.0% of total assets and total assets must be greater than $75 million, or tangible capital must be at least 5.0% of total assets if total assets are less than $75 million; and

(iii) Sheshunoff rating must be 30 or better.

(C) Other financial institutions qualifications:

(i) the letter of credit must be 110% collateralized by an investment instrument that would meet the qualifications for a county investment; and

(ii) the investment instrument must be registered in the county's name and the county must receive safekeeping receipts for all collateral before the letter of credit is accepted.

(3) The letter of credit shall list as sole beneficiary the county judge of the county, in his official capacity, or the judge's successor in office, and must be approved by the county judge of the county. The form of the letter of credit shall be modeled after the form attached in Appendix 2B.
Figure: 31 TAC §364.54(c)(3)

(4) The letter of credit shall be conditioned upon installation or construction of water and wastewater facilities meeting the criteria established under Division 2 of this subchapter and upon construction of facilities within the time stated on the plat, or on the document attached to the plat for the subdivision, or within any extension of time granted by the commissioners court.

(d) Financial guarantee. The county will determine the amount of the bond, letter of credit, or cash deposit required to ensure proper construction of adequate water and wastewater facilities in the subdivision.

(e) Alternative to county accepting a financial guarantee. The county may approve a final plat under this section without receiving a financial guarantee in the name of the county if:

(1) the property being subdivided lies wholly within the jurisdiction of the county;

(2) the property being subdivided lies wholly within the extra-territorial jurisdiction of a municipality; and

(3) the municipality has executed an interlocal agreement with the county that imposes the obligation on the municipality to:

(A) accept the bonds, letters of credit, or other financial guarantees, that meet the requirements of this section;

(B) execute the construction agreement with the subdivider; and

(C) assume the obligations to enforce the terms of the financial guarantee under the conditions set forth therein and complete construction of the facilities identified in the construction agreement.

§364.55. Review and Approval of Final Plats.

(a) Scope of review. The county will review the final plat to determine whether it meets the standards of Division 2 and the requirements of Division 3 of this subchapter.

(b) Disapproval authority. The commissioners court shall refuse to approve a plat if it does not meet the requirements prescribed by or under these rules.

(c) Prerequisites to approval. Final plat approval shall not be granted unless the subdivider has accomplished the following:

(1) dedicated the sites for the adequate water and sewerage facilities identified in the final plat to the appropriate retail public utility responsible for operation and maintenance of the facilities; and

(2) provided evidence that the water facilities and sewerage facilities have been constructed and installed in accordance with the criteria established within these rules and the approvals from TNRCC of the plans and specifications for such construction, including any change orders filed with these agencies; or

(3) obtained all necessary permits for the proposed water facilities and sewerage facilities (other than for OSSF permits on individual lots within the proposed subdivision) and has entered into a financial agreement with the county secured by a bond or other alternative financial guarantee such as a cash deposit or letter of credit for the provision of water and sewerage facilities with the bond or financial guarantee meeting the criteria established in Division 3 of this subchapter.

§364.56. Time Extensions for Providing Facilities.

(a) Reasonableness. The commissioners court may extend, beyond the date specified on the plat or on the document attached to the plat, the date by which the required water and sewer service facilities must be fully operable if:

(1) any financial guarantees provided with the final plat as originally submitted are effective for the time of the requested extension or new financial guarantees that comply with §364.54 are submitted which will be effective for the period of the extension; and

(2) the court finds the extension is reasonable and not contrary to the public interest.

(b) Timeliness. If the facilities are fully operable before the expiration of the extension period, the facilities are considered to have been made fully operable in a timely manner.

(c) Unreasonableness. An extension is not reasonable if it would allow a residence in the subdivision to be inhabited without water or sewer services that meet the standards of Division 2 of this subchapter.

§364.57. Criteria for Subdivisions that Occurred Prior to September 1, 1989.

(a) Authority and scope. This section shall apply only to tracts of land that were divided into two or more parts to lay out a subdivision before September 1, 1989, and have not been platted or recorded.

(b) Purpose. It is the purpose of this section to promote the public health of the county residents, to ensure that adequate water and sewerage facilities are provided in subdivisions within the jurisdiction of this county, and to establish the minimum standards for pre-1989 subdivisions for which no plat has been filed or recorded in the records of the county.

(c) Required plat. In the event that the owner of tract of land located outside the limits of a municipality who subdivided the tract

into two or more parts to lay out a subdivision of the tract prior to September 1, 1989, including an addition, or to lay out suburban lots or building lots, and to lay out streets, alleys, squares, parks or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks, or other parts, was legally obligated to, but has failed to have a plat of the subdivision prepared, approved by the commissioners court, and filed, the owner of a residential lot which was created by the subdivision may have a plat of the individual lot prepared and approved by the commissioners court as provided in this section in lieu of the filing of a plat of the subdivision.

(d) Special criteria. The commissioners court may approve the plat of a residential lot which does not comply with the provisions of §§364.15(b) of this title (sale restrictions), 364.36 of this title (Setbacks), 364.37 of this title (Number of Dwellings per Lot), 364.52 of this title (Final Engineering Report), and 364.54 of this title (Financial Guarantees for Improvements) as applied to an individual subdivided lot if such approval is in harmony with the general purpose and intent of these rules so that the public health, safety, and welfare may be secured and substantial justice done.

(1) Owners of individual lots in a single unplatted subdivision may file a joint request for approval of their respective individual residential lots.

(2) An application for approval of the plat of an individual lot shall be made in writing. The application shall state specifically the chapter, section, or subsection with which the plat does not comply and from which a waiver is being requested. The application shall contain available information and documentation which supports the requested approval. The applicant shall also provide such additional documentation as the commissioners court may request to support the application, including:

(A) a copy of a dated plat, sales contract, utility records, or other acceptable documentation that the subdivision occurred prior to September 1, 1989;

(B) the name and address of the original subdivider or the subdivider's authorized agent, if known;

(C) a survey and plat of the lot for which approval is requested, showing existing residences, roads, and utilities; and

(D) a deed, an affidavit of ownership or other evidence of ownership of the lot for which approval is requested.

(3) Approval of plats of individual lots shall be granted subject to the limitations of state law, and based on written findings by the commissioners court that:

(A) the lot for which approval is requested is within a tract that was subdivided prior to September 1, 1989, and is not owned by the original subdivider;

(B) a plat was required for the subdivision, but has not been filed with the county by the subdivider legally obligated to file it;

(C) an existing, currently occupied residential dwelling is located on the lot;

(D) existing water and sewer services which comply with the minimum standards set forth herein are available to the lot; and

(E) the request is reasonable, compliance with specified sections of these rules is impractical, and a waiver is not contrary to the public health and safety.

(e) Final determination. The commissioners court shall make the final decision on an application for a waiver, following review and recommendation by the county planning commission or department, if any. The applicant may withdraw a request for a waiver at any point in the process. If the requested waiver application is approved by the commissioners court, the county shall issue a certificate stating that a plat of the residential lot has been reviewed and approved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

TRD-9907857
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Division 4. ENFORCEMENT

31 TAC §364.71, §364.72

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.71. Oversight.
The owner, by submitting a plat, acknowledges the authority of the county and state agencies to lawfully enter and inspect property for purposes of execution of their statutory duties. Such inspection will not release the owner from any obligation to comply with the requirements of these rules.

§364.72. General Enforcement Authority of County.
The provisions of this chapter are enforceable pursuant to the specific provisions hereof related to enforcement and state law including Water Code, Chapter 7 and §§16.352, 16.353, 16.3535, 16.354, and 16.3545, and Local Government Code, §232.037 and §232.080.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
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Texas Water Development Board
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Subchapter C. MODEL RULES (MUNICIPALITY)

Division 1. MUNICIPALITIES WITH NO OTHER SUBDIVISION ORDINANCES

31 TAC §364.80, §364.81

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.80. Rules to be Adopted.

Municipalities that have not adopted nor have in effect other comprehensive subdivision ordinances shall adopt the necessary ordinances to implement the requirements of the model rules set out in Subchapter B of this chapter with appropriate modifications to assure their applicability to developments within the municipality.

§364.81. Modifications.

Municipalities adopting these model rules shall modify the provisions of subchapter B of this chapter to change all references to "County" or county authority to be consistent with the identity and authority of the adopting entity. In particular, the following provisions shall be modified as indicated:

(1) section 364.11 (Authority) shall reflect the municipality authority contained in the Local Government Code, Chapter 212;

(2) section 364.15 (Plat Required) shall reflect application of the rules to the subdivision of a tract of land located within the corporate boundaries and the extraterritorial jurisdiction of the municipality;

(3) section 364.18 (Definitions) shall identify the municipality and its governing body; and

(4) section 364.72 (Enforcement Authority) shall reflect the enforcement authority of the municipality contained in the Local Government Code, §212.0175 and §212.018.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
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Texas Water Development Board
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Division 2. MUNICIPALITIES WITH EXISTING SUBDIVISION ORDINANCES

31 TAC §364.90, §364.91

The new sections are proposed under the authority of the Texas Water Code, §6.101 and §16.343.

The statutory provisions affected by the proposed new sections are Texas Water Code, Chapter 15 and Chapter 17.

§364.90. Rules to be Adopted.

Municipalities that have adopted and have in effect other subdivision ordinances shall adopt and incorporate those requirements of the model rules set out in subchapter B of this chapter which are necessary to make the existing ordinances consistent with the goal and intent of the model rules to provide minimum standards that assure adequate water supply and wastewater services to subdivisions within the municipality.

§364.91. Minimum Requirements.

Subdivision ordinances adopted by a municipality must be reviewed and modified as necessary to incorporate the minimum standards contained in the model rules set out in subchapter B of this chapter, including the following:

(1) application of the ordinances to the subdivision of a tract of land within the corporate limits of the municipality into two or more lots of five acres or less intended for residential purposes;

(2) preparation of a subdivision plat to be approved by the municipality and filed for record with the county clerk after approval;

(3) water supply standards consistent with the standards developed by the commission and set out in 30 TAC Chapter 290.

(4) prohibition of individual water wells or non-public water systems that do not meet the water quality standards developed by TNRCC and set out in 30 TAC Chapter 290;

(5) wastewater collection and disposal system standards consistent with the standards developed by TNRCC and set out in 30 TAC Chapters 305 and 317 and in Health and Safety Code, Chapter 366;

(6) prohibition of pit privies, portable toilets, and on-site sewerage facilities that do not meet the wastewater treatment standards developed by TNRCC and set out in 30 TAC Chapter 285;

(7) setback limitations consistent with local fire code requirements;

(8) prohibition of more than one single family detached dwelling per subdivision lot;

(9) preparation of an engineer's report consistent with §364.52 of this title; and

(10) requirements for posting of a financial guarantee to assure completion of water supply and sewer service facilities required by the approved plat and consistent with this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Chapter 365. INVESTMENT RULES

The Texas Water Development Board (the board) proposes amendments to 31 TAC §§365.2, 365.8, and 365.18 (Chapter 365) regarding Investment Rules. The amendments are proposed for clarification and compliance with the Public Funds Investment Act (PFIA), Government Code, Chapter 2256.

Section 365.2.(7) is proposed for amendment to specify the definition of a Historically Underutilized Business (HUB) as a business that is certified as a HUB by the Texas General Services

Commission pursuant to the Government Code, Chapter 2161. Section 365.2.(8) is proposed for amendment to reflect the appropriate title for the Director of Internal Audit. Sections 365.8 and 365.18 are proposed for amendment to reflect changes to the frequency of audit requirements in accordance with recent amendments to the Government Code, Chapter 2256, §2256.005.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five year period the sections are in effect there will not be fiscal implications for state and local government as a result of enforcing or administering the sections.

Ms. Todd also has determined that for each year of the first five years that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the Board's compliance with the PFIA and clarity for both investment staff and other stakeholders. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

Comments on the proposed sections will be accepted for 30 days following publication and may be submitted to Randy Galbreath, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, (512) 463-8479.

Subchapter A. GENERAL PROVISIONS

31 TAC §365.2, §365.8

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257 which requires each State agency to adopt rules regarding the investment of its funds.

There are no statutory provisions affected by the proposed amendments.

§365.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(6) (No change.)

(7) HUB–Historically Underutilized Business (HUB) that is currently certified by the Texas General Services Commission as a HUB. [~~which is a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons who have been historically underutilized because of their identification as women or as member of certain minority groups, including Black Americans, Hispanic Americans, Asian Pacific Americans, and Native Americans who have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control.~~]

(8) Internal auditor–The Director of Internal Audit [~~internal auditor~~] employed by the Texas Water Development Board.

(9)-(14) (No change.)

§365.8. Delegation of Authority.

Pursuant to the authority of the Texas Water Code, the Texas Government Code, and bond resolutions, the management responsibility for investing the portfolio is delegated to the investment officer who shall be responsible for all transactions undertaken and shall have a system of written controls established consistent with this chapter. The internal auditor's biennial [~~annual~~] review of investment controls conducted pursuant to §365.18 of this title (relating to Internal Control) shall be presented to the Finance Committee. All investment transactions shall be conducted pursuant to this chapter and such written controls. The investment officer shall be responsible for all investment transactions and shall direct the activities of subordinate investment staff.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 17, 1999.

TRD-9907823
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Subchapter B. SELECTION OF AUTHORIZED DEALERS

31 TAC §365.18

The amendment is proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and the Texas Government Code, Chapters 2256 and 2257 which requires each State agency to adopt rules regarding the investment of its funds.

There are no statutory provisions affected by the proposed amendment.

§365.18. Internal Control.

The internal auditor [~~annually~~] will review at least every two years the investment functions and the internal investment controls. The review will be based upon policies and procedures which are put in place by the investment officer. In addition, all investment functions will be open for review by the State Auditor. The board shall review the investment policy and strategies listed in this chapter at least annually.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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Chapter 370. COLONIA PLUMBING LOAN PROGRAM

Subchapter C. APPLICATIONS TO THE BOARD

31 TAC §370.41

The Texas Water Development Board (board) proposes an amendment to 31 TAC §370.41, concerning the Colonia Plumbing Loan Program.

The amendment to §370.41(b)(1) deletes language related to the board's adoption of the model subdivision rules by reference. This language is no longer necessary because the board has been directed to adopt model subdivision rules by the passage of Senate Bill 1421 and the amendments of Texas Water Code §16.343 by the recent 76th Legislature, 1999. The model subdivision rules are being concurrently proposed and will be found in 31 TAC Chapter 364.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five- year period the amendment is in effect there will be no fiscal implications on state and local government as a result of enforcement and administration of the rule.

Ms. Todd has also determined that for the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be an updated rule that is consistent with relevant statutes. Ms. Todd has determined there will be no economic costs to small businesses or individuals required to comply with the amendment as proposed.

Comments on the proposed amendment will be accepted for 30 days following publication and may be submitted to Jonathan Steinberg, Assistant General Counsel, Border Project Management Division, Legal Services, (512) 475-2051, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, or by fax at (512) 463-5580.

The amendment is proposed under the authority of the Texas Water Code, §6.101 which requires the board to adopt rules to carry out the powers and duties of the board under the Texas Water Code and other laws of the state.

The statutory provisions affected by the proposed amendment is Texas Water Code, Chapter 15, subchapter L and §16.343.

§370.41. Required Information.

The following information is required on all applications to the board for plumbing improvement loans:

(1)-(9) (No change.)

(10) evidence that the applicant political subdivision is in a county that has adopted the model subdivision rules [~~adopted by reference in §355.74(2) of this title (relating to Criteria for Eligibility)~~], and if such applicant is a municipality, that the municipality has also adopted the model subdivision rules;

(11)-(18) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 17, 1999.

TRD-9907830
Suzanne Schwartz
General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Chapter 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 375, Clean Water State Revolving Fund (CWSRF). The board proposes to amend: §§375.2, 375.12, 375.16, 375.36, 375.39, 375.52, 375.71, 375.72, 375.82, 375.85, 375.221, and 375.222.

Section 375.2 relating to Definitions of Terms, is proposed for amendments. The term "Alternative technology" is amended to broaden the meaning to include any wastewater management technique. The term "Closing" clarifies for the borrower that closing is the event at which funds are released by the board. "Commitment" is revised to specify that a commitment is not just a legal obligation of the board but is an action by the board, evidenced by a resolution. The term "Delivery" is deleted because it duplicates the process described in "Closing" and "Release". A definition for the term "Pre-design commitment" is added to explain that an applicant which desires to use the pre-design funding option must first receive a pre-design commitment from the board. A definition for "Rural hardship community" has been added to set out the criteria which must be met by a community in order to be eligible for the hardship grants program. The Definition of Terms section is also renumbered to account for deletions and additions to the section.

Section 375.12, relating to Types of Assistance, is proposed for amendment to add a heading to subsection (a) which became necessary when subsection (b) was added. The more restrictive term "bonds" was replaced with a broader term, "debt obligations" to cover a wider range of customer debt. Subsection (b) is added to inform applicants of new insurance requirements for refinancing of debt.

Section 375.16, relating to Rating Process, is proposed for amendments to broaden "wastewater treatment" to "wastewater management" and to provide consistency with the existing rules by replacing the numbers in the section with words. The section further provides new incentives to projects that implement existing plans for regional facilities, consolidation, or commission recommendations by awarding three priority rating points. The section is also amended to provide incentives for projects which utilize innovative or alternative waste management techniques. Additionally, the section is proposed for amendment to state board policy regarding the rating and ranking of completed projects for which refinancing is sought. Finally, the section is renumbered to include new subsections.

Section 375.36, relating to Engineering Feasibility Data, is proposed for amendment to emphasize the board requirement that the data must include a description of alternative management techniques that were considered.

Section 375.39, relating to Pre-design Funding Option, is proposed for amendment to clarify that the pre-design funding

option refers to a method of receiving a loan commitment, as well as a method of closing a loan and releasing funds.

Section 375.52, relating to Lending Rates, is proposed for amendment to allow flexibility in the setting of variable interest rates to specify a formula rather than basis points so that there is no need for frequent rule changes to accommodate changing market conditions.

Section 375.71, relating to Loan Closing, is proposed for amendment to clarify that applicants must secure authorizations only from those agencies that have been identified. The section further omits a phrase that is confusing and unnecessary as no building funds could be released before the loan closing.

Section 375.72, relating to Release of Funds, is renumbered and proposed for amendment to include in two different paragraphs the existing but previously unstated criteria that all requirements of identified agencies having jurisdiction have been met. The section also reduces the number of copies of construction contracts that must be submitted since one copy has been determined to be sufficient.

Section 375.82, relating to Inspection During Construction, is proposed for amendment as a means of ensuring quality during construction by requiring qualified inspection, but clarifying that a registered professional engineer may merely supervise the inspection instead of conducting it.

Section 375.85, relating to Building Phase Submittals, is proposed for amendment to enable the as-built plans for a project to be provided directly to the owner of the plans, the applicant, rather than be submitted through the board.

Section 375.221, relating to Pre-design Funding Option, is proposed for amendment to clarify that the pre-design funding option refers to a method of receiving a loan commitment, as well as a method of closing a loan and releasing funds.

Section 375.222, relating to Lending Rates, is proposed for amendment to continue the board's policy regarding setting variable lending rates without the need for frequent rule changes to accommodate changing market conditions.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five- year period these sections changes are in effect there will be no fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Todd has also determined that for the first five years the changes as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be more consistent and efficient administration of the board's financial assistance programs as a result of the clarifications and changes incorporated in the proposed amendments. Ms. Todd has determined there will be no economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Gail Allan, Director of Legal Administration, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Subchapter A. GENERAL PROVISIONS

Division 1. INTRODUCTORY PROVISIONS

31 TAC §375.2

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15 and not defined here shall have the meanings provided by the chapter or subchapter as appropriate.

(1) Act - The Federal Water Pollution Control Act, as amended, 33 USC 1251 et. seq.

(2) Administrative cost recovery fund - An operating fund to finance the administration of the CWSRF program, to be held outside the state treasury and separate from the CWSRF program account.

(3) Administrative costs - All reasonable and necessary costs of administering any aspect of the CWSRF program, including the cost of servicing debt obligations of recipients of CWSRF financial assistance.

(4) Alternative technology - Proven wastewater management [~~treatment processes and~~] techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constituents [~~or otherwise eliminate the discharge of pollutants,~~] or recover energy. Specifically, alternative technology includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse [~~(nonpotable)~~]; horticulture; revegetation of disturbed land; containment ponds; sludge composting and drying prior to land application; self-sustaining incineration; methane recovery; individual and onsite systems; and small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated wastewater.

(5) Applicant - A political subdivision or subdivisions which file an application with the board for financial assistance or associated actions.

(6) Application for assistance - All the information required for submittal in the following sections: §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), §375.34 of this title (relating to Required Fiscal Information), §375.35 of this title (relating to Required Environmental Review and Determination), and §375.36 of this title (relating to Engineering Feasibility Data).

(7) Authorized representative - The signatory agent of the applicant authorized and directed by the applicant's governing body to make application for assistance and to sign documents required to undertake and complete the project, on behalf of the applicant.

(8) Board - The Texas Water Development Board.

(9) Bonds - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(10) Building - The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

(11) Capitalization grant - Federal grant assistance awarded to the state for capitalization of the Clean Water State Revolving Fund.

(12) Change order - The documents issued by the loan recipient, authorizing a change, alteration, or variance in previously approved engineering contract documents, including, but not limited to, additions or deletions of work to be performed pursuant to the contract or a change in costs for work performed pursuant to the contract.

(13) Closing - The time at which the requirements for loan closing have been completed under §375.71 of this title (relating to Loan Closing) and an exchange of debt for release of funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(14) Collector sewer - The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewater directly from facilities which convey wastewater from individual systems, or from private property.

(15) Commission - The Texas Natural Resource Conservation Commission.

(16) Commitment - An action of the board evidenced by a resolution, approving a request for financial assistance pursuant to this chapter. [~~A legal obligation approved by the board, specifying the terms and conditions under which assistance may be provided.~~]

(17) Construction - Any one or more of the following:

(A) preliminary planning to determine the feasibility of treatment works;

(B) engineering, architectural, environmental, legal, title, fiscal, or economic studies;

(C) the expense of any condemnation or other legal proceeding;

(D) surveys, designs, plans, working drawings, specifications, procedures; and

(E) erection, building, acquisition, alteration, remodeling, improvement or extension of treatment works or the inspection or supervision of any of the foregoing items.

(18) Construction fund - A dedicated source of funds, created and maintained by the applicant at an official depository, or a designated depository approved by the executive administrator, used solely for the purposes of construction of a project as approved by the board.

(19) Contract documents - The engineering description of the project including engineering drawings, maps, technical specifications, design reports, instructions and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(20) Cost-effectiveness determination - A determination based on engineering, environmental, and financial analyses that a proposed project or component part will result in the minimum total monetary costs over time, but without overriding adverse social, economic, and environmental considerations and legal requirements.

(21) CWSRF - The state water pollution control revolving fund created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the Clean Water State Revolving Fund.

(22) CWSRF program account - The program account is an account in the CWSRF created pursuant to a resolution of the board in issuing CWSRF bonds and is used, pursuant to such bond resolution(s), for the purpose of providing financial assistance to political subdivisions for construction of treatment works and, if needed, to pay rebate amounts to the federal government.

(23) Debt - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

[~~(24) Delivery - The time at which payment is made by the board to the loan recipient against the purchase price of the loan recipient's debt, and the board takes possession of the debt instruments evidencing the loan recipient's debt. Delivery may occur simultaneously with a release of funds, or without release of funds pursuant to an escrow agreement.~~]

(24) [~~(25)~~] Designated management agency, waste treatment management agency - A political subdivision of the state which is designated by the governor and approved by EPA to receive federal assistance pursuant to the Act, §208 and §303(e).

(25) [~~(26)~~] Effluent limitation - Any restriction established by the state or the EPA administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discarded from a point source into waters of the state.

(26) [~~(27)~~] Eligible applicant - A waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law which has authority to dispose of sewage, industrial wastes, or other waste; or an authorized Indian tribal organization; or any political subdivision applying for financial assistance to build a nonpoint source pollution control project pursuant to the Act, §319; or any political subdivision applying for financial assistance for an estuary management project pursuant to the Act, §320.

(27) [~~(28)~~] Enforceable requirements of the Act - Those conditions and limitations of permits issued pursuant to the Act, §402 and §404, which, if violated, could result in issuance of a compliance order or initiation of a civil or criminal action under the Act, §309. Where a permit has not been issued, but issuance is anticipated, the term means any requirement which will be in the permit when issued. Where no permit is applicable, the term means any requirement which is necessary to meet applicable criteria for best practicable waste treatment technology.

(28) [~~(29)~~] Engineering feasibility data - Those necessary plans and studies which directly relate to treatment works needed to comply with enforceable requirements of the Act and state statutes, and which consist of a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic, and institutional characteristics of the area and will demonstrate the selected alternative is cost-effective.

(29) [~~(30)~~] Environmental assessment - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to make an environmental determination.

(30) [~~(31)~~] Environmental determination - A finding by the executive administrator regarding the potential environmental impacts of a proposed project and describing what mitigative measures, if any, the applicant will be required to implement as a condition of financial assistance.

(31) [~~(32)~~] Environmental information document - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to prepare an environmental

assessment to allow an environmental determination to be made by the executive administrator.

(32) [~~(33)~~] Environmental review - The process whereby an evaluation is undertaken by the board, consistent with the National Environmental Policy Act and other federal, state, and local laws and requirements, to determine whether a proposed project may have significant impacts on the environment and therefore require the preparation of an environmental impact statement, as detailed in §375.35 of this title (relating to Required Environmental Review and Determination).

(33) [~~(34)~~] EPA - The United States Environmental Protection Agency.

(34) [~~(35)~~] Escrow - The transfer of funds to a custodian of the funds which will act as the escrow agent or trust agent.

(35) [~~(36)~~] Escrow agent - The third party appointed to hold the funds which are not eligible for release to the loan recipient.

(36) [~~(37)~~] Escrow agent bank - The financial institution which has been appointed to hold the funds which are not eligible for release to the loan recipient.

(37) [~~(38)~~] Estuary management plan - A plan for the conservation and management of an estuary of national significance as described in the Act, §320.

(38) [~~(39)~~] Estuary management project - A project pursuant to an estuary management plan.

(39) [~~(40)~~] Executive administrator - The executive administrator of the board or a designated representative.

(40) [~~(41)~~] Financial assistance - Loans by the board from the CWSRF, which may be made in conjunction with grants from the Hardship Grants Program for Rural Communities.

(41) [~~(42)~~] Fund - The state water pollution control revolving fund, created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the CWSRF.

(42) [~~(43)~~] Funding year - The particular federal fiscal year (October 1 - September 30) for which funds are made available to the CWSRF.

(43) [~~(44)~~] Hardship Grants Program for Rural Communities - The program established by the federal Omnibus Consolidated Recessions and Appropriations Act of 1996 (Public Law 104-403).

(44) [~~(45)~~] Infiltration - Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

(45) [~~(46)~~] Inflow - Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

(46) [~~(47)~~] Innovative technology - Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(47) [~~(48)~~] Intended use plan - A plan identifying the intended uses of the amount of funds available for loans in the CWSRF for each fiscal year as described in the Act, §606(c).

(48) [~~(49)~~] Interceptor sewer - A sewer which is designed for one or more of the following purposes:

(A) to intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor;

(B) to replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant;

(C) to transport wastewater from one or more municipal collector sewers to another municipality or to a regional facility for treatment; and

(D) to intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

(49) [~~(50~~] Lending rate - Interest rate assessed to loan applicants for loans through the CWSRF.

(50) [~~(51)~~] Market interest rate - The average interest rate given in current market dealings for this section of the country/state as determined by the board.

(51) [~~(52)~~] Nonpoint source pollution plan - A plan for managing nonpoint source pollution as described in the Act, §319.

(52) [~~(53)~~] Nonpoint source pollution project - A project pursuant to a nonpoint source pollution plan.

(53) [~~(54)~~] Permit or waste discharge permit - The authority granted by the commission to establish the conditions under which waste may be discharged into or adjacent to waters in the state.

(54) [~~(55~~] Planning area - The existing and proposed wastewater service area consistent with the appropriate water quality management plan.

(55) [~~(56)~~] Point source - Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(56) [~~(57)~~] Population - For purposes of §375.15 of this title (relating to Criteria and Methods for Distribution of Funds) and §375.16 of this title (relating to Rating Process), population will be based upon data that is acceptable to the executive administrator and is determined as follows:

(A) where the applicant is an incorporated city or town, the best available estimate of the current number of people which reside within the territorial boundaries of the applicant, or where greater, the number of people which receive wholesale or retail wastewater service from the applicant; or

(B) where the applicant is not an incorporated city or town, the best available estimate of the current number of people in the wastewater treatment service area to which the proposed project provides service.

(57) Pre-design commitment - A commitment by the board prior to completion of planning or design pursuant to §375.39 of this title (relating to Pre-Design Funding Option).

(58) Principal project - A project or group of projects included in a proposal which are intended to address a specific system condition within a single wastewater treatment service area that can be rated according to §375.16 of this title (relating to Rating Process), the cost of correction of which represents greater than 50% of the cost of all projects included in the proposal.

(59) Priority list - A list of projects for which CWSRF assistance may be requested.

(60) Project - The scope of work describing a construction endeavor normally within a single wastewater treatment or collection service area which can be separately rated in accordance with §375.16 of this title (relating to Rating Process).

(61) Project completion - The date that operations of the treatment works are initiated or are capable of being initiated, as determined by the executive administrator.

(62) Project engineer - The engineer or engineering firm retained by the applicant to provide professional engineering services during the planning, design, and/or construction of a project.

(63) Regional facility - Wastewater collection and treatment, which incorporates multiple service areas into an area wide service facility, thereby reducing the number of required facilities, or any system which serves an area that is other than a single county, city, special district, or other political subdivision of the state, the specified size of which is determined by any one or combination of population, number of governmental entities served, and/or service capacity. Regional wastewater treatment facilities may also include those identified in the approved state water quality management plan and the annual updates to that plan.

(64) Release - The time at which funds are made available to the loan recipient.

(65) Rural hardship community - A community consisting of not more than 3,000 residents that is not a remote area within the corporate boundaries of a larger city and that:

(A) is lacking centralized wastewater treatment or collection systems or is in need of improvements to onsite wastewater treatment systems;

(B) has an average annual per capita income equal to or less than 80% of the national annual per capita income as determined by the latest decennial census; and

(C) has an unemployment rate that exceeds by at least one percentage point the most recently reported average yearly national unemployment rate.

(66) [~~(65)~~] State of Texas 303(d) List - The list prepared biennially by the commission as required by the Act, §303(d).

(67) [~~(66)~~] Treatment works - Any devices and systems which are used in the storage, treatment, recycling, and reclamation of waste or which are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste.

(68) [~~(67)~~] Trust agent - The party appointed by the applicant and approved by the executive administrator of the board to hold the funds which are not eligible for release to the loan recipient.

(69) [~~(68)~~] Unserved areas - For purposes of the rating process, refers to populated areas of an existing developed community that are not served by a centralized collection system.

(70) [~~(69)~~] Water conservation plan - A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area, as further defined in §375.37 of this title (relating to Required Water Conservation Plan).

(71) [~~(70)~~] Water conservation program - A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

(72) [~~(71)~~] Water quality management plan - A plan prepared and updated annually by the state and approved by the Environmental Protection Agency which determines the nature, extent, and causes of water quality problems in various areas of the state and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907903
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Division 2. PROGRAM REQUIREMENTS

31 TAC §375.12, §375.16

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.12. Types of Assistance.

(a) Use of fund. The fund may be used for the following purposes: [~~The fund may be used for the following purposes:~~]

(1) to make loans on the condition that:

(A) such loans are made at or below market interest rates, including interest free loans at terms not to exceed 20 years;

(B) annual principal and interest payments will commence not later than one year after completion on any project and all loans will be fully amortized not later than 20 years after project completion; and

(C) the recipient of a loan will establish a dedicated source of revenue for repayment of loans;

(2) to buy or refinance the bonds of eligible applicants within the state at or below market rates, when such debt obligations [~~bonds~~] were incurred after March 7, 1985;

(3) for the reasonable costs of administering the fund and conducting activities under the Act, Title VI;

(4) as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state if the proceeds of sale of such bonds will be deposited in the fund;

(5) to earn interest on fund accounts; and

(6) to guarantee or purchase insurance for local debt obligations.

(b) Refinancing of debt. Applications for which refinancing is sought must include provisions for purchase of insurance for the local debt obligation.

§375.16. Rating Process.

(a) Policy. The rating process is designed to achieve optimum water quality management, consistent with public health and water quality goals, and to give consideration to the varying populations of the state's political subdivisions.

(b) Rating of principal projects. Proposals for inclusion of projects in an intended use plan will be rated based upon the principal project. Additional projects may be included in a proposal and may receive funding, so long as their costs represent 50% or less of the total project costs. The factors used to rate applications and the number of points assigned to each factor shall be as follows.

(1) Where the principal project is a wastewater treatment plant or collection system in which the facility's hydraulic capacity requires expansion or removal of extraneous flow, the project will receive priority points according to the following considerations. A project may receive points for only one of the considerations listed in this section at subparagraphs A-E of this paragraph, whichever results in the largest score.

(A) Where the wastewater treatment plant is at 90% or greater of its permitted capacity on an annual average flow basis as reported to the commission, or for plants which are permitted for less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive 3 [~~three~~] points, provided that the project directly or indirectly improves the capacity problem at the facility.

(B) Where the wastewater treatment plant is at 75% or greater but less than 90% of its permitted capacity on an annual average flow basis as reported to the commission, or for plants which are permitted for less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive 2 [~~two~~] points, provided that the project directly or indirectly improves the capacity problem at the facility.

(C) Where the wastewater treatment plant is at 65% or greater but less than 75% of its permitted capacity on an annual average flow basis as reported to the commission, or for plants less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive 1.5 points provided that the project directly or indirectly improves the capacity problem at the facility.

(D) Projects intended to remedy collection system overflows under a schedule imposed by a court order, EPA administrative order, or commission enforcement order will receive 3 [~~three~~] points.

(E) Projects to expand an existing treatment facility, permitted for no discharge, where no self-reporting flow data is required to be reported to the commission will receive 1.5 points.

(2) Where the principal project is under a schedule imposed by a court order, EPA administrative order, or commission enforcement order, the project will receive 1 [~~one~~] point.

(3) Where the principal project is required by permit to meet a higher level of treatment at a future date or where the principal project is a conversion to a no-discharge or partial reuse facility in order to avoid a higher level of treatment, the project will receive 1.5 points.

(4) Where the principal project will provide service to an unserved area, the project will receive 1.1 points. In addition, where the applicant provides a finding from a public health official that a nuisance dangerous to the public health and safety exists resulting from water supply and sanitation problems in the area to be served by the proposed project, the project will receive an additional 3 [~~three~~] points.

(5) Where the principal project is to construct innovative or alternative wastewater management[~~treatment or collection~~] systems, the project will receive 3 points [~~one point~~].

(6) Where the principal project impacts stream segments designated as "high priority" or where a total maximum daily load (TMDL) analysis is underway or completed as identified in the current approved State of Texas 303(d) List and where the principal project will directly or indirectly mitigate the identified problem, the project will receive 4 points.

(7) Where the principal project impacts stream segments designated as "medium priority," as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive 3 [~~three~~] points.

(8) Where the principal project impacts stream segments designated as "low priority," as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive 2 [~~two~~] points.

(9) Where the principal project impacts stream segments designated as "threatened" as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive 1 [~~one~~] point.

(10) Where the principal project will result in removal from service of one or more existing wastewater treatment plants, thus reducing the number of plant outfalls; or where the principal project will result in delivery of flow to, or receipt of flow at a regional facility, rather than create or continue use of a separate wastewater treatment facility, the project will receive 1 [~~one~~] point.

(11) Where there is documentation that the principal project as proposed will implement a regional solution, 3 points will be awarded if the project recommended is proposed to implement one of the following:

(A) a regional facility plan for water resources funded in whole or in part by a grant from the board;

(B) a commission regionalization or consolidation plan; or

(C) other plans developed by state or regional entities pursuant to legislative authority. [~~Where the principal project is a project which received a preliminary eligibility determination under §363.224 of this title (relating to Capital Improvements Plan Option) prior to the effective date of this chapter, received approval of plans and specifications prior to September 1, 1998, and will receive funding under the fiscal year 2000 intended use plan, the project shall receive one point.~~]

(c) Rating of refinancing. If refinancing is sought for a completed project, the project will be rated in accordance with subsection (b) of this section, based upon the conditions which existed prior to the initiation of construction of the project. A completed project can not be combined with a project for which construction has not been completed, but must be rated separately.

(d) [~~(c)~~]Rating score. The rating score will be the sum of the points assigned to the application under all criteria which are applicable to the application.

(e) Ranking for refinancing. Completed projects which involve refinancing will be listed in the intended use plan in the appropriate category as a separate group and will be placed below the group of projects in that category for which construction has not been completed.

(f) [~~(d)~~]Tie-breaker. In the event more than one project as listed in the intended use plan receives the same rating score, funding will first be made available for the project in which the sewage treatment plant is at the greatest percentage of its rated capacity as calculated in paragraph (1)(A) of this subsection for projects improving plant capacity. For any remaining ties funding will first be made available to the applicant with the lowest annual per capita income.

(g) [~~(e)~~]Abandoned facilities. Where the existing treatment facilities will be abandoned and sewage diverted to a different location, the diversion line will be given the rating score of the treatment facilities to be abandoned.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 19, 1999.

TRD-9907904
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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Division 3. APPLICATIONS FOR ASSISTANCE

31 TAC §375.36, §375.39

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.36. Engineering Feasibility Data.

(a) Submittal of engineering feasibility data. The applicant shall submit engineering feasibility data signed and sealed by a professional engineer registered in the State of Texas. The data, based on guidelines provided by the executive administrator, shall provide:

(1) description and purpose of the project;

(2) entities to be served and current and future population;

(3) the cost of the project;

(4) a description of innovative, alternative,and conventional management techniques [~~alternatives~~] considered and reasons for the selection of the project proposed;

(5) sufficient information to evaluate the engineering feasibility; and

(6) maps and drawings as necessary to locate and describe the project area. The executive administrator may request additional information or data as necessary to evaluate the project.

(b) Nonpoint source applications. Applications for assistance for nonpoint source pollution control projects must be consistent with an approved nonpoint source management plan pursuant to the Act, §319.

(c) Estuary management applications. Applications for assistance for estuary management projects must be consistent with an approved estuary management plan pursuant to the Act, §320.

(d) Approval of engineering feasibility data. The executive administrator will approve the engineering feasibility data after confirming that the items listed in subsection (a) of this section have been completed, the appropriate environmental determinations have been completed in accordance with §375.35 of this title (relating to Required Environmental Review and Determination) or §375.214 of this title (relating to Required Environmental Review and Determination), whichever is appropriate, and the loan recipient has agreed to incorporate all mitigating measures directed by the executive administrator.

(e) Changes to engineering feasibility data. If changes occur in the project after approval of the engineering feasibility data, the executive administrator may request additional engineering and/or environmental information in order to ascertain that the loan commitment and environmental determination continues to be appropriate.

§375.39. Pre-Design Funding Option.

(a) This loan application option will provide an applicant that meets all applicable board requirements an alternative to secure a commitment and to close on the commitment [~~loan proceeds~~] for planning, design or building costs associated with a project. Under this option, a loan may be closed [~~and funds released~~] to complete planning and design activities. [~~If all required planning has been completed and approved, design funds may also be released at the time of closing and building funds will be escrowed.~~] If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. After planning and environmental review, the board may require the applicant to make changes in order to receive the board's approval and proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board

in inverse order of maturity. [~~General procedures and requirements for pre-design funding are described in this section.~~]

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, contractual, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, an engineering plan of study which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan as required under §375.37 of this title (relating to Required Water Conservation Plan) will be adopted prior to the release of loan funds;

(4) all information required in §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), and §375.34 of this title (relating to Required Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) After board commitment and completion of all closing and release prerequisites as specified in §375.71 of this title (relating to Loan Closing) and §375.72 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan if still outstanding under §375.37 of this title.

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of the engineering feasibility data as specified in §375.36 of this title (relating to Engineering Feasibility Data) and compliance with §375.35 of this title (relating to Required Environmental Review and Determination); and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(e) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (c)(1) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns to allow the executive administrator to make a recommendation to the board on pre-design funding. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided by §375.35 of this title.

(f) Prior to the board's approval of release of funds for design, the executive administrator shall summarize the project's environmental review and shall inform the board of any environmentally related special mitigative or precautionary measures recommended for the project. The board may elect to affirm or alter the conditions of the original commitment to the applicant or withdraw the commitment to the applicant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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Division 4. BOARD ACTION ON APPLICATIONS

31 TAC §375.52

The amendment is proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.52. Lending Rates.

(a) Procedure for setting fixed interest rates.

(1) The development fund manager will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution; and

(B) not more than 45 days before the anticipated closing of the loan from the board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the development fund manager's approval.

(b) Fixed rates. The fixed interest rates for loans under this subchapter are set at rates 70 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. Using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale, the fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis. For borrowers with either no rating or a rating less than investment grade, the 90 index scale of the Delphis will apply. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.18 of this title (relating to Administrative Cost Recovery) an additional 25 basis points reduction will be used,

for total fixed interest rates of 95 basis points below the fixed index rates for such borrowers.

(2) For borrowers filing applications on or after February 5, 1998 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after February 5, 1998 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) Variable rates. The interest rate for variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF [~~31.5 basis points~~]. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the development fund manager. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the development fund manager and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (a) and (b) of this section.

(d) Adjustment of interest rate. The development fund manager may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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Division 6. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §375.71, §375.72

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.71. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of identified all local, state and federal agencies having jurisdiction have been met [~~prior to release of building funds~~], including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the development fund manager's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the applicant, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the applicant shall fix and maintain rates and collect charges to provide adequate operation, maintenance and

insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the applicant will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the applicant shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with generally accepted government accounting standards and other financial assistance related legal and contractual provisions;

(H) that the applicant covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapter 15, subchapter J; and

(I) that the applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a participating underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the applicant's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the applicant is an obligated person with respect to such bonds under rule 15c2-12;

(3) two copies of the applicant's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator;

(6) executed escrow agreement entered into by the applicant and an escrow agent bank or an executed trust agreement entered into by the applicant and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed;

(7) evidence that the applicant shall maintain adequate insurance coverage on the project in an amount adequate to protect the board's interest;

(8) assurances that the applicant will comply with any special conditions specified by the board's environmental determination until all financial obligations to the state have been discharged; and

(9) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. At such time as available following the final release of funds the applicant shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Refinancing construction loans. If the project includes the refinancing of a loan, the applicant shall submit all of the items specified in subsection (a) of this section and any records, assurances, or appraisals concerning the construction of the project. Additionally, the project must pass the executive administrator's inspection of the project.

(d) Loan closing prior to completion of design. In the event financial assistance is needed by the applicant to complete design of a project without escrow of funds for building under §375.39 of this title (relating to Pre-Design Funding Option), the executive administrator will so advise the board. The board at its option may authorize the executive administrator to close the loan for planning and design without requiring the submittals in subsection (a)(1) and (6) of this section. However, the submittals in subsection (a)(1) of this section will be required prior to delivery of funds for building purposes. Applicants wishing to close prior to obtaining required commission permits will be required to present documentation that the required permits are expected to be issued.

(e) Loan closing for phased construction. The executive administrator may determine it appropriate to close only a portion of a loan for a phased construction project unless the applicant can demonstrate the need for phased construction and that closing the portion of the loan desired by the applicant is necessary to expedite construction.

(f) Closing requirements. The applicant shall be required to comply with the following closing requirements:

(1) all loans shall be closed in book-entry-only form;

(2) the applicant shall use a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(3) the applicant shall be responsible for paying all DTC closing fees assessed to the applicant by the board's custodian bank directly to the board's custodian bank; and

(4) the applicant shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the applicant's paying agent/registrar prior to closing.

§375.72. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits; [~~and~~]

(4) evidence that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) [~~(4)~~]other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the engineering feasibility data required under §375.36 of this title (relating to Engineering Feasibility Data) has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §375.39 of this title (relating to Pre-Design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one [~~two~~] executed original copy [~~copies~~] of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations;

(7) [~~(6)~~]evidence that the project is consistent with plans, if any, developed under the Act, §§205(j), 208, 303(e), 319 and 320, as well as the applicable sections of the Clean Air Act which apply to the project receiving the financial assistance;

(8) [~~(7)~~]an updated schedule of projected monthly reimbursements for eligible project costs to be requested by the applicant throughout the project funding period. Any eligible project costs which will be paid by the applicant prior to receiving reimbursement must be identified separately in this schedule; and

(9) [~~(8)~~]other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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Division 7. BUILDING PHASE

31 TAC §375.82, §375.85

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.82. Inspection During Construction.

After the construction contract is awarded, the applicant shall provide for adequate qualified inspection of the project under the supervision of [~~by~~] a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, and in accordance with sound engineering principles and construction practices. The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The executive administrator shall bring to the attention of the applicant any deviations from the approved contract documents. The applicant and the project engineer shall immediately initiate necessary corrective action.

§375.85. Building Phase Submittals.

After a project is completed, the applicant shall submit documentation that the applicant has received [~~receive~~] from the contractor a complete set of as-built drawings of the project.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
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Subchapter B. PROVISIONS PERTAINING TO USE OF CAPITALIZATION GRANT FUNDS

Division 3. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §375.221, §375.222

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.221. Pre-Design Funding Option.

(a) This loan application option will provide an applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan [~~proceeds~~] for planning, design or building costs associated with a project. Under this option, a loan

may be closed and funds necessary [released] to complete planning and design activities released. [If all required planning has been completed and approved, design funds may also be released at the time of closing and building funds will be escrowed.] If planning requirements have not been satisfied, design and building funds will be escrowed and released in the sequence described in this section. After planning and environmental review, the board may require the applicant to make changes in order to receive the board's approval and proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity. [General procedures and requirements for pre-design funding are described in this section.]

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, an engineering plan of study which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan as required under §375.37 of this title (relating to Required Water Conservation Plan) will be adopted prior to the release of loan funds or the applicant's election to submit the water conservation plan under §375.37(b) of this title;

(4) all information required in §§375.32, 375.33, and 375.34 of this title (relating to Required General Information, Required Legal Information, and Required Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) Recipients of funds for pre-design funding under this subchapter must close their loans under §375.71 of this title (relating to Loan Closing) within six months of the date the board commits funds, unless extended by the board.

(e) After board commitment and completion of all closing and release prerequisites as specified in §375.71 of this title and §375.72 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan if still outstanding under §375.37(b) of this title;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of the engineering feasibility data as specified in §375.36 of this title (relating to the Engineering Feasibility Data) and compliance with §375.214 of this title (relating to Required Environmental Review and Determination) and after board approval under subsection (e) of this section; and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (c)(1) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns to allow the executive administrator to make a recommendation to the board on pre-design funding. Prior to release of funds for design, these projects must have the board's approval based upon an environmental review conducted during planning under the standards of §375.214 of this title as applicable.

(g) Prior to the board's approval of release of funds for design, the executive administrator shall summarize the project's environmental review and shall inform the board of any environmentally related special mitigative or precautionary measures recommended for the project. The board may elect to affirm or alter the conditions of the original commitment to the applicant or withdraw the commitment to the applicant.

§375.222. Lending Rates.

(a) Procedure for setting fixed interest rates.

(1) The development fund manager will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution; and

(B) not more than 45 days before the anticipated closing of the loan from the board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the development fund manager's approval.

(b) Fixed rates. The fixed interest rates for CWSRF loans under this chapter are set at rates 120 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. The fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.18(c) of this title (relating to Administrative Cost Recovery) an additional 25 basis points reduction will be used, for total fixed interest rates of 145 basis points below the fixed index rates for such borrower.

(2) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is

interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the total fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) Variable rates. The interest rate for CWSRF variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF [~~31.5 basis points~~]. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the development fund manager. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the development fund manager and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (a) and (b) of this section.

(d) Adjustment of rate. The development fund manager may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 20, 2000
For further information, please call: (512) 463-7981

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TITLE 34. PUBLIC FINANCE

Part 1. COMPTROLLER OF PUBLIC ACCOUNTS

Chapter 3. TAX ADMINISTRATION

Subchapter F. MOTOR VEHICLE SALES TAX

34 TAC §3.61

The Comptroller of Public Accounts proposes an amendment to §3.61, concerning credit for motor vehicle sales or use tax paid to another state. House Bill 2140, 76th Legislature, 1999, amends the Tax Code, §152.023, effective September 1, 1999, providing that a new resident to Texas bringing a leased vehicle into this state may qualify for the new resident use tax in lieu of the 6 1/4% use tax and increasing the new resident tax rate.

Mike Reissig, Director of Estimates, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in limiting the applicable motor vehicle sales and use tax due from new residents to the state that are brining in leased vehicles. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §152.023.

§3.61. Credit for Motor Vehicle Sales or Use Tax Paid to Another State.

A credit is allowed to a person, firm, or corporation that, as a purchaser, has paid legally imposed sales or use tax to another state on a motor vehicle that later becomes subject to the Texas Motor Vehicle Use Tax. The credit allowed is the amount of the prior payment to the other state. Credit is not allowed against the $90 [~~$15~~] new resident tax. If a motor vehicle purchased tax- free for use solely outside the state is later used inside the state, use tax is due on the original purchase price; however, [~~a~~] credit is allowed in the amount of a legally imposed sales or use tax paid to another state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Martin Cherry
Special Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 463-4062

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34 TAC §3.70

The Comptroller of Public Accounts proposes an amendment to §3.70, concerning motor vehicle leases and sales. House Bill 2140, 76th Legislature, 1999, amends the Tax Code, §152.023, effective September 1, 1999, providing that a new resident to Texas bringing a leased vehicle into this state may qualify for the new resident use tax in lieu of the 6.25% use tax, and increases the new resident tax rate.

Mike Reissig, Director of Estimates, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §152.023.

§3.70. Motor Vehicle Leases and Sales.

(a) Except for purchases by franchised dealers described in this subsection, motor vehicles that [~~which~~] are purchased by a lessor to be leased are subject to motor vehicle sales or use tax based upon the purchase price of the motor vehicle to the lessor. Such tax is due from the lessor at the time of purchase. Subsequent lease payments are not subject to the tax. The purchase of a new motor vehicle by a franchised dealer who removes the motor vehicle from inventory for the purpose of leasing the vehicle to another person, and who immediately after executing the lease contract transfers title of the vehicle and assigns the lease contract to a lessor, is not a retail purchase and is not subject to tax. If the title is not transferred and the lease assigned within seven calendar days, the dealer's purchase and use will be presumed to be a retail purchase and taxable. The presumption may be overcome by showing evidence of intent. The lessor to whom the dealer transfers title and assigns the lease contract is liable for motor vehicle sales and use tax.

(b) If, at the termination of a lease, a motor vehicle is sold by the lessor to the lessee and the lease contained an "option to purchase" at less than fair market value or a "must purchase" clause or if the vehicle is sold to the lessee at less than fair market value, the amount subject to the motor vehicle sales and use tax will be the total consideration paid the lessor by the lessee under the agreement, since the agreement [~~it~~] will be considered a sale rather than a lease agreement. "Total consideration" means the amount paid or to be paid for a motor vehicle and all accessories attached to it at the time of the sale; total consideration [~~it~~] does not include separately stated finance charges, carrying charges, service charges, or interest.

(c) If the transaction is considered to be a sale and not a lease, as described in subsection (b) of this section, no additional motor vehicle sales tax is due at the time the initial lessee/purchaser takes title to the vehicle, provided the correct amount of tax was previously paid on the total consideration. If the correct amount of tax was not paid on the total consideration, the lessee/purchaser must pay the difference when the vehicle is titled in his name.

(d) If the motor vehicle is sold to a person not privy to the lease or if it is sold to the lessee at fair market value, the amount subject to the motor vehicle sales and use tax is [~~would be~~] the agreed-upon sales price. (See Attorney General Opinion WW-711 (1959).)

(e) Motor [~~The motor~~] vehicle use tax is due on a motor vehicle [~~vehicles~~] purchased outside of the State of Texas and leased and brought into the state for use upon the highway. The lessee of the motor vehicle is liable for such tax. If the lessee [~~if he~~] is a resident of this state or is domiciled or doing business in this state the [~~. The~~] tax is based upon the consideration paid outside the state by the purchaser of the motor vehicle, regardless of any use or depreciation of the vehicle subsequent to its purchase and prior to its use in this state. If the lessee is a new resident of this state as described in §3.71 of this title (relating to Definition of "Resident" and "New Resident"), the new resident may pay a new resident use tax of $90 imposed by Tax Code, §152.023, in lieu of the 6.25% use tax.

(f) A [~~credit is allowed to a~~] lessee may take credit for [~~who has paid or whose lessor has paid~~] legally imposed sales, use, or similar taxpaid to another state by the lessee or the lessor on the leased [~~with respect to a~~] motor vehicle [~~to another state and~~] before [~~thereafter~~] that vehicle becomes subject to the Texas motor vehicle use tax imposed by Tax Code, §152.022. If the lessee purchases the leased vehicle, credit will be [~~is~~] allowed for Texas motor vehicle use tax imposed by Tax Code, § 152.022, and paid by the lessee when the vehicle [~~unit~~] was brought into this state.

(g) An owner of a motor vehicle that was purchased to be leased for interstate use, tax exempt under Tax Code, §152.089, is liable for motor vehicle sales/use tax if the motor vehicle is no longer held for interstate use or held exclusively for resale. The tax is imposed at a rate prescribed by Tax Code, §152.021(b), and based on the owner's book value at the time the vehicle was removed from interstate use.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907838
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4062

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Subchapter K. HOTEL OCCUPANCY TAX

34 TAC §3.161

The Comptroller of Public Accounts proposes an amendment to §3.161, concerning definitions, exemptions, and exemption certificate. The 76th Legislature, 1999, in House Bill 1014, amended the Tax Code, Chapter 156, to limit the exemption for public and private institutions of higher education to Texas

public or private institutions of higher education as defined in the Education Code, §61.003.

Mike Reissig, Director of Estimates, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §156.102.

§3.161. Definitions, Exemptions, and Exemption Certificate.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Educational organization–A nonprofit organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities consisting solely of presenting discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The organization will not be considered for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Entities that are defined in the Education Code, §61.003, as Texas "institutions of higher education" are recognized for exemption under this provision. Included in the definition of "institutions of higher education" are state and private universities and colleges. Public and private "institutions of higher education" of other states or countries do not meet the requirements for exemption under this provision.

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

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907884
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4062

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Subchapter V. FRANCHISE TAX

34 TAC §3.561

The Comptroller of Public Accounts proposes an amendment to §3.561, concerning enterprise zones and defense economic readjustment zones. Subsection (g) substitutes "enterprise project" for "qualified business" in accordance with House Bill 3658, 76th Legislature, 1999. A provision is added to subsection (g) to prohibit the enterprise zone deduction if a corporation is eligible to take a capital investment credit. This amendment is in accordance with Senate Bill 441, 76th Legislature, 1999.

Mike Reissig, Director of Estimates, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be clarification of comptroller policy relating to franchise tax enterprise zone incentives. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §171.1015 and §171.805.

§3.561. Enterprise Zones and Defense Economic Readjustment Zones.

(a)-(f) (No change.)

(g) A corporation that the Texas Department of Economic Development has certified to be an enterprise project [~~a qualified business~~] eligible for a tax deduction may elect to reduce either its apportioned taxable capital or apportioned taxable earned surplus in accordance with the Tax Code, §171.1015, on each report based on a fiscal year during all or part of which the corporation is designated an enterprise project. An election for an initial period applies to the second tax period and to the first regular annual period. This requirement is applicable to the first regular annual period whether it is included in the corporation's initial report or first annual report.

Otherwise, the election will not be binding on the corporation for future reports. A corporation that establishes its eligibility for a capital investment credit under the Tax Code, §171.802, cannot take the enterprise zone deduction authorized by the Tax Code, §171.1015.

(1)-(2) (No change.)

(h)-(l) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907883
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-4062

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Chapter 9. PROPERTY TAX ADMINISTRATION

Subchapter C. APPRAISAL DISTRICT ADMINISTRATION

34 TAC §9.402

The Comptroller of Public Accounts proposes an amendment to §9.402, concerning applications for special property tax appraisal. This rule is being amended to prescribe a model application form for restricted-use timber appraisal, required by Senate Bill 977, 76th Legislature, 1999, effective January 1, 2000.

James LeBas, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. The amendment to the rule will have no fiscal impact on small business. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Buddy Breivogel, Manager, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §5.07, which requires the comptroller to prescribe the contents of all forms necessary for the administration of the property tax system, and Senate Bill 977, 76th Legislature, 1999, effective January 1, 2000, which requires the comptroller to prescribe an application form for restricted-use timberland appraisal.

The amendment implements the Tax Code, §23.9804.

§9.402. Special Use Application Forms.

(a) In applying for special use valuation under the Tax Code, Chapter 23, the applicant shall use a form provided by the appraisal office. The appraisal office shall use the model form adopted by the Comptroller of Public Accounts which is appropriate to the special use type, or use a form containing information which is in substantial compliance with the model form adopted by the comptroller.

(b) The model application forms listed in paragraphs (1)-(6) of this subsection and the new model form in paragraph (7) of this subsection are adopted by the Comptroller of Public Accounts by reference[, ~~as amended~~]. Copies of these forms are available for inspection at the office of the *Texas Register* or can be obtained from the Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-9121. In Austin, call (512) 305-9999. From a Telecommunications Device for the Deaf (TDD), call 1-800-248-4099, toll free. In Austin, the local TDD number is (512) 463-4621:

(1) 1-d Appraisal Application (1-d Agricultural Land), (Form 50-165);

(2) [~~amended~~] 1-d-1 Appraisal Application (1-d-1 Agricultural Land), (Form 50-129);

(3) open-space land application (1-d-1 timberland), (Form 50-167);

(4) 1-d-1 Ecological Laboratory Appraisal Application, (Form 50-166);

(5) application for recreational, park, and scenic land, (Form 50-168); [~~and~~]

(6) application for public access airport property, (Form 50-169); and[~~,~~]

(7) application for restricted-use timberland appraisal (Form 50-281).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907961
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-3699

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Subchapter H. TAX RECORD REQUIREMENTS

34 TAC §9.3039

The Comptroller of Public Accounts proposes an amendment to §9.3039, concerning applications for property tax refunds. This rule is being amended to add language to the currently prescribed application form as required by Senate Bill 446, 76th Legislature, 1999, effective September 1, 1999, which requires the comptroller to prescribe a form for property tax refund applications, prescribes minimum requirements for a refund application form, and requires the tax assessor-collector to sign the application, to indicate the taxing unit's governing body's approval or disapproval of the refund application and the date of the approval or disapproval, and House Bill 2220, 76th Legislature, effective September 1, 1999, which provides that the governing body of a county with a population of 2.8

million or more must approve refund applications for amounts over $2,500, rather than $500, which is the refund amount that all other governing bodies must approve. The amendments also updates the language describing penalties for filing a false application and make other non substantive changes.

Mike Reissig, director of estimates, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. There is no anticipated significant cost to the public. The amendment to the rule will have no fiscal impact on small business. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Buddy Breivogel, Manager, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §5.07, which requires the comptroller to prescribe the contents of all forms necessary for the administration of the property tax system, and Senate Bill 446, 76th Legislature, 1999, effective September 1, 1999, which requires the comptroller to prescribe a form for an application for a property tax refund.

The amendment implements the Tax Code, §31.11.

§9.3039. Tax Refund Form.

(a) All offices collecting taxes for purposes of ad valorem taxation shall prepare and make available forms for use by taxpayers in applying for a tax refund for an overpayment or erroneous payment of taxes, as provided in Texas Property Tax Code, §31.11.

(b) The tax refund form shall make provision for the following items of information to be filed by the taxpayer who believes that an overpayment or erroneous payment of taxes has been made:

(1) the name and address of the property owner and/or agent;

(2) the description of the property and its location;

(3) the account number of the property on the tax roll and/or tax receipt of the property;

(4) the name of the taxing unit(s) from which the refund is requested;

(5) the year for which the refund is requested;

(6) the date of the payment of taxes;

(7) the amount of taxes paid by the taxpayer;

(8) the amount of refund requested by the taxpayer;

(9) the reason that the taxpayer believes that the payment was an overpayment or erroneous payment and support documentation;

(10) the signature of the applicant;

(11) the date of the application for tax refund.

(c) The office collecting taxes for purposes of ad valorem taxation shall provide the following items of information tax refund form:

(1) the name and address of the collecting office and the name of the taxing unit(s) for which that office collects;

(2) an indication of the approval or disapproval of the application by a taxpayer for a tax refund;

(3) the signature of the authorized officer charged with the authority to approve or disapprove tax refunds and the date of the approval or disapproval;

(4) the signature of the tax assessor collector of the taxing unit, if the signature is required by the Tax Code, §31.11, [~~presiding officer of the governing body for the approval or disapproval of tax refunds of over $500,~~] and the date of the approval or disapproval.

(d) The application form for tax refund shall contain the following affirmation above the signature of the applicant: "I hereby apply for the refund of the above described taxes and certify that the information I have given on this form is true and correct."

(e) The tax refund application shall also contain the following statement: "If you make a false statement on this application, you could be found guilty of a Class A misdemeanor or a state jail felony under the Texas Penal Code, §37.10." [~~Any person who makes a false entry upon the foregoing record shall be subject to one of the following penalties: (1) imprisonment of not more than 10 years nor less than 2 years and/or a fine of not more than $5,000 or both such fine and imprisonment; (2) confinement in jail for a term up to one year or a fine not to exceed $2,000 or both such fine and imprisonment as set forth in §37.10, Penal Code."~~]

(f) Collecting offices failing to prepare a tax refund form as required in subsection (a) [~~(e)~~] of this section may be judged to be in compliance upon a showing to the comptroller [~~board~~] that a tax refund form substantially equivalent to that required in subsection (a) [~~(e)~~] of this section has been prepared.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907960
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-3699

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

Chapter 3. TRAFFIC LAW ENFORCEMENT

Subchapter D. TRAFFIC SUPERVISION

37 TAC §3.62

The Texas Department of Public Safety proposes amendments to §3.62, concerning Regulations Governing Transportation Safety. The amendments are necessary to implement changes resulting from the passage of Senate Bills 370 and 1019 by

the 76th Texas Legislature and revisions to the Federal Motor Carrier Safety Regulations by the U. S. Congress.

Section 3.62 is amended to implement the use of non-commissioned personnel within the Department's License & Weight Service. Senate Bill 370 authorizes the use of non-commissioned personnel to conduct roadside inspections of commercial vehicles at fixed-site facilities and to conduct compliance reviews of motor carrier operations.

A second amendment is needed to implement the provisions of Senate Bill 1019 authorizing the Department to impound any commercial vehicle that is being operated by or under the direction of a person who has failed to pay an administrative penalty assessed under the Compliance Review Program. The amendment establishes the procedures for assessment of an administrative penalty for violation of the safety regulations, notification to the motor carrier, and the impoundment of the commercial vehicles under certain circumstances.

A third amendment is provided to implement the changes in the amount of the administrative penalties that can be assessed for violation of the Federal Hazardous Materials Regulations and the Federal Motor Carrier Safety Regulations. This amendment will allow the Department to remain consistent with the federal penalties that were increased by Congress in Public Law 105-178 for violation of the safety regulations.

A fourth amendment implements a change in the municipal police officers that are eligible to be trained and certified to enforce the Motor Carrier Safety Standards. Senate Bill 370 provides that police officers from a municipality with a population of less than 25,000, any part of which is located in a county with a population of 2.4 million, and that contains or is adjacent to an international port are eligible to be trained and certified under this program.

The Department is also changing the bureau to which the vision waiver requests are submitted from the Motor Carrier Bureau to the License Issuance Bureau. In addition, all references to Texas Civil Statutes are being revised to properly reflect the Texas Transportation Code cites.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the sections.

Mr. Tom Haas also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be to ensure to the public greater compliance by motor carriers with all of the statutes and regulations pertaining to the safe operation of commercial vehicles in the state. The cost of compliance for small businesses will be same as the cost of compliance for large businesses. There is no anticipated cost to individuals.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The amendments are proposed pursuant to Texas Transportation Code, Chapter 644, and Texas Government Code, §411.006(4) and §411.018, which provide the director of the Texas Department of Public Safety with the authority to establish rules for the conduct of the work of the Texas Department of Public Safety, and which authorizes the director to adopt rules regulating the safe operation of commercial motor vehicles.

This proposal affects Texas Transportation Code, Chapter 644, and Texas Government Code, §411.006(4) and §411.018.

§3.62. Regulations Governing Transportation Safety.

(a) (No change.)

(b) Terms. Certain terms, when used in the federal regulations as adopted in subsection (a) of this section, will be defined as follows:

(1)-(8) (No change.)

(9) foreign commercial motor vehicle has the meaning assigned by Texas Transportation Code, §648.001 [~~Civil Statutes, Article 6675c-2~~];

(10)-(12) (No change.)

(c) (No change.)

(d) Exemptions. Exemptions to the adoption in subsection (a) of this section were made pursuant to Texas Transportation Code, §§644.052-644.054, [~~§644.052, Texas Civil Statutes, Article 6675d, §5 (as authorized by Senate Bill 370 and House Bill 1418), and §5 (as authorized by Senate Bill 1486), and §3A~~] and are adopted as follows:

(1)-(7) (No change.)

(e) (No change.)

(f) Vision Waiver. Under this section the Texas Department of Public Safety may provide a waiver for a person who is otherwise disqualified under Title 49, Code of Federal Regulations, Part 391.41(b)(10) provided that intrastate drivers meet the vision standards specified in §16.9 of this title (relating to Qualifications to Drive in Intrastate Commerce).

(1) Applications for a waiver shall be accepted by the Texas Department of Public Safety's License Issuance Bureau [~~Motor Carrier Bureau~~].

(2)-(5) (No change.)

(g) Authority to Enforce.

(1) An officer of the department may enter or detain on a highway or at a port of entry a motor vehicle that is subject to Texas Transportation Code §644[~~and Texas Civil Statutes, Article 6675d~~].

(2) A non-commissioned employee of the department that is trained and certified to enforce the federal safety regulations may enter or detain at a fixed-site facility, or at a port of entry, a motor vehicle that is subject to Texas Transportation Code, §644.

(3) [~~(2)~~] An officer of the department or a non-commissioned employee of the department that is trained and certified to enforce the federal safety regulations may prohibit the further operation of a vehicle on a highway or at a port of entry if the vehicle or operator of the vehicle is in violation of Texas Transportation Code, §522, or a federal safety regulation or rule adopted under Texas Transportation Code, §644, [~~and Texas Civil Statutes, Article 6675d,~~] by declaring the vehicle or operator out-of-service using the North American Standard Uniform Out-of-Service Criteria as a guideline.

(4) [~~(3)~~] Police officers from any of the following Texas cities meeting the training and certification requirements contained in subsection (h) of this section and certified by the department may enter or detain on a highway or at a port of entry within the municipality a motor vehicle subject to Texas Transportation Code §644[~~and Texas Civil Statutes, Article 6675d~~]:

(A) a municipality with a population of 100,000 or more;

(B) a municipality with a population of 25,000 or more, any part of which is located in a county with a population of 2.4 million or more; [~~or,~~]

(C) a municipality any part of which is located in a county bordering the United Mexican States; or, [~~.~~]

(D) a municipality with a population of less than 25,000, any part of which is located in a county with a population of 2.4 million and that contains or is adjacent to an international port.

(5) [~~(4)~~] A certified police officer from an authorized municipality may prohibit the further operation of a vehicle on a highway or at a port of entry within the municipality if the vehicle or operator of the vehicle is in violation of Texas Transportation Code §522, or a federal safety regulation or rule adopted under Texas Transportation Code, §644, [~~and Texas Civil Statutes, Article 6675d,~~] by declaring the vehicle or operator out-of-service using the North American Standard Uniform Out-of-Service Criteria as a guideline.

(h) (No change.)

(i) Training and Certification Requirements.

(1)-(4) (No change.)

(5) Training provided by the department. When the training is provided by the Texas Department of Public Safety, the department shall collect fees in an amount sufficient to recover from municipalities the cost of certifying its police [~~peace~~] officers. The fees shall include:

(A)-(E) (No change.)

(6) (No change.)

(j) (No change.)

(k) Safety Audit Program. The rules in this subsection, as authorized by Texas Transportation Code §644.155, establish procedures to determine the safety fitness of motor carriers, assign safety ratings, take remedial actions when necessary, assess administrative penalties when required, and prohibit motor carriers receiving a safety rating of "unsatisfactory" from operating a commercial motor vehicle. The department will use the Compliance Review Audit to determine the safety fitness of motor carriers and to assign safety ratings. The safety fitness determination will be assessed on intrastate motor carriers and the intrastate operations of interstate motor carriers based in Texas.

(1) Definitions specific to the Safety Audit Program are as follows:

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

(G) For the purposes of collection of the administrative penalty, Final Departmental Action is defined as:

(i) a motor carrier's failure to pay or becomes delinquent in the payment of an administrative penalty as outlined in this subchapter;

(ii) a motor carrier's failure to request an informal hearing or an administrative hearing within 20 days of receipt of the Notice of Claim; or

(iii) a motor carrier's failure to appeal a Final Order issued from an administrative hearing as outlined in this subchapter.

(2) Inspection of Premises.

(A) Authority to Inspect. An officer or a non-commissioned employee of the department who has been certified by the director may enter a motor carrier's premises to inspect lands, buildings, and equipment and copy or verify the correctness of any records, reports or other documents required to be kept or made pursuant to the regulations adopted by the director in accordance with Texas Transportation Code, §644.155.

(B)-(C) (No change.)

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

(l) Administrative Penalties.

(1) The compliance review may result in the initiation of an enforcement action based upon the number and degree of seriousness of the violations discovered during the review as well as those factors listed in Title 49, Code of Federal Regulations, Part 385.7. As a result of the enforcement action, the department may impose an administrative penalty against a motor carrier who violates a provision of [~~Texas Civil Statutes, Article 6675d or a provision of~~] the Texas Transportation Code Title 7, Subtitle B, Chapter 522 (relating to Commercial Driver's License), Subtitle C, Chapters 541 - 600 (relating to the Rules of the Road), and Subtitle F, Chapter 644 (relating to Commercial Motor Vehicles), including any amendments not codified in the Texas Transportation Code. Each of these provisions relates to the safe operation of a commercial motor vehicle under Texas Transportation Code §644.153(b).

(2) The department shall have discretion in determining the appropriate amount of the administrative penalty assessed for each violation. A penalty under this section may not exceed the maximum penalty provided for violations of a similar federal safety regulation as provided under 49 United States Code, §521(b), §5123, and the Transportation Equity Act for the 21st Century (Public Law 105-178) [~~and Title 49, Code of Federal Regulations, Parts 386.81, 386.82, and Appendix A to Part 386~~].

[~~(A) Record keeping violations. These are violations of the administrative requirements of the Federal Safety Regulations. A penalty shall not exceed $550 for each violation. Each day of a violation shall constitute a separate violation, except that the total of all administrative penalties assessed against any violator for all violations relating to any single violation shall not exceed $2,750.~~]

[~~(B) Serious pattern of safety violations. These violations are considered the middle range of violations between those of record keeping noncompliance and a willful case of negligence. These violations are not an isolated event but rather a tolerated pattern of noncompliance. An administrative penalty may be assessed in an amount not to exceed $1,100 for each violation; except that the maximum penalty for each such pattern of safety violations shall not exceed $11,000.~~]

[~~(C) Substantial health or safety violations. These are violations which could reasonably lead to or have resulted in serious personal injury or death. An administrative penalty may be assessed in an amount not to exceed $11,000 for each violation.~~]

[~~(D) Employee non-record keeping violations. These are acts committed by a driver of a non-record keeping nature that are considered to be of gross negligence or a reckless disregard for safety. The employee may be assessed an administrative penalty in an amount not to exceed $1,100.~~]

[~~(E) Hazardous materials violations. A person that knowingly violates a hazardous material regulation is liable for an administrative penalty of at least $250 but not more than $27,500 for each violation. A person acts knowingly when the person has actual~~

~~knowledge of the facts giving rise to the violation, or a reasonable person acting in the circumstance and exercising reasonable care would have that knowledge. A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.]~~

(3) (No change.)

(m) Notification.

(1) The department will notify a motor carrier of an enforcement action by the issuance of a claim letter. [~~The notification will consist of the requirements of Title 49, Code of Federal Regulations, Part 386.11.~~]

(2) The notification may be submitted to the motor carrier's principal place of business by certified mail, first class mail, or personal delivery. A notification sent by mail shall be presumed to have been received by the motor carrier five days after the date of the mailing.

(3) The motor carrier shall respond within 20 days of receipt of the claim letter with one of the following options: [~~must reply within 20 days of receipt of a claim letter. The reply must contain:~~]

(A) Payment of the claim in the full amount as outlined in the claim letter; or [~~an admission or denial of each allegation of the claim and a concise statement of facts constituting each defense;~~]

(B) Request, in writing, an informal hearing; or [~~a statement of whether the motor carrier requests an administrative hearing concerning the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty;~~]

(C) Request, in writing, an administrative hearing. [~~a statement of whether the motor carrier requests an informal hearing under subsection (1) of this section;~~]

~~[(D) a statement of whether the motor carrier accepts the determination and recommended penalty;]~~

~~[(E) a statement of whether the motor carrier wishes to negotiate the terms of payment or settlement of the amount of the penalty, or the terms and conditions of the order; and]~~

~~[(F) a certification that the reply has been served in accordance with Title 49, Code of Federal Regulations, Part 386.31.]~~

(4) A request under paragraph (3)(B) or (C) of this subsection must contain the following:

(A) A concise statement of the issues to be presented at the hearing, including the occurrence of the violations, the amount of the penalty, or both; and,

(B) defenses the carrier asserts to the department's claim.

(5) Failure to respond within 20 days as outlined in paragraph (3)(A), (B), or (C) of this subsection is deemed as Final Departmental Action.

(n) Informal hearing.

(1) [~~Request.~~]If requested, the department will hold an informal hearing to discuss a penalty recommended under this section. Such hearing will be scheduled and conducted by the manager of the Motor Carrier Bureau or the director's designee.

(2) [~~Procedure.~~]An informal hearing shall not be subject to rules of evidence and civil procedure except to the extent necessary for the orderly conduct of the hearing. The department will summarize the nature of the violation and the penalty, and discuss the factual basis for such. The motor carrier will be afforded an opportunity to respond to the allegations verbally and/or in writing.

(3) After the conclusion of the informal hearing, the hearing officer will issue a Memorandum of Decision, which will be provided to the motor carrier. The Memorandum of Decision will contain the following: [~~Resolution. In the event matters are resolved in the motor carrier's favor, the manager or the director's designee will send the carrier written notification that the proposed penalty is withdrawn.~~]

(A) a statement of findings by the hearing officer, including a statement of dismissal of charges, modification of penalties, or affirmation of penalties; and

(B) if the penalties are modified or affirmed, the Memorandum of Decision will be accompanied by a new claim letter requiring the motor carrier to respond within 20 days of receipt of claim letter with one of the following options:

(i) Payment of the claim in the full amount as outlined in the claim letter; or

(ii) Request an administrative hearing before the State Office of Administrative Hearings.

(4) Failure to respond as outlined in paragraph (3)(B)(i) or (ii) of this subsection is deemed as Final Departmental Action. [~~Modified penalty. If matters are resolved resulting in a modified penalty, the manager or the director's designee may prepare a settlement agreement as provided by subsection (n) of this section.~~]

~~[(5) Failure to resolve. If matters are not resolved in the informal hearing, the department will initiate a formal enforcement action as provided by subsection (o) of this section.]~~

(o) Administrative Hearing [~~Formal Enforcement Action~~].

(1) If the motor carrier requests an administrative hearing, as required by subsection (m)(3)(C) or (n)(3)(B)(ii) of this section, the department shall request an administrative hearing before the State Office of Administrative Hearings [~~fails to respond in a timely manner to the claim letter as identified in subsection (m) of this section, or does not negotiate a settlement, the department may initiate a formal enforcement action as a contested case~~]. The department will provide written notice by certified mail, return receipt requested, or by personal service of such action to the motor carrier.

(2) A contested case under this subsection will be governed by Texas Government Code, Chapter 2001, subchapters C and D, and Chapter 29 of this title (relating to General Rules of Practice and Procedure), and not by Title 49, Code of Federal Regulations, Part 386, Subparts D and E.

(p) Payment, Collection and Settlement of Administrative Penalty.

(1) Payment. A person who is subject to an administrative penalty imposed by the Department as authorized by §644.153(d) is required to pay the administrative penalty. The administrative penalty may be paid through one of the following options: [~~If the motor carrier does not pay the amount of the penalty and the enforcement of the penalty is not stayed, the director may refer the matter to the attorney general for collection of the amount of the penalty.~~]

(A) Full Payment. Full payment of the administrative penalty in the form of a check, cashier's check, or money order made payable to the Department of Public Safety shall be submitted to the

Texas Department of Public Safety, Attn: Motor Carrier Bureau, 6200 Guadalupe, Building P, Austin, Texas 78752-0522.

(B) Installment Payments.

(i) A person(s), firm, or business may, upon approval of the director or the director's designee, be allowed to make installment payments of an administrative penalty, costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state upon submission of adequate proof of inability to pay the full amount of the claim. An application shall be submitted on a form approved by the department.

(ii) The person(s), firm, or business requesting the installment agreement must submit adequate documentation to support the request and make all relevant financial records of the person(s), firm, or business available to the department for inspection and verification.

(iii) In the event of a default of the installment agreement by the person(s), firm, or business, then the remaining balance of the installment agreement will be due immediately.

(iv) Upon default the person(s), firm, or business will be sent a Notice of Claim as outlined in paragraph (2)(B) of this subsection. Once there is default under an installment agreement, the person(s), firm, or business is no longer eligible for installment payments.

(2) Non-Payment of Administrative Penalty. A person who fails to pay, or becomes delinquent in the payment of the administrative penalty imposed by the department as authorized by Texas Transportation Code, §644.153(d) shall not operate or direct the operation of a commercial motor vehicle on the highways of this state until such time as the administrative penalty has been remitted to the department. The department will make every effort to collect an administrative penalty once an enforcement action has been deemed as Final Departmental Action through the following options: [~~At any time prior to the date on which a final order is issued by the director, the department and the motor carrier may agree to enter into a compromise settlement agreement. The compromise settlement agreement shall e signed by the motor carrier and the director, or the director's designee and will reflect that the motor carrier consents to the assessment of a specific administrative penalty or other action by the department against the motor carrier.~~]

(A) Issuance of an Impoundment Order. Pursuant to Texas Transportation Code, §644.153(d) - (h), the department will issue an impoundment order for the impoundment of any commercial motor vehicle that is operated or directed by the person(s), firm, or business that fails to pay an administrative penalty issued under this subchapter.

(B) Prior to issuing the impoundment order, the department will send a Notice of Claim to the person(s), firm, or business in violation of this subchapter by certified mail return receipt requested, or by personal service requiring a response within 20 days. The notice will contain the following language in bold, large face type: "FAILURE TO PAY THIS CLAIM OR RESPOND WITHIN 20 DAYS WILL RESULT IN THIS NOTICE OF CLAIM BEING DEEMED A "FINAL DEPARTMENT ACTION.." "A PERSON WHO IS SUBJECT TO AN ADMINISTRATIVE PENALTY IMPOSED BY THE DEPARTMENT UNDER THIS SUBCHAPTER IS REQUIRED TO PAY THE ADMINISTRATIVE PENALTIES OR RESPOND TO THE DEPARTMENT'S NOTICE OF CLAIM. A PERSON WHO FAILS TO PAY, OR BECOMES DELINQUENT IN THE PAYMENT OF THE ADMINISTRATIVE PENALTIES IMPOSED BY THE DEPARTMENT UNDER THIS SUBCHAPTER SHALL NOT OPERATE OR DIRECT THE OPERATION OF A COMMERCIAL MOTOR VEHICLE ON THE HIGHWAYS OF THIS STATE UNTIL SUCH TIME AS THE ADMINISTRATIVE PENALTIES HAVE BEEN REMITTED TO THE DEPARTMENT."

(C) The Department shall issue an Impoundment Order if the person(s), firm, or business fail to respond to Notice of Claim within 20 days. The Impoundment Order will contain the following information:

(i) Motor carrier's name, address, city, zip code and telephone number;

(ii) The motor carrier's Texas Department of Transportation, United States Department of Transportation, or Motor Carrier number, if any;

(iii) The amount of delinquent penalty assessment;

(iv) The date the Impoundment Order was issued;

(v) A contact number for the Motor Carrier Bureau;

(vi) Notice that impoundment will be lifted upon receipt of full payment of the administrative penalty at the Motor Carrier Bureau or the designated License and Weight employee as described in paragraph (5)(C)(i) or (ii) of this subsection; and,

(vii) In bold, conspicuous letters, notice that the carrier is responsible for all costs of storage of the vehicle and its cargo, and towing.

(3) Prior to impounding any vehicle the trooper shall verify the Impoundment Order is still valid. Verification can only be made by the Manager, Assistant Manager, or the Motor Carrier Compliance Audit Section Supervisor of the Motor Carrier Bureau. If a trooper is unable to verify the Impoundment Order is in force, then the vehicle shall not be impounded. [~~Simultaneously with the filing of a compromise settlement agreement, the motor carrier shall remit a cashier's check or money order to the Texas Department of Public Safety.~~]

(4) Once a vehicle is impounded, the trooper impounding the vehicle shall immediately ensure the motor carrier is notified of impoundment of the vehicle. The trooper will inform the motor carrier of the name, location, and telephone number of the vehicle storage facility where the vehicle is impounded, notice the vehicle will not be released until the administrative penalty has been paid, and a contact number for the Motor Carrier Bureau.

(5) Release of Impounded Vehicles.

(A) To cancel the Impoundment Order and to release a vehicle from impoundment, the motor carrier shall pay the administrative penalty in full.

(B) The payment of the administrative penalty must be for the full amount. The payment must be made by cashier check or money order payable to the Texas Department of Public Safety.

(C) The payment can be made in one of two ways only:

(i) by sending it to the following address as indicated: Texas Department of Public Safety, Motor Carrier Bureau, 6200 Guadalupe, Bldg. P, Austin, Texas 78752-0522 Attn: Negotiators, Impoundment Notice; or

(ii) directly to the trooper at the time of the actual impoundment or to any License and Weight employee at any department regional, district or sub-district office.

(D) Only upon receipt of payment as specified under paragraph (5)(C)(i) or (ii) of this subsection will the impounded vehicle be released and Impoundment Order cancelled, and/or;

(E) Referral of the case to the attorney general for collection of the amount of the penalty;

[(q) Installment Payment of Administrative Penalty.]

[(1) A person(s), firm, or business may, upon approval of the director or the director's designee, be allowed to make installment payments of an administrative penalty, costs, fees, expenses, and reasonable and necessary attorney's fees incurred by the state upon submission of adequate proof of inability to pay. An application shall be submitted on a form approved by the department.]

[(2) The person(s), firm, or business requesting the installment agreement must submit adequate documentation to support the request and make all relevant financial records of the person(s), firm, or business available to the department for inspection and verification.]

[(3) In the event of a default of the installment agreement by the person(s), firm, or business, then the remaining balance of the installment agreement will be due immediately.]

(q) [(r)] Suspension and revocation by the Texas Department of Transportation.

(1) The director will determine whether the department will request the Texas Department of Transportation to suspend or revoke a registration issued by the Texas Department of Transportation based upon the department's compliance review.

(2) This determination may be based upon the following:

(A) an unsatisfactory safety rating under Title 49, Code of Federal Regulations, Part 385;

(B) multiple violations of Texas Transportation Code §644[and Texas Civil Statutes, Article 6675d];

(C) multiple violations of one of these rules; and/or,

(D) multiple violations of the Uniform Traffic Act or Transportation Code.

(3) Once the determination has been made the director will forward a letter to the executive director of the Texas Department of Transportation requesting said department initiate a suspension/revocation proceeding against the motor carrier.

(4) Any suspension/revocation action initiated by the Texas Department of Transportation, pursuant to this section, shall be administered in the manner specified by the rules of the Texas Department of Transportation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907842

Dudley M. Thomas

Director

Texas Department of Public Safety

Earliest possible date of adoption: January 2, 2000

For further information, please call: (512) 424-2135

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Chapter 15. DRIVERS LICENSE RULES

Subchapter C. EXAMINATION REQUIREMENTS

37 TAC §15.59

The Texas Department of Public Safety proposes an amendment to §15.59, concerning Renewal Test. The title of the section is amended to better reflect the contents of this section. The amendments also require the reformatting of subsections due to the adding and deleting of language which will provide applicants with alternative methods of applying for renewal of driver licenses and identification certificates.

This amendment is the direct result of legislation found in Senate Bill 370 (DPS Sunset), §§19, 24, and 28, 76th Texas Legislature, 1999, that authorizes the Department to establish eligibility standards for mail or electronic renewal of driver licenses and identification certificates. This bill also authorizes the Department to accept electronic fund transfers and/or valid credit cards for the payment of fees, and allows for the payment of a discount or service charge for a credit card payment in addition to the associated fee.

Tom Haas, Chief of Finance, has determined that for each year of the first five years the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Mr. Haas also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be reduced lines and wait times in driver license offices statewide, thereby providing faster service. There is no anticipated economic cost to small or large businesses. The anticipated cost to individuals who are required to comply with the section as proposed will be the cost of renewing the driver license or identification certificate.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.59. Alternate Methods of Renewal [Test].

[(a) A standard vision test is administered to all persons applying for renewal of a Texas drivers license. In addition, other tests as prescribed by law may be administered.]

(a) [(b)] Provided certain conditions are met [by a licensee], the department may provide licensees with alternate methods of renewal [will issue invitations to renew driver's license by mail and in these cases, the aforementioned test are waived]. Such alternate methods may include renewal by mail, by telephone or over the Internet.

(b) [(c)] The department will only accept alternate renewals [Renewals by mail will only be accepted] from eligible [those] licensees [who receive an invitation] and application must be made in the manner [only on the form] provided by the agency, accompanied by the applicable fee [in the invitation]. A service charge may be imposed for a credit card payment. Alternate renewal [This invitation

to renew by mail] will not be extended to eligible licensees for any two consecutive renewal periods.

[(1) Persons receiving an invitation to renew by mail may submit the invitation by mail with a check or money order for $16. Proof of insurance must also be submitted with the invitation.]

(c) [(2)] Persons who are eligible for alternate renewal [with mail in invitations] may elect to renew at any local Driver [Drivers] License office. A vision test will be conducted on all [renewal] applicants renewing at a local Driver [Drivers] License office, in addition to any other tests prescribed by law.

(d) The following licensees will not be considered eligible to renew their license by mail:

[(1) any licensee whose driving record as maintained by the department reflects a conviction for a moving traffic law violation or a conviction for an offense described by Texas Civil Statutes, Article 6687b §24, within four years preceding the date of application for renewal. A moving traffic law violation for the purposes of this rule is defined as any act committed in connection with the operation of a motor vehicle on public street or highway and is prohibited by state law or city ordinance, except equipment violations of a nonhazardous nature; length, width, weight, and height violations; motor carrier violations; lease law violations; registration law violations; evidence of liability insurance law violations; parking or standing violations of a nonhazardous nature; and violations of the laws governing the transportation of hazardous material;]

(1) [(2)] holders of a provisional or occupational license or commercial driver [driver's] license (CDL);

(2) [(3)] licensees whose driver [driver's] license reflects a restriction to driving with telescopic lenses or telescopic aids;

[(4) licensees whose record, as maintained by the department, reflects that they are holders of more than one type of license;]

(3) [(5)] licensees whose driver [driver's] license reflects restrictions because of driving ability or a medical condition that requires a periodic review [for such conditions], including any medical or physical condition that may affect the licensees' [result in progressive deterioration of licensee's] ability to safely operate a motor vehicle;

(4) [(6)] any licensee whose license is suspended, canceled, revoked, or denied;

(5) [(7)] any licensee that to the best of the department's knowledge has an outstanding warrant or capias on a case filed by a DPS officer.

(6) any licensee who does not have a social security number and digital image on file with the department.

(e) For those licensees deemed eligible and upon receipt of the proper application and fee, the department will issue and mail to the licensee a renewal license which utilizes the previous digital image on file with the department. [certificate of current status sticker, which extends the validity of such license for the period indicated on the certificate. The certificate of current status sticker must be attached to the back of the license. Loss of the certificate or license will require an application for a duplicate license at a local driver license office.]

(f) The department may reject any application for alternate [mail] renewal and require a personal appearance at a driver [drivers] license office if it has information that the applicant has misrepresented eligibility for licensing in any manner, including medical and vision conditions.

(g) The department may also provide alternate methods for the renewal of an identification certificate. To be eligible, an individual must have a digital image on file with the agency. Application must be made in the manner provided by the department and accompanied by the applicable fee. A service charge may be imposed for a credit card payment. Alternate renewal will not be extended for any two consecutive renewal periods.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907843
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 424-2135

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Part 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Chapter 151. GENERAL PROVISIONS

37 TAC §151.25

The Texas Department of Criminal Justice (TDCJ) proposes an amendment to §151.25, concerning the Texas Department of Criminal Justice Tobacco Policy. This policy is applicable to all employees of, persons in the custody of, visitors to the Texas Department of Criminal Justice, and privately operated secure correctional facilities under contract with the TDCJ. The TDCJ is committed to providing a safe and healthy environment and working conditions for employees and offenders. All offenders and persons visiting offenders are prohibited from possessing or using any tobacco products. TDCJ employees and persons on TDCJ property conducting official State business are authorized to possess and use tobacco products in accordance with Agency policies and procedures.

David P. McNutt, Director of Financial Services for the Texas Department of Criminal Justice has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment as proposed.

Mr. McNutt also has determined that the public benefit anticipated as a result of enforcing the amendment as proposed will be a safe and healthy environment and working conditions for employees and offenders. There will be no effect on small businesses or micro-businesses as a result of enforcing the amendment as proposed. There is no anticipated economic cost to individuals required to comply with the amendment as proposed.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas, 78711. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendment is proposed under Texas Government Code, §492.013, which grants the Texas Board of Criminal Justice general rulemaking authority, and Texas Government Code, §493.006(b) and §494.010.

Cross Reference to Statute: Texas Government Code, §493.006(b) and §494.010.

§151.25. Texas Department of Criminal Justice Tobacco Policy.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Tobacco Products–Cigars, [All items such as cigars] cigarettes, snuff, or similar goods prepared for smoking, chewing, dipping, or other such personal use.

(2) Buildings–Buildings and private offices owned, leased or under contract by the TDCJ, excluding individual family dwellings.

(3) State Vehicles–All vehicles owned, leased, or contracted by the TDCJ.

(4) TDCJ Employee–All [Includes all] employees of the TDCJ, including temporary, part-time, contract employees, volunteers [and persons on TDCJ property conducting official State business].

(b) Applicability. This policy is applicable to all employees of, persons in the custody of, visitors to the Texas Department of Criminal Justice (TDCJ or Agency) and privately operated secure correctional facilities under contract with the TDCJ.

(c) Policy. The TDCJ is committed to providing a safe and healthy environment and working conditions for employees and offenders. [TDCJ recognizes an employee's choice to use tobacco products, while balancing the security need to control contraband.] All offenders and persons visiting offenders are prohibited from possessing or using any tobacco products. TDCJ employees and persons on TDCJ property conducting official State business are authorized to possess and use tobacco products in accordance with Agency policies and procedures. [the procedures outlined below and in PD-91 "Work Cycles and Compensable Hours of Work."]

(d) Procedures. The use of tobacco products inside all TDCJ buildings and vehicles, [as defined in subsection (a) of this section,] is strictly prohibited. Designated outdoor tobacco areas must be at a sufficient distance from a place at which employees regularly perform duties to ensure that no employee who abstains from the use of tobacco products is physically affected by the use of tobacco products at the designated areas. Tobacco use in the designated areas must not negatively affect the comfort or safety of any employee or offender.

(1) Administrative Offices [with Staff of Multiple Divisions].

(A) Employees are permitted to carry and store tobacco products while in [at] administrative offices. The use of tobacco products is only allowed outdoors in approved, designated areas or in personal vehicles.

(B) For administrative offices with staff from multiple divisions, designated [Designated] areas shall be identified by the Deputy Executive Director or his designee and submitted as consent items to the Texas Board of Criminal Justice (TBCJ or Board) for approval. For administrative offices with staff from a single division, designated areas shall be identified by the ranking supervisor, submitted through channels to the Division Director and submitted as consent items to the Board for approval.

(C) Human Resources Representatives shall be responsible for maintaining the approved list of designated areas and posting the list on the employee bulletin board.

[(2) Administrative Offices with Staff of a Single Division.]

[(A) Employees are permitted to carry and store tobacco products while at administrative offices. The use of tobacco products is only allowed outdoors in approved, designated areas.]

[(B) Designated areas shall be identified by the ranking supervisor, submitted through channels to the Division Director and submitted as consent items to the Board of Criminal Justice for approval.]

[(C) Human Resources Representatives shall be responsible for maintaining the approved list of designated areas and posting the list on the employee bulletin board.]

(2) [(3)] Secure Correctional Facilities within the Institutional, State Jail, and Parole Divisions.

(A) Employees are permitted to use tobacco products in designated areas of the parking lots, designated areas adjacent to the parking lots, or in personal vehicles.

(B) Designated areas within or adjacent to the parking lot shall be identified by each Warden/Facility Administrator and submitted through the chain of command to the Division Director. These areas will be submitted as consent items to the Board [of Criminal Justice] for approval.

(C) Human Resources Representatives shall be responsible for maintaining the approved list of designated areas and posting the list on the employee bulletin board.

(D) Tobacco products are prohibited outside of the parking lot. Tobacco products found beyond the parking lot will be considered as contraband. Violation of this policy may result in disciplinary action pursuant to PD-22, "Guidelines for Employee Disciplinary Actions."

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907982
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-9693

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part 1. TEXAS DEPARTMENT OF HUMAN SERVICES

Chapter 49. CONTRACTING FOR COMMUNITY CARE SERVICES

40 TAC §49.5, §49.19

The Texas Department of Human Services (DHS) proposes amendments to §49.5 and §49.19, concerning contract assignment and sanctions, in its Contracting for Community Care Services chapter. The purpose of the amendment to §49.5 is to specify that DHS may terminate the assignor's contract when the assignee does not meet the conditions for contracting. When the provider's contract is terminated because the assignee did not meet the conditions for contracting, DHS will establish a timeframe for terminating the contract to allow sufficient time for transferring clients. The purpose of the amendment to §49.19 is to add a provision for contract termination when a provider does not deliver Community Care services for six consecutive months. Before terminating a provider's contract, DHS will ensure adequate availability of providers in a geographic area.

Eric M. Bost, Commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that DHS can evaluate a provider's compliance history prior to terminating the agency's contract when the agency attempts to assign a contract to an entity that does not meet the requirements for contracting. Also, the proposed change will allow DHS contract management staff to focus their attention on providers who are actively participating in the program. The amendment to §49.5 will have a positive effect on large, small, or micro businesses because DHS will consider the reasons that an assignee was not eligible to contract and the current provider's history in the program, prior to terminating the assignor's contract. The amendment to §49.19 will have no adverse effect on large, small, or micro businesses because the provider being terminated has not served clients in the Community Care programs for at least six consecutive months; therefore the provider has received no revenue from the contract for a period of time. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Marilyn Eaton at (512) 438-3136 in DHS's Community Care Services Section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-061, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement §§22.001-22.030 and §§32.001-32.042 of the Human Resources Code.

§49.5. Contract Assignment.

(a)-(c) (No change.)

(d) If the assignee does not meet the conditions for contracting, DHS may terminate [~~immediately terminates~~] the assignor's contract [~~and transfers all clients to another provider agency~~]. DHS establishes a timeframe for terminating the contract that will allow sufficient time for transferring clients.

(e)-(f) (No change.)

§49.19. Sanctions.

(a) (No change.)

(b) Sanctions may include one or more of the following at the discretion of DHS:

(1)-(2) (No change.)

(3) Contract termination. DHS may initiate contract termination for one or more reasons including, but not limited to:

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

(G) the provider agency having validated report(s) of abuse, neglect, or exploitation when the perpetrator is an employee, volunteer, or owner who has or will have access to clients served through this contract; [~~or~~]

(H) the provider agency's knowing and willful solicitation of clients from another provider agency; or [.]

(I) a provider agency's failure to deliver Community Care services for six consecutive months. DHS will consider the availability of services in a geographic area prior to terminating the provider agency's contract for this reason.

(c)-(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 18, 1999.

TRD-9907847
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 438-3108

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Part 4. TEXAS COMMISSION FOR THE BLIND

Chapter 161. APPEALS AND HEARING PROCEDURES

Subchapter A. VOCATIONAL REHABILITATION AND INDEPENDENT LIVING PROGRAMS [~~PROGRAM~~]

40 TAC §§161.10-161.14, 161.37, 161.42, 161.45

The Texas Commission for the Blind proposes amendments to §§161.10-161.14, 161.37, 161.42 and 161.45 pertaining the agency's appeals and hearing rules for the Vocational

Rehabilitation Program. These subchapter rules have been amended to expand the appeals and hearings procedures to the agency's Independent Living Program so that the agency has one system for both programs. Section 161.14 has been amended to remove the mandatory 45 day time frame in which hearings must be held because federal law no longer requires the deadline. The deadline was interfering with efforts to resolve disputes through informal means, including voluntary mediation.

Alvin Miller, Chief Financial Officer, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local governments as a result of the rules.

Mr. Miller has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of the rules will be consistent hearing rules that provide consumers applying for and receiving services from the agency with the full benefits of federal law.

There will be no effect on small businesses. There is no anticipated economic cost to individuals as a result of the proposal.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 459-2611 and written comments on the proposal may be submitted to Policy and Rules Coordinator, P.O. Box 12866, Austin, Texas, 78711, within 30 days from the date of this publication.

The amendments are proposed under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

No other statutes are affected by the proposal.

§161.10. Purpose and Scope.

(a) The purpose of this chapter is to establish procedures whereby an applicant for services or a consumer receiving agency services may appeal an action taken by the Commission in the administration of the Vocational Rehabilitation and Independent Living Programs [~~Program~~].

(b) (No change.)

§161.11. Legal Authority and Scope.

(a) Procedures for appealing [~~rehabilitation counselor~~] determinations made by staff of the Commission are authorized by and must comply with 29 United States Code, Section 701, et seq., also known as the Rehabilitation Act of 1973, as amended, and Department of Education Regulations at 34 Code of Federal Regulations (CFR) 361.57, as such authority may exist or may be amended from time to time.

(b) The procedures in this subchapter are available to any applicant or consumer who is dissatisfied with a determination made by staff of the Commission [~~a rehabilitation counselor~~] concerning the furnishing or denial of services authorized in Chapter 163 of this title (relating to the Vocational Rehabilitation Program) and Chapter 164 of this title (relating to the Independent Living Program).

(c) (No change.)

(d) The Commission shall not institute a suspension, reduction, or termination of services being provided under an individualized plan for employment or independent living [~~written rehabilitation~~] plan pending informal resolution or a final determination of the formal hearing under this subchapter unless the individual or, in an appropriate case, the individual's authorized representative, so requests or the agency has evidence that the services have been obtained through misrepresentation, fraud, collusion, or criminal conduct on the part of the individual.

§161.12. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. The use of the singular or plural case is not meant to be limiting unless the context clearly indicates otherwise.

(1)-(4) (No change.)

(5) Consumer–A person who has been determined eligible for and is receiving [~~vocational rehabilitation~~] services from the Commission.

(6)-(13) (No change.)

§161.13. Filing a Request for Review.

(a) Any applicant or eligible individual who is dissatisfied with a determination made by the staff of the Commission [~~a rehabilitation counselor~~] concerning the furnishing or denial of services may request a review of the determination by notifying the Commission [~~their counselor~~] in writing. Although no prescribed form is required to file a request, preprinted forms for this purpose shall be maintained in every Commission office and are available upon request.

(b) Upon receiving a request for review, the Commission [~~rehabilitation counselor~~] shall, no later than the next working day, mail the appellant:

(1)-(4) (No change.)

(c) A request for review shall be considered timely if it is received by the Commission [~~counselor~~] within a reasonable period of time, not to exceed 180 days from the date the person was mailed notice of the determination to the person's last known address.

§161.14. Time for Hearing.

A hearing by an impartial hearing officer shall be held at a time mutually agreeable to the parties [~~within 45 days of the individual's request for review unless the parties resolve the dispute prior to that time or the parties agree to a specific time extension for the hearing~~].

§161.37. Documentary Evidence and Official Notice.

(a)-(b) (No change.)

(c) The following laws, rules, regulations, and policies are officially noticed:

(1)-(4) (No change.)

(5) Texas Commission for the Blind Vocational Rehabilitation and Independent Living Manuals [~~Manual~~]; and

(6) (No change.)

§161.42. Impartial Hearing Officer Decision.

(a)-(c) (No change.)

(d) The impartial hearing officer may prescribe such remedies as are appropriate within the scope of the Vocational Rehabilitation Program or Independent Living Program, whichever is applicable.

(1)-(3) (No change.)

§161.45. Mediation Procedures.

(a)-(c) (No change.)

(d) Upon receiving a request for mediation, the Executive Director shall either:

(1) select an individual from a list of qualified mediators who are knowledgeable in laws and regulations relating to the provision of vocational rehabilitation or independent living services, whichever may be applicable to the dispute, or

(2) (No change.)

(e)-(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 15, 1999.

TRD-9907769
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 459-2611

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TITLE 43. TRANSPORTATION

Part 1. TEXAS DEPARTMENT OF TRANSPORTATION

Chapter 1. MANAGEMENT

Subchapter A. ORGANIZATION AND RESPONSIBILITIES

43 TAC §1.2

The Texas Department of Transportation proposes an amendment to §1.2, concerning the organization and responsibilities of the department.

Transportation Code, §201.102 requires the Texas Transportation Commission to implement policies that separate the policy-making responsibilities of the commission and the management responsibilities of the executive director and staff. House Bill 3092, 76th Legislature, 1999, amended the Texas Motor Vehicle Commission Code, Texas Civil Statutes, Article 4413(36). The amendments remove the executive director of the Texas Department of Transportation as an ex officio member of the Motor Vehicle Board and clarify the department's responsibility in providing equipment, facilities, property, and service to the board.

The amendment to §1.2(c) updates the rule to reflect that the term "special office" is no longer used by the department.

The amendment to §1.2(e)(1) removes the language indicating that the executive director of the department is a member of the Motor Vehicle Board. This is necessary to conform the rule to the statute as revised by House Bill 3092.

The amendments to §1.2(e)(3) remove language requiring the board to advise the department on motor vehicle dealer licensing issues and to devise policies separating the board's and the department's responsibilities. The amendments also clarify that the department's responsibility is to provide equipment, facilities, property, and services to the board. These changes are necessary to conform the rule to the statute as revised by House Bill 3092.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. There are no anticipated costs for persons required to comply with the amendments as proposed.

Richard Monroe, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendment.

PUBLIC BENEFIT

Mr. Monroe has also determined that for each year of the first five years that the amendments are in effect, the public benefit anticipated as a result of enforcing the section will be an increased public awareness of the Motor Vehicle Board's statutory role within the department. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed addition may be submitted to Richard D. Monroe, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 3, 2000.

STATUTORY AUTHORITY

The amendment is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the proposed amendments.

§1.2. Texas Department of Transportation.

(a)-(b) (No change.)

(c) Divisions. Consistent with commission direction provided under §1.1(b)(1)(T) and (U) of this title (relating to Texas Transportation Commission), the executive director shall organize the department into headquarters operating divisions and [~~special~~] offices reflecting the various functions and duties assigned to the department, and shall designate a division or [~~special~~] office director who shall administer each division or [~~special~~] office.

(d) (No change.)

(e) Motor Vehicle Board.

(1) Membership. The Motor Vehicle Board of the Texas Department of Transportation (board) consists of nine persons appointed by the governor with the advice and consent of the senate. The [~~executive director of the Texas Department of Transportation is a member of the board ex officio. The executive director may attend a meeting of the board and may confer with and advise the board, the chairman, or the director. The executive director may not vote on a matter coming before the board. Except as provided by this subsection, the provisions of the Texas Motor Vehicle Commission Code relating to~~] members of the board include:

(A)-(B) (No change.)

(2) (No change.)

(3) Board responsibilities.

(A) In accordance with the Texas Motor Vehicle Commission Code, the board shall:

(i) exercise the authority and perform the duties placed on the board by law; and

(ii) advise the department on budgetary, equipment, data processing, and facility and property needs of the board and the Motor Vehicle Division of the department.[:]

~~*[(I)* matters arising under the Texas Motor Vehicle Commission Code and other matters relating to the licensing and regulation of motor vehicle manufacturers, distributors, converters, and dealers; and]~~

~~*[(II)* the personnel, budgetary, equipment, data processing, and facility and property needs of the board and the Motor Vehicle Division of the department; and]~~

~~*[(iii)* in coordination with the department, develop and implement policies that clearly delineate the policy-making responsibilities of the board and the management responsibilities of the department.]~~

(B) The department, by agreement with the board, shall [~~may~~] provide equipment, facilities, property, [~~personnel~~] and services to the board as needed to carry out purposes, powers, and duties of the board. The board may delegate authority to personnel as needed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907935
Richard Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-8630

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Chapter 9. CONTRACT MANAGEMENT

Subchapter F. CONTRACTS FOR SCIENTIFIC, RIGHT OF WAY ACQUISITION, AND LANDSCAPE ARCHITECTURAL SERVICES

43 TAC §§9.80-9.88

The Texas Department of Transportation proposes amendments to §§9.80-9.88, concerning contracts for scientific, right of way acquisition, and landscape architectural services.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 223, Subchapter D, provides that the department may follow a procedure using competitive sealed proposals to procure the services of technical experts including archeologists, biologists, geologists, historians, or other technical experts to conduct environmental and cultural assessments for transportation projects within the authority or jurisdiction of the department.

House Bill 1782, 75th Legislature, 1997, amended Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act, to include land appraisers as a professional service. Senate Bill 1133, 76th Legislature, 1999, also amended Chapter 2254, Subchapter A to include landscape architects.

The amendments set forth procedures for the selection of landscape architects and make minor revisions to the selection procedures for technical experts. The amendments also set forth procedures for right of way acquisition providers (ROW providers) when the acquisition requires the services of an appraiser. The procedures for ROW providers do not apply if the acquisition requires the services of an engineer, architect, or surveyor.

The amendments to §9.81 add ROW providers and landscape architects to the types of services that can be procured by the department with the use of competitive sealed proposals.

The amendments to §9.82 provide terms for landscape architect, and right of way acquisition provider. The term "mandatory" has been expanded to include "minimum" in order to accommodate the terminology used in the additional fields of work. The term "provider" has been clarified to include an individual or entity that provides these types of services. This eliminates the use of the term "offeror." The context makes clear whether the provider is offering services or whether the provider has been awarded a contract. The definition of "scientific services" has been added to this section and removed from the explanation in §9.83 since §9.83 has been expanded to include other services.

The amendments to §9.83 allow the providers to obtain the Request for Proposal (RFP) packets by sending in a letter of interest, downloading it from the department's website, or obtaining it at the proposal meeting, if there is one. Since a provider is no longer required to send in a letter of interest, the letter of interest deadline has been removed. The notice will be issued at least 21 days before the proposal is due in accordance with Government Code, §2155.074, which requires procurements exceeding $25,000 to be posted in the State Business Daily. The criteria for breaking ties will be included in the RFP packet if the criteria are different from that outlined in §9.85(e).

Because information relating to the proposal is now available in the State Business Daily and the department's website, the requirement to publish notice in newspapers has been reduced to one newspaper. Since the provider may now wait to obtain the RFP packet at the proposal meeting, the date and location of the meeting will be included in the notice.

The amendments to §9.84 require the providers to submit a price.

The amendments to §9.85 add ROW providers to the evaluation criteria currently being used for technical experts. The criteria have been changed to be used when the criteria is applicable to that particular proposal since some proposals do not need to contain all of the listed criteria. A landscape architect will be evaluated on the experience of the project manager and project team, demonstrated understanding of the scope of services to be provided, references, ability to meet department scheduling requirements, and reasonableness of fee.

The amendments to §9.86 provide for discussions for best and final offers. The department may elect to include discussions with the top three responsive providers in order to get the best offer. If multiple providers are to be selected, then a discussion

will be held for the number of contracts to be awarded plus three. These providers will be given the opportunity to revise their proposals.

The amendments to §9.87 eliminate the requirements that multiple contracts may not exceed $500,000. With the addition of other services to this section, the department needs to be able to enter into specific project agreements in amounts greater than $500,000. The limit for indefinite delivery contracts has been raised from $500,000 per contract to $1,000,000 in order to accommodate the expanded scope of these sections. The notice for multiple contract selection will indicate the number and type of contracts to result from the advertisement, and specify a range of scores for providers that will be considered qualified to perform the work in order to give notice as the qualifications necessary.

The amendments to §9.88 provide that the department may make an award to a ROW provider or landscape architect.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amendments are in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. The state will experience a savings due to a decrease in the use of state resources. The number of RFP packets that need to be physically produced and distributed has been reduced, thereby saving paper, postage, and labor. In addition, because advertising is only required in one newspaper instead of multiple newspapers, there will be a reduction in advertising costs.

The anticipated economic cost to persons who are required to comply with the proposed sections will be minimal. These amendments will decrease providers' costs because they are no longer required to submit a letter of interest. Right of way providers and landscape architects costs will increase because they will now submit proposals. The exact fiscal implications to the providers and the department cannot be determined because it will depend upon the number of RFPs and proposals generated. There will be no fiscal implications for local governments.

Jennifer Soldano, Director, Contract Services Office, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

Ms. Soldano has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be to further the department's mission to provide an efficient, effective process to select ROW providers and landscape architects, and to simplify the process for selecting technical experts. There will be no effect on small or micro businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Jennifer Soldano, Director, Contract Services Office, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 3, 2000.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Texas Transportation Code, Chapter 223, Subchapter D, which provides for the selection of technical experts, and Government Code, Chapter 2254, Subchapter A, which provides for the selection of appraisers and landscape architects.

No statutes, articles, or codes are affected by these proposed amendments.

§9.80. Purpose.

(a) Transportation Code, Chapter 223, Subchapter D, provides that the department may follow a procedure using competitive sealed proposals to procure the services of technical experts including archeologists, biologists, geologists, historians, or other technical experts to conduct environmental and cultural assessments for transportation projects within the authority or jurisdiction of the department. This subchapter, which implements Chapter 223, Subchapter D of the Transportation Code, establishes standard procedures for selection of technical experts to provide scientific services including environmental and cultural studies, analyses, and document preparation.

(b) This subchapter also establishes standard procedures for selection of right of way acquisition providers and landscape architects in accordance with Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act.

§9.81. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(3) (No change.)

(4) Landscape architect - An individual licensed to practice landscape architecture in the state or states that he or she performs professional services.

(5) Mandatory/minimum [~~(4)Mandatory provider~~] qualifications - Those qualifications listed in the request for proposals that the provider [~~technical expert~~] must demonstrate it meets in order for the proposal to be considered responsive.

(6) Provider - An individual or entity that provides scientific, right of way acquisition, or landscape architectural services.

~~[(5) Provider - The technical expert awarded a department provider contract.]~~

(7) [~~(6)~~] Request for proposals (RFP) - A request for submittal of a [~~technical~~] proposal that demonstrates competence and qualifications of the provider [~~technical expert~~] to perform the requested services and shows an understanding of the specific project.

(8) Right of way acquisition provider (ROW provider) - A firm performing right of way acquisition, including appraisal services, but excluding surveying, engineering, or architectural services.

(9) [~~(7)~~] Subprovider - A provider proposing to perform work through a contractual agreement with the provider.

(10) Scientific services - Environmental or cultural studies, analyses, and document preparation services required by state or federal law, for a transportation project within the authority or jurisdiction of the department, and performed by an archeologist, biologist, geologist, historian, architectural historian, or other technical expert.

(11) [~~(8)~~] Technical expert - An archeologist, biologist, geologist, historian, architectural historian, or other non-engineering

expert in a natural, social, historical, or environmental science qualified to conduct an environmental or cultural study required by state or federal law for a transportation project. This definition includes a firm or institution employing one or more technical experts.

§9.82. Use of Providers [~~Technical Expert~~].

The department may use competitive sealed proposals to procure scientific, right of way acquisition, and landscape architectural services [~~including those of an archeologist, biologist, geologist, historian, architectural historian, or other technical expert to conduct environmental or cultural studies, analyses, and document preparation required by state or federal law for a transportation project within the authority or jurisdiction of the department~~].

§9.83. Notice and Letter of Interest.

(a) Notice. When the department elects to use competitive sealed proposals to procure right of way acquisition, landscape architectural, and scientific services, notice will be given as follows.

(1) Electronic and newspaper notice. Not less than 21 [~~10~~] days before the proposal [~~letter of interest~~] due date, the department will post a notice on an electronic bulletin board and publish a notice in a selected newspaper [~~newspapers~~]. The notice will contain the:

(A) proposed contract or RFP number;

(B) type of selection in accordance with §9.87 [~~§9.87(a)~~] of this title (relating to Selection Types);

(C) general description of the project and work to be done;

(D) due date for providers to send letters of interest to the department;

(E) contact person; [~~and~~]

(F) date and location of the proposal meeting, if applicable; and

(G) [~~(F)~~] location of the electronic bulletin board that contains more information.

(2) Organizations. The department will publish a quarterly statewide list of projected contracts to be issued under this subchapter [~~for scientific services~~] and will provide upon request, or make available on the department's Web site, a copy of the list to community, business, and professional organizations for dissemination to their membership.

(b) Letter of interest.

(1) The provider may obtain an RFP packet by:

(A) sending a letter of interest to the department notifying the department of the provider's interest in the contract;

(B) downloading it from the department's Web site; or

(C) obtaining it at the proposal meeting, if applicable.

[~~(1) The technical expert shall send a letter of interest to the department notifying the department of the provider's interest in the contract. This letter of interest must be received by the department no later than the deadline published in the notice.~~]

(2) The department will accept a letter of interest by electronic facsimile.

(c) Requests for proposals. [~~The department will send each technical expert submitting a letter of interest a copy of the RFP packet.~~] The RFP packet will include:

(1) the requirements for a responsive proposal including:

(A) date, time, and location for submittal of the proposal;

(B) an outline of the required proposal format and content; and

(C) mandatory/minimum [~~mandatory~~] provider qualifications;

(2) scope of services to be provided by the department;

(3) scope of services to be provided by the provider [~~technical expert~~];

(4) proposed contract duration;

(5) proposed method of payment;

(6) any constraints directly relating to the performance of the contract, if applicable;

(7) description of the evaluation criteria including numerical weighting values [~~of evaluation criteria and minimum and preferred qualifications~~];

(8) a copy of the evaluation matrices;

(9) type of contract selection;

(10) a copy of the proposed contract, with all attachments; [~~and~~]

(11) criteria for breaking ties, if criteria are different from that outlined in §9.85(e) of this title (relating to Evaluation;

(12) [~~(11)~~] any special contract requirements.

(d) Proposal meeting. The meeting may be either mandatory or optional at the discretion of the department. If the meeting is mandatory, the department will only accept proposals from providers [~~technical experts~~] represented at the meeting. [~~Every technical expert submitting a letter of interest will be notified of the date and time of the proposal meeting, if one is to be held.~~] The proposal meeting provides an opportunity for the provider [~~technical expert~~] to seek clarification or ask [~~of~~] questions concerning the contract.

§9.84. Proposals.

(a) Proposal format. The proposal shall be limited to the contents specified in the RFP packet plus the provider's [~~offeror's~~] price for the required [~~technical~~] services.

(b) Receiving proposals. All proposals must be received by the date, time, and location specified in the RFP packet. Proposals will not be accepted by electronic facsimile.

(c) Opening proposals. The department will open proposals and conduct evaluations in confidence, and there will be no disclosure of contents to competing providers [~~offerors~~] during the negotiation process. After the contract is awarded, all proposals shall be open for public inspection except as provided in Government Code, Chapter 552.

(d) Non-responsive proposals. A proposal which does not include all the requirements set forth in the RFP will be rejected as non-responsive and will not be considered further.

§9.85. Evaluation.

(a) Technical expert and ROW provider evaluation [~~Evaluation~~] criteria. The department will evaluate a technical expert's or ROW provider's responsive proposals based on the following criteria, if applicable:

(1) professional qualifications [~~of technical experts~~];

(2) experience of the firm and the team or individuals [~~technical experts~~];

(3) [~~technical or scientific~~] merits of the proposal, including unique or innovative methods for performing the work, [~~if applicable~~];

(4) ability to commit personnel, time, and other resources to the project (technical experts cannot be removed from association with the contract without prior consent by the department);

(5) demonstrated understanding of the scope of services to be provided, including identifying which type of work will be performed by a subprovider, if any;

(6) demonstrated understanding of applicable rules, regulations, policies, and other requirements associated with the environmental or cultural studies, analyses, or document preparation to be performed;

(7) ability to meet department scheduling requirements; [~~and~~]

(8) past performance of the provider, specific provider staff, or subproviders on similar contracts; and

(9) [~~(8)~~] reasonableness of fee.

(b) Landscape architect evaluation. The department will evaluate a landscape architect's responsive proposals based on the following criteria:

(1) experience of the project manager and project team;

(2) demonstrated understanding of the scope of services to be provided, including identifying which type of work will be performed by a subprovider, if any;

(3) references including the ability of the landscape architect to meet deadlines over the past three years;

(4) ability to meet department scheduling requirements; and

(5) reasonableness of fee.

(c) [~~(b)~~] Evaluation scale. The department will assign a numerical weighting value to each evaluation criterion and then score each criterion based upon a numerical scale [~~of 0 to 10 points per criterion with 10 points being the best qualified~~].

(d) [~~(c)~~] Evaluation matrix. The department will evaluate each responsive proposal using an individual proposal evaluation matrix.

(e) Tie scores. In the event of a tie, the managing officer will break the tie using the following method unless different criteria have been listed in the RFP.

(1) The first tie breaker, if needed, will be references/past performances.

(2) The second tie breaker, if needed, will be ability to meet department scheduling requirements.

(3) If there is still a tie, the provider will be chosen by random selection.

§9.86. Discussions For Best and Final Offer for Scientific, Right of Way Acquisition, and Landscape Architectural Services.

(a) When it is determined to be in the best interests of the state for scientific, right of way acquisition, and landscape architectural service contracts, the department may elect to include discussions with the top three [~~for~~] responsive providers' to clarify their [~~offerors'~~] best and final offer prior to selection. In the case of selecting multiple providers, discussions will be held with a number of providers equal to the number of contracts to be awarded plus three. Discussions for best and final offer will occur following completion of the steps in §9.82 through §9.85 of this subchapter, relating to contracts for scientific, right of way acquisition, and landscape architectural services.

(b) If the department elects to conduct discussions as provided for in subsection (a) of this section, the top providers, as determined by subsection (a) of this section, [~~each responsive offeror~~] shall be given an equal opportunity to discuss and revise their proposals [~~his or her proposal~~]. The department will not disclose any information derived from proposals submitted by competing providers [~~offerors~~] during these discussions. Discussions will include [~~identification of~~] any portion of the responsive proposal [~~not meeting minimum qualifications or meeting only minimum qualifications~~] in order to assess a provider's [~~an offeror's~~] ability to meet the RFP requirements, and an opportunity for the provider [~~offeror~~] to demonstrate an understanding of the project and remedy the proposal's deficiencies. Discussions may include reasonableness of fee.

(c) After completing discussions with providers [~~offerors~~], the department will send written notification to each provider [~~offeror~~] to submit a best and final offer. The proposals will be reevaluated using the criteria in §9.85 [~~§9.85(a)~~] of this title (relating to Evaluation). The evaluation shall be made in writing and shall include the individual proposal evaluation matrix as specified in §9.85(d) [~~§9.85(c)~~] of this title.

§9.87. Selection.

The department will perform three types of contract selections.

(1) Individual contract selection. One contract will result from the contract notice.

(2) Multiple contract selection. More than one contract, of similar work types and estimated amounts [~~not to exceed $500,000 per contract,~~] will result from the contract notice. The notice will indicate the number and type of contracts to result from the advertisement, and specify a range of scores for providers that will be considered qualified to perform the work.

(3) Indefinite delivery contract selection. This contract selection may be for award of contracts to single or multiple providers to perform work under a general scope of services. The typical type of work will be described in the contract notice. Specific services shall be authorized by individual work authorizations [~~orders~~] on an as-needed basis. The maximum contract amount shall be specified and shall not exceed $1,000,000 [~~$500,000~~] per contract. The contract period shall be specified. All work authorizations [~~orders~~] under an indefinite delivery contract shall be issued within two years of the effective date of the contract.

§9.88. Award.

(a) The department will make the award to the provider [~~technical expert~~] submitting the highest-ranked proposal and will notify the other providers [~~offerors~~] of the selection. For multiple awardees under a single RFP, the department will make awards to the highest ranked providers [~~offerors~~].

(b) If the department finds that none of the proposals are acceptable, the department will reject all proposals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on November 22, 1999.

TRD-9907936
Richard Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-8630

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Chapter 29. MAINTENANCE

Subchapter B. SANCTION OF MAINTENANCE CONTRACTORS

43 TAC §§29.21-29.26

The Texas Department of Transportation proposes amendments to §§29.21-29.26, concerning sanction of maintenance contractors.

EXPLANATION OF PROPOSED AMENDMENTS

Chapter 29, Subchapter B, provides guidelines by which maintenance contractors may be debarred. The proposed amendments are necessary to allow the department to clarify the sanctions that may be imposed on contractors that are declared in default on maintenance contracts. In addition, the amendments provide a broader range of sanctions to be imposed than are currently allowed. The new range of sanctions will range from less severe to more severe than is currently allowed. The title of Subchapter B is being changed from "Debarment of Maintenance Contractors" to "Sanction of Maintenance Contractors."

Amendments to §29.21 are nonsubstantive. The reference to the Texas Transportation Commission has been removed because the commission no longer awards all maintenance contracts.

Amendments to §29.22 revise the definition of "maintenance contract" to remove unnecessary language and add a definition of "sanction." These amendments are nonsubstantive.

Amendments to §29.23 clarify the reasons for which a contractor may be sanctioned by deleting actions that may only result in a contract default. Since these actions result in a default, listing them is redundant.

Amendments to §29.24 substitute the word "sanction" for "debar" to reflect amendments to §29.26 which add a reduction in bidding capacity as a sanction. The amendments also update a citation to the department's contested case procedure rules.

Amendments to §29.25 substitute the word "sanction" for "debarment" to reflect amendments to §29.26.

Amendments to §29.26 describe the various sanctions that are possible and the periods that the sanctions will imposed. The current rules authorize the department to debar a contractor for up to one year.

The proposed amendments will allow a lesser and more appropriate sanction of a one year reduction in bidding capacity in cases of one default. The reduction in bidding capacity will allow a contractor to demonstrate for one year its ability to complete work before being able to again bid at full capacity.

The amendments will clarify that a sanction of a one year debarment and an additional one year reduction in bidding capacity may result from two defaults within a five year period.

The proposed amendments will also allow a more severe and appropriate sanction of three years debarment and an additional one year reduction in bidding capacity to be imposed if a contractor defaults on a third contract within five years of their second default. The three years debarment is needed to deny state contracts to contractors who repeatedly fail to complete contracts.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amendments are in effect, there will no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Zane L. Webb, Director, Maintenance Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Webb has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing or administering the amendments will be to provide for the expeditious completion of state maintenance projects, thereby maximizing the use of scarce state highway funds and the safety of the traveling public. The proposed amendments place no new demands, requirements, or practices on any business, including small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Zane L. Webb, P.E., Maintenance Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 3, 2000.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the proposed amendments.

§29.21. Purpose.

It is the policy of the Texas Transportation Commission to protect the health, welfare, and safety of the traveling public and the state's substantial investment in its system of state highways, by ensuring that only responsible contractors are eligible to bid on, enter, or subcontract under highway maintenance contracts awarded under Transportation Code, Chapter 223 [~~by the commission~~], and further to ensure that those contracts are fully performed in an efficient and timely manner.

§29.22. Definitions.

The following words and terms, when used in the sections under this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliate - A contractor is said to be an affiliate of another contractor if they are so closely connected or associated that

one of them, either directly or indirectly, controls or has power to control the other; if a third party controls or has the power to control both of them; if the owner of one is a spouse or a member of the immediate family of the owner of the other; or if they are or have been so closely allied through an established course of dealings, including but not limited to the lending of financial assistance, engaging in joint ventures, etc., as to create a public perception that the two contractors are a single entity.

(2) Commission - The Texas Transportation Commission.

(3) Contract - A maintenance contract.

(4) Contractor - A maintenance contractor.

(5) Debar, debarment - To disqualify (the disqualification of) a contractor from bidding on, entering, and/or participating as a subcontractor under a maintenance contract.

(6) Department - The Texas Department of Transportation.

(7) Executive director - The executive director of the Texas Department of Transportation or his designee not below the level of deputy or assistant executive director.

(8) Maintenance contract - A contract let by the Texas Department of Transportation[~~, through either its Maintenance Division or one of its district offices,~~] for maintenance work on a segment of the state highway system.

(9) Maintenance contractor - An individual, partnership, corporation, or other business entity which bids on a maintenance contract, or which functions, or seeks to function, as a subcontractor under any such contract.

(10) Sanction - Debarment or reduction in bidding capacity.

(11) [~~(10)~~] Subcontractor - An individual, partnership, corporation, or other business entity to which the prime contractor sublets, or proposes to sublet, any portion of a highway maintenance contract.

§29.23. Reasons for Sanctions [~~Debarment~~].

(a) The executive director may sanction [~~debar~~] a contractor, and/or a contractor's affiliate or successor[~~, from bidding on, entering, and/or participating as a subcontractor under a maintenance contract,~~] if that contractor:

[~~(1) fails to enter a maintenance contract duly awarded by the commission;~~]

[~~(2) performs a maintenance contract in an unsatisfactory manner by:~~]

[~~(A) failing to begin work within the specified time;~~]

[~~(B) failing to perform the work with sufficient workmen, equipment and/or materials to ensure completion of the work within the specified time;~~]

[~~(C) neglecting or refusing to remove materials or to perform anew work rejected by the department as being defective or not meeting specifications;~~]

[~~(D) discontinuing prosecution of the work without the express approval of the department;~~]

[~~(E) assigning any interest in a maintenance contract for any purpose without express approval by the executive director;~~]

[~~(F) subletting any work under that contract without express approval by the department; or~~]

[~~(G) failing for any other reason to perform the work in an acceptable and workmanlike manner;~~]

(1) [~~(3)~~] is declared in default on a contract; or

(2) [~~(4)~~] commits an act or offense, or engages in conduct which is a basis for debarment of a contractor pursuant to §9.6 of this title (relating to Procedure for Debarment of a Contractor) or §9.8 of this title (relating to Supplemental Procedures for Suspension or Debarment of a Contractor).

(b) The existence of a cause for sanction [~~debarment~~] under this section does not necessarily require that the contractor be sanctioned [~~debarred~~]; the seriousness of the contractor's acts or omissions and any mitigating circumstances should be considered in making any sanction [~~debarment~~] decision.

(c) Default [~~Failure to perform, unsatisfactory performance, or default~~] caused by acts beyond the control of the contractor shall not be considered as a basis for sanctioning [~~debarment~~].

§29.24. Notice and Appeal.

(a) Upon a determination that a contractor should be sanctioned [~~debarred~~], the department shall mail a notice of the proposed sanction [~~debarment~~] to the last known address of the contractor by certified mail.

(b) The notice shall clearly state:

(1) the facts and circumstances underlying the proposed sanction [~~debarment~~];

(2) the effective date and period of the sanction [~~debarment~~]; and

(3) the right of the contractor to request an administrative hearing on the question of the proposed sanction [~~debarment~~].

(c) A request for administrative hearing under this section must be made in writing to the executive director within 10 days of the receipt of the notice of proposed sanction [~~debarment~~].

(d) An administrative hearing requested pursuant to this section shall be conducted in accordance with §§1.21 et seq. [~~§§1.21-1.61~~] of this title (relating to Contested Case Procedure), and shall serve to abate the proposed sanction [~~debarment~~] unless and until that sanction [~~debarment~~] is affirmed by order of the commission.

§29.25. Effective Date of Sanction [~~Debarment~~].

Except as provided in §29.24 of this title (relating to Notice and Appeal), sanction [~~debarment~~] shall be effective on the date specified in the notice of proposed sanction [~~debarment~~].

§29.26. Imposition of Sanctions [~~Period of Debarment~~].

(a) After one default, the department may impose a 50% reduction in the contractor's bidding capacity (calculated in accordance with §9.12 of this title (relating to Qualification of Bidders)) for a period not to exceed 12 months.

(b) After a second default within five years of the first default, the department may debar the contractor for a period not to exceed 12 months, and after the debarment period impose a 50% reduction in the contractor's bidding capacity (calculated in accordance with §9.12 of this title) for a period not to exceed 12 months.

(c) After a third default within five years of the second default, the department may debar the contractor for a period not

to exceed 36 months, and after the debarment period impose a 50% reduction in the contractor's bidding capacity (calculated in accordance with §9.12 of this title) for a period not exceed 12 months.

(d) A contractor who commits an act or offense, or engages in conduct which is a basis for debarment pursuant to §9.6 of this title (relating to Procedure for Debarment of a Contractor) or §9.8 of this title (relating to Supplemental Procedures for Suspension or Debarment of a Contractor) shall be sanctioned as described in those sections.

[~~(a) The period of a single debarment imposed under §29.23 of this title (relating to Debarment), shall be for a period commensurate with the seriousness of the cause, but shall not exceed 12 months duration.~~]

(e) [~~(b)~~] The executive director may consider rescinding or reducing [~~terminating~~] the sanction [~~debarment or reducing the period~~], upon the contractor's application, supported by documentation, for reasons deemed appropriate by that official.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907937
Richard Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 2, 2000
For further information, please call: (512) 463-8630

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 19. EDUCATION

Part 7. STATE BOARD FOR EDUCATOR CERTIFICATION

Chapter 232. GENERAL REQUIREMENTS APPLICABLE TO ALL CERTIFICATES ISSUED

Subchapter M. TYPES AND CLASSES OF CERTIFICATES ISSUED

19 TAC §232.500

The State Board for Educator Certification has withdrawn from consideration for permanent adoption the amendment to §232.500, which appeared in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8886).

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907973
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Effective date: November 22, 1999
For further information, please call: (512) 469-3001

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19 TAC §232.520

The State Board for Educator Certification has withdrawn from consideration for permanent adoption the repeal of §232.520, which appeared in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8886).

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907974
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Effective date: November 22, 1999
For further information, please call: (512) 469-3001

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 16. ECONOMIC REGULATION

Part 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

Chapter 62. CAREER COUNSELING SERVICES

16 TAC §§62.1, 62.10, 62.80, 62.90

The Texas Department of Licensing and Regulation adopts amendments to §§62.1, 62.10, 62.80 and 62.90 concerning the Career Counseling Services program, without changes to the proposed text as published in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8857).

The 76th Legislature enacted HB3155, which made non-substantive changes to Texas Revised Civil Statutes Annotated, Article 9100 and codified the article into the Occupations Code, Chapter 51. These changes are reflected in §§62.1 and 62.90. Other changes in these sections are for clean-up and clarity.

The amendments to §62.10 number definitions as required by the Texas Register.

The amendments to §62.80 increase the original and renewal certificate of authority fees from $650 to $750. The reprint fee has been changed from $50 to $25 to standardize it with the agency's other rules. Other changes in this section are for clean-up and clarity. The fee rate stated herein was set by the Texas Department of Licensing and Regulation Commission, and not mandated by the Legislature. The Department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are below the amount required by the Department to cover costs. Without the increase, it could adversely affect the administration and enforcement of the Career Counseling Services program.

The sections will function by allowing the department to cover program costs, clean-up and clarify existing language and update citations from Article 9100 to the Occupations Code, Chapter 51.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Revised Civil Statutes Annotated, Article 5221a-8 (Vernon 1997) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Article.

The amendments affect Texas Revised Civil Statutes Annotated, Article 5221a-8 (Vernon 1997) and the Texas Occupations Code, Chapter 51 (Vernon 1999).

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907742
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 5, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-7357

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Chapter 68. ARCHITECTURAL BARRIERS

16 TAC §§68.1, 68.10, 68.30, 68.65, 68.80, 68.90, 68.93

The Texas Department of Licensing and Regulation adopts amendments to §§68.1, 68.10, 68.30, 68.65, 68.80, 68.90, 68.93 concerning the Architectural Barriers program, without changes to the proposed text as published in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8858).

The 76th Legislature enacted HB3155, which made non-substantive changes to Article 9100 and codified the article into the Occupations Code, Chapter 51. These changes are reflected in §§68.1, 68.90, and 68.93. The amendments to §68.10 number definitions as required by the Texas Register. The amendment to §68.30 corrects a typographical error in the last rule adoption by changing "host" to "hoist" in paragraph (2). The amendments to §68.65 are for clean-up and clarity.

The amendments to §68.80 increase the fees for reviews, inspections, variances, plan reviews, and contract provider fees as shown on the proposed fee schedule by increasing the review fees in increments of $25 and the inspection fees are increased in increments of $35. The inspection of state leases where there is no construction involved has been increased from $175 to $225 per lease; the variance application fee has been increased from $100 to $150; the variance appeal fee has been increased from $100 to $200; the contract provider project filing fee has been increased from $35 to $50; and a $50 contract provider inspection filing fee has been added. The Department is authorized to hire two FTE's for the architectural barriers program, and their salaries, benefits, equipment, and

travel expenses must be supported by fees collected. The fee rate was set by the Texas Department of Licensing and Regulation Commission, and not mandated by the Legislature. The Department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are below the amount required by the Department to cover costs. Without the increase it could adversely affect the administration and enforcement of the Architectural Barriers program.

Comments on the amendments were received from Accessology, Inc., Texas Society of Architects and Texas Society of Professional Engineeers.

Comment: In §68.10(12), rename the definition "Substantially Renovated, Modified or Altered" to "Substantial Renovation, Modification or Alteration". The reason given for this suggestion was recent changes in the Texas Architectural Barriers Act (Article 9102) removing the word "Substantially" from this phrase.

Response: The agency agrees that the definition in §68.10(12) should mirror changes in recent legislation and intends to propose renaming this definition to "Renovation, Modification or Alteration" in upcoming recommendations for proposed rule changes.

Comment: Expand §68.30(1), "Buildings and facilities owned and operated by the federal government," to read "Buildings and facilities owned, or operated, or leased to, the federal government." Reasons given for this suggestion were: attempting to apply state law to facilities leased to a federal agency meets resistance as well as questions of jurisdiction from the entity and/or landlord; and, landlord is often mandated by the agency to construct according to established plans and specifications.

Response: The agency will consider this suggestion in upcoming recommendations for proposed rule changes with input from interested parties, but will not at this time, expand the federal building exemption.

Comment: Two commenters raised objections to the change proposed in §68.65 that formally increases the number of members from eight to nine. Both commenters felt that the "current" makeup of eight members works well and should not be changed.

Response: The agency disagrees. The Legislature specifically states that the Architectural Barriers Advisory Committee shall be unbalanced in favor of persons with disabilities; Section 7(a) of Article 9102. Since Article 9102 requires at least eight members, in order to maintain positions currently on the board, an additional seat for a disabled person was created. Therefore, the current composition of this board is nine members, of which five are persons with disabilities.

Comment: That the new "Contractor Provider Inspection Filing Fee" in §68.80 not be retroactive and only be applied to new projects filed with the agency after a date subsequent to the effective date of these amendments. The commenter further recommended that the agency consider increasing the existing "Contract Provider Project Filing Fee" to $100 and charge only one fee, rather than charging separate project filing and inspection filing fees. Reasons given for this suggestion were: in most cases, commenter collects plan review, inspection and filing fees when construction documents are submitted for review, before construction is complete; commenter feels that billing owner for additional fees now seems awkward and unfair, since fees for inspection services have already been collected, and that they should not have to incur administrative costs of additional billing and collection; and, commenter felt that their second suggestion would simplify the fee schedule and reduce their and the agency's administrative time by having to make only one bookkeeping entry.

Response: The department agrees that the fees should not apply retroactively and disagrees that the fees should apply to a date subsequent to adoption. We realize that immediately after adoption of these rule changes, the new filing fee for inspections may occur after an Independent Contract Provider (ICP) has billed a building or facility owner for inspection services. This situation will result in an ICP sending an amended invoice to building or facility owners, or absorbing the additional fee. The agency believes the burden of re-billing or absorbing the $50 filing fee is minimal, given the finite number of possible occurrences, and in comparison to the agency's appropriations requirement to cover costs for the Architectural Barriers program. The agency disagrees with the second suggestion. The reason for establishing separate fees for plan review and inspection filing was that not all ICP's for the agency provide both plan review and inspection services. Requiring all ICP's to pay the larger initial fee would force those providing only plan review services to pay a fee for which they may not be fully reimbursed. This would also apply to those ICP's who do not necessarily provide inspection services for all projects that they review.

Comment: That the plan review and inspection fees in §68.80, for projects with estimated construction cost less than $50,000, be increased from $75 to $150 - $175 for review and from $85 to $200 - $225 for inspection. Reasons given for this suggestion were: although Independent Contract Providers (ICP) set their own fees, many charge the same as or close to state's fees; proposed fees are too low to cover costs incurred by ICP or agency; and, the time and travel expenses for such small projects are similar to those falling into $50,000 - $200,000 range.

Response: The department disagrees. Increasing the fees for projects with estimated construction costs less than $50,000 would garner a negligible amount of revenue, given the small number of projects falling in this category. The proposed fee change for plan reviews from $50 to $75, and the proposed fee change for inspections from $50 to $85 covers the cost for services at this time.

Comment: Two commenters objected to the fee increases proposed in §68.80. Both felt that the increases were not necessary. One of these commenters felt that changes made to Article 9102, allowing the agency to expand coverage by third party reviewers and inspectors, should alleviate the need to increase department fees. The other commenter expressed concern that the increase in fees for third party contractors would seem to be a disincentive to their performing more of the agency's review and inspection functions.

Response: The agency disagrees. We are required to structure fees for each statute to pay for its regulation and the fees currently in place are below the amount required for the Department to cover all costs related to the program. These increases are necessary to fund all aspects of administering and enforcing the program, and to fund general support services such as human resources, purchasing, facilities management, general administrative support, Attorney General's Office services, State Auditor's Office services, etc. An increase in reviews and

inspections by third party contractors would not directly relate to the agency's cost to perform these same functions. The cost per agency review and inspection will remain the same or even increase if more of these are performed by third parties. The increase in fees for the third party contractors is necessary to cover the agency's cost of supporting and overseeing this aspect of the program, particularly if this aspect of the program continues to grow.

The amendments are adopted under Texas Revised Civil Statutes Annotated, article 9102 (Vernon 1999) which authorizes the Texas Commission of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The amendments affect Texas Revised Civil Statutes Annotated, article 9102 (Vernon 1999) and the Texas Occupations Code, Chapter 51 (Vernon 1999).

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907745
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 5, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-7357

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Chapter 69. REGULATION OF CERTAIN TRANSPORTATION SERVICE PROVIDERS

16 TAC §§69.1, 69.80, 69.90

The Texas Department of Licensing and Regulation adopts amendments to §§69.1, 69.80, and 69.90 concerning the Regulation of Certain Transportation Service Providers program, without changes to the proposed text as published in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8860).

The 76th Legislature enacted HB3155, which made nonsubstantive changes to Texas Revised Civil Statutes Annotated, Article 9100 and codified the article into the Occupations Code, Chapter 51. These changes are reflected in §§69.1 and 69.90. Other changes in these sections are for clean-up and clarity.

The amendments to §69.80 increase the application processing and renewal fee for a certificate of registration from $300 to $320. The fee rate stated herein was set by the Texas Department of Licensing and Regulation Commission, and not mandated by the Legislature. The Department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are below the amount required by the Department to cover costs. Without the increase it could adversely affect the administration and enforcement of the Regulation of Certain Transportation Service Providers program.

No comments were received regarding adoption of the amendments.

The amended sections are adopted under Texas Civil Statutes, Article 6675(e) (Vernon 1997) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Article.

The amendments affect the Texas Civil Statutes, Article 6675(e) (Vernon 1997) and the Texas Occupations Code, Chapter 51 (Vernon 1999).

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907743
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 5, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-7357

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Chapter 75. AIR CONDITIONING AND REFRIGERATION CONTRACTOR LICENSE LAW

16 TAC §§75.10, 75.80, 75.90

The Texas Department of Licensing and Regulation adopts amendments to §§75.10, 75.80 and 75.90 concerning the Air Conditioning and Refrigeration Contractors program, without changes to the proposed text as published in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8860).

The amendment to §75.10 corrects a typographical error in the last rule submission by changing "and" to "or" in the definition of repair work.

The amendment to §75.80 raises the fees for new and renewed licenses from $125 to $300 for a three-year period. The Department is authorized to hire two FTE's for the air conditioning and refrigeration enforcement program, and their salaries, benefits, equipment, and travel expenses must be supported by fees collected. The fee rate stated herein was set by the Texas Department of Licensing and Regulation Commission, and not mandated by the Legislature. The Department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are below the amount required by the Department to cover costs. Without the increase it could adversely affect the administration and enforcement of the Air Conditioning and Refrigeration Contractors program.

The amendments to §75.90 update the cite for the Texas Revised Civil Statutes Annotated, Article 8861 from (Vernon 1997) to (Vernon 1999) and the cite for 16 Texas Administrative Code, Chapter 60, (1998) to (1999). Changes were made to the statute and the code and the rules should reflect the current information.

The sections will function by allowing the department to cover program costs and by updating citations from Article 9100 to the Occupations Code, Chapter 51.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Revised Civil Statutes Annotated, article 8861 (Vernon 1999) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Act.

The amendments affect Texas Revised Civil Statutes Annotated, article 8861 (Vernon 1999) and the Texas Occupations Code, Chapter 51 (Vernon 1999).

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907741
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 5, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-7348

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Chapter 76. WATER WELL DRILLERS AND WATER WELL PUMP INSTALLERS

16 TAC §§76.707, 76.800, 76.900

The Texas Department of Licensing and Regulation adopts amendments to §§76.707, 76.800, 76.900 concerning the Water Well Drillers and Water Well Pump Installers program. Section 76.800 is adopted with changes to the proposed text as published in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8861). Sections 76.707 and 76.900 are adopted without changes and will not be republished.

The 76th Legislature enacted HB3155, which made non-substantive changes to Texas Revised Civil Statutes Annotated, Article 9100 and codified the article into the Texas Occupations Code, Chapter 51. These changes are reflected in §§76.707 and 76.900.

The amendments to §76.800 increase the driller and installer license and renewal fees from $125 to $170, and the combination driller and installer license and renewal fees from $175 to $220.

During the comment period, TDLR received comments from the Texas Natural Resource Conservation Commission (TNRCC) and two licensed water well drillers. The comment from TNRCC suggested that the word "annual" be added to §76.800 in order to clarify that this is an annual license fee. The department agrees and the newly revised §76.800 was amended to add "annual" license. Two licensed water well drillers opposed the increase in fees proposed in §76.800. The Department is required to structure fees for each statute to pay for its own regulation and the fees currently in place for the Water Well Drillers and Water Well Pump Installer programs are below the amount required by the Department to cover costs. Without the increase it could adversely affect the administration and enforcement of the Water Well Drillers and Pump Installers program.

The amendments are adopted under the Texas Water Code, Chapters 32 and 33 (Vernon 1999) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Code.

The amendments affect the Texas Water Code, Chapters 32 and 33 (Vernon 1999) and the Texas Occupations Code, Chapter 51 (Vernon 1999).

§76.800. Fees.

(a) Exam Fees.

(1) Driller and Installer application exam fees are $125 per exam.

(2) Re-exam fee is $100 for each exam.

(b) Annual License Fees.

(1) Driller's license is $170.

(2) Installer's license is $170.

(3) A combination Driller and Installer license is $220.

(4) Apprentice registration is $50.

(c) Annual License Renewal Fees.

(1) Driller's renewal license is $170.

(2) Installer's renewal license is $170.

(3) A combination Driller and Installer renewal license is $220.

(4) Apprentice renewal registration is $50.

(d) Lost, revised, or duplicate license $25.

(e) Variance request fee is $100.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907744
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 5, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-7357

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TITLE 19. EDUCATION

Part 2. TEXAS EDUCATION AGENCY

Chapter 61. SCHOOL DISTRICTS

Subchapter CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1035

The Texas Education Agency (TEA) adopts new §61.1035, concerning school facilities, without changes to the proposed text as published in the September 24, 1999, issue of the *Texas*

Register (24 TexReg 8037) and will not be republished. The new section creates a state allotment for the payment of existing debt as authorized under the Texas Education Code (TEC), Chapter 46.

Senate Bill 4, 76th Texas Legislature, 1999, created the program of assistance with payment of existing debt as a third tier of the Foundation School Program pursuant to the TEC, Chapter 46. The new tier, called the existing debt allotment (EDA), provides a guaranteed amount of state and local funds for each cent of tax effort to pay the principal and interest on eligible bonds. The amount of state support, subject to certain limitations, is determined by formula. New §61.1035 explains the eligibility criteria for the EDA, limits on assistance, data elements, payment cycle, use of funds, and refinancing of eligible debt.

No comments were received regarding adoption of the new section.

The new section is adopted under the Texas Education Code, §46.031, as added by Senate Bill 4, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules for the administration of assistance with payment of existing debt.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907926
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Effective date: December 12, 1999
Proposal publication date: September 24, 1999
For further information, please call: (512) 463-9701

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TITLE 25. HEALTH SERVICES

Part 1. TEXAS DEPARTMENT OF HEALTH

Chapter 31. NUTRITION SERVICES

25 TAC §31.2, §31.3

The Texas Department of Health (department) adopts amendments to §31.2 and §31.3 concerning the Farmers' Market Nutrition Program and the Register of Mother-Friendly Business. Section 31.3 is adopted with changes to the proposed text published in the June 4, 1999, issue of the *Texas Register* (24 TexReg 4142). Section 31.2 is adopted without changes and therefore will not be republished.

Government Code, §2001.039, enacted by the 76th Texas Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The sections have been reviewed, and the department has determined that reasons for readopting the sections continue to exist.

The department published a Notice of Intention to Review concerning §31.2 and §31.3 as required by the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, in the *Texas Register* on February 12, 1999 (24 TexReg 1001). No comments were received by the department in response to this notice.

The Farmer's Market Nutrition Program supplements the Special Supplemental Food Program for Women, Infants, and Children (WIC) by making fresh fruits and vegetables purchased from authorized farmers' markets in Texas available to WIC clients. Section 31.2 was amended to rename the program because this activity by the department is no longer a demonstration project. Each year the department updates the state plan of operations for the Farmers' Market Nutrition Program for review and approval by the United States Department of Agriculture (USDA). The date of USDA approval was added to §31.2(a), which may then be amended annually.

State law authorizes a woman to breast-feed her baby in any location in which the mother is authorized to be. Health and Safety Code, §165.003 states that businesses which support work-site breast-feeding may use the designation "mother-friendly" in their promotional materials if their policies have been approved by the department. The Register of Mother-Friendly Businesses lists businesses whose policies have been approved and is available for public inspection. Section 31.3, Register of Mother-Friendly Businesses, was amended to include current references to the division within the department which supports the program.

The department received no public comments during the comment period for these amendments. However, the department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning §§31.3(c)(1)-(2), 31.3(d)(1), and 31.3(d)(3), all remaining references to "Breast-feeding Promotion Section" have been deleted and replaced by "Bureau of Nutrition Services". The amendment was included in another part of §31.3(c)(1) and §31.3(d)(2) as proposed. Sections 31.3(c)(2), 31.3(d)(1) and 31.3(d)(3) were originally proposed for readoption without change, but are being amended so the reference to "Bureau of Nutrition Services" will be consistent throughout the section.

The amendments are adopted under Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health. Government Code, §2001.039 was implemented by this adoption.

§31.3. Register of Mother-Friendly Businesses.

(a) Definitions. The following words and terms, when used in this section shall have the following meaning, unless the context clearly indicates otherwise.

(1) Mother-friendly business–A business that actively promotes and supports breast-feeding by its employees.

(2) Department–Texas Department of Health.

(b) Minimum standards. To be considered mother-friendly, a business must:

(1) adhere to the definition of a mother-friendly business;

(2) provide work schedule flexibility to allow employees time for either expressing breast milk or breast-feeding;

(3) provide employees access to a private area for either expressing breast milk or breast-feeding;

(4) provide access to a sink; and

(5) provide access to a hygienic place to store expressed breast milk.

(c) Application for designation as a mother-friendly business. To apply for designation as a mother-friendly business, a business must:

(1) complete a mother-friendly application. Applications are available from the Bureau of Nutrition Services (BNS), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and should be completed by the contact person for mother-friendly activities. Completed applications should be returned to the department's Bureau of Nutrition Services; and

(2) submit completed applications for review. Completed applications will be reviewed by the staff of the Bureau of Nutrition Services for compliance with the minimum standards set forth in subsection (b) of this section. Businesses that meet the standards will receive a letter signed by the Commissioner of Health and a certificate suitable for framing and display. Businesses that do not meet the standards will be notified by letter and will be offered technical assistance to achieve compliance.

(d) Maintaining designated status. A business designated as mother-friendly must:

(1) be listed as such by the department. The list of mother-friendly businesses will be maintained by the staff of the department's Bureau of Nutrition Services. The department will make the list available for public inspection;

(2) keep the staff of the Bureau of Nutrition Services informed of any changes in the company's mother-friendly policies. If its mother-friendly policies change, a business must submit an amended application; and

(3) comply with minimum standards at all times. If a business does not comply with the program's minimum standards at all times, the department may suspend or revoke the mother-friendly designation. A business may amend its nonconforming policies and may reapply for the mother-friendly designation. Employees and clients should direct complaints about the activities of a business that employs the mother-friendly designation to the department's Bureau of Nutrition Services.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907887

Susan K. Steeg

General Counsel

Texas Department of Health

Effective date: December 9, 1999

Proposal publication date: June 4, 1999

For further information, please call: (512) 458-7236

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Chapter 139. ABORTION FACILITY REPORTING AND LICENSING

Subchapter A. GENERAL PROVISIONS

25 TAC §§139.1-139.3

The Texas Department of Health (department) adopts amendments to §§139.1-139.3, concerning the regulation of abortion facilities without changes as published in the *Texas Register* on September 24, 1999 (24 TexReg 8082), and therefore the sections will not be republished. Specifically, the sections cover purpose and scope, definitions, and exempt and unlicensed facilities.

The amendments implement certain provisions of House Bill 2085. Article 22, House Bill 2085, 76th Legislature, 1999, amended Health and Safety Code (HSC), Chapter 245. The statutory amendment to HSC, §245.004, relating to exemption from licensing requirement, provides an exemption for the office of a physician licensed under the Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), unless the office is used for the purpose of performing more than 300 abortions in any 12-month period, effective September 1, 1999. The statute, prior to September 1, 1999, exempted the office of a physician provided the office was not used "primarily" for the purpose of performing abortions. "Primarily" was defined by rule (25 TAC §139.2) as 51% or more of the patients actually treated within the previous calendar year. Statutory language was also added that excludes abortions performed by a physician to prevent the death of the patient or to prevent serious impairment of a patient's physical health in the calculation of the number of abortions performed. Physicians affected by these changes are required to be licensed by January 1, 2000. These statutory amendments are reflected in the amendments to §§139.1-139.3.

The statutory amendment to HSC, §245.014(b) relating to criminal penalties, makes it a "Class A" misdemeanor (changed from "Class C" misdemeanor) for a person who is not exempt from licensure to establish or operate an abortion facility in this state without an appropriate license issued under the Act, effective September 1, 1999. No rule change was necessary.

The statutory amendment to HSC, §245.016 relating to abortion in an unlicensed abortion facility to prevent death or serious impairment, removes from consideration "to prevent serious impairment of a patient's mental condition" as an option/responsibility of a physician in consideration of performing an abortion in an unlicensed abortion facility effective September 1, 1999. No rule change was necessary.

No comments were received on the proposal during the comment period.

The amendments are adopted under Health and Safety Code, Chapter 245 which establishes the licensing requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907888
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 9, 1999
Proposal publication date: September 24, 1999
For further information, please call: (512) 458-7236

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Chapter 139. ABORTION FACILITY REPORTING AND LICENSING

The Texas Department of Health (department) adopts new §139.4 and §139.5, the repeal of §139.5, and amendments to §139.23 and §139.47, concerning abortion reporting requirements without changes to the proposed text as published in the September 24, 1999, issue of the *Texas Register* (24 TexReg 8085), and therefore the sections will not be republished.

Existing §139.5 which includes annual reporting requirements and third trimester reporting requirements is repealed to allow for the section to be restructured. The annual reporting requirements for facilities are moved to new §139.4. The reporting requirements for third trimester abortions and emergency abortions performed on minors are under new §139.5. Cite references to §139.5 are amended as appropriate in §139.23 (application procedures for annual renewal of a license) and §139.47 (facility administration).

New §139.5 includes new statutory requirements adopted during the 1999 legislative session relating to abortion reporting. Senate Bill 30 adopted new requirements for abortion notification (Title 2, Family Code, Chapter 33). Section 33.002 abridges a physician's performance of an abortion on a pregnant unemancipated minor until certain criteria have been met. The criteria include 48-hour parental notification, judicial approval, failure by a court to act, or determination by the physician that a medical emergency exists. A physician may perform an abortion on a minor without parental notification or a court order if the physician provides written certification to the Texas Department of Health and in the patient's medical record that immediately performing the abortion was necessary to prevent the minor's death or serious bodily injury. The department is responsible for preparing the form to be used by the physician for making the certification. The rule requires abortion facilities/physicians to comply with the new reporting requirement.

No comments were received on the proposal during the comment period.

Subchapter A. GENERAL PROVISIONS

25 TAC §139.4, §139.5

The new sections are adopted under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907889
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: September 24, 1999
For further information, please call: (512) 458-7236

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25 TAC §139.5

The repeal is adopted under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Subchapter B. LICENSING PROCEDURES

25 TAC §139.23

The amendment is adopted under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

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Susan K. Steeg
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Texas Department of Health
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For further information, please call: (512) 458-7236

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Subchapter D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §139.47

The amendment is adopted under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

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Susan K. Steeg
General Counsel
Texas Department of Health
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Chapter 157. EMERGENCY MEDICAL CARE

Subchapter G. EMERGENCY MEDICAL SERVICES TRAUMA SYSTEMS

25 TAC §157.130

The Texas Department of Health (department) adopts an amendment to §157.130 concerning distribution of monies from the Emergency Medical Services (EMS) and Trauma Care System Account (account) without changes to the proposed text as published in the September 24, 1999, issue of the *Texas Register* (24 TexReg 8088), and therefore the section will not be republished.

This section is amended to implement required changes resulting from legislative amendments to the Health and Safety Code, Chapter 773. The amendment modifies the allocations of the account to EMS and the methodology for disbursement of the EMS and Regional Advisory Council (RAC) allotments.

The Health and Safety Code, Chapter 773, §§121-124, was amended by three bills enacted by the 76th Legislature, 1999. Rider 61 on House Bill (HB) 1 specified that at least 60% of the EMS allotment be allocated to rural counties and 40% to urban counties. Sections 19.07-19.09 of HB 2085, allow the EMS and RAC allotments to be disbursed directly to a RAC for distribution if the RAC is incorporated as an entity that is exempt from federal income tax under the Internal Revenue Code of 1986, §501(a), and its subsequent amendments, by being listed as an exempt organization under §501(c)(3) of the code. Section 16 of HB 3084 changes the status of the fund from a dedicated fund to an account in the state treasury.

The department received general comments that were in favor of the rule as proposed. The department agreed with the commenters and no changes were made as a result of the comments.

The commenters were Senator Drew Nixon, Representative Richard Hardcastle, Representative Edmund Kuempel, and Representative Tom Ramsey and were in favor of the proposed rule.

The amendment is adopted under the Health and Safety Code, §773.115, which provides the Texas Board of Health (board) with the authority to adopt rules for the development of an EMS/trauma care system; and Health and Safety Code §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Part 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

Chapter 406. ICF/MR PROGRAMS

Subchapter C. VENDOR PAYMENTS

25 TAC §406.102

The Texas Department of Mental Health and Mental Retardation (TDMHMR) Adopts the repeal of §406.102 of 25 TAC, Chapter 406, Subchapter C, governing Vendor Payments with-

out changes to the text as proposed in the August 6, 1999, issue of the *Texas Register* (24 TexReg 5994). The repeal of the section is adopted in order to adopt new §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 of Chapter 419, Subchapter E, Intermediate Care Facilities for the Mentally Retarded (ICF/MR) Programs, which address substantially the same issues.

New §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 and the repeals of §406.102 of Chapter 406, Subchapter C, governing Vendor Payment; §§406.251-409.254 of 25 TAC, Chapter 406, Subchapter F, governing Personal Finances and Funds; and §406.311 of 25 TAC, Chapter 406, Subchapter G, governing Additional Facility Responsibilities are contemporaneously proposed for public comment in this issue of the *Texas Register*. The new rules are part of a comprehensive reorganization of chapters and subchapters in TDMHMR's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by the Texas Government Code, §2001.039 as added by Senate Bill 178, §1.11, 76th Texas Legislature.

A public hearing was held on August 20, 1999, at which no public testimony was received. No written comments were received.

The repeals of the rules are adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has designated TDMHMR as the operating agency for the ICF/MR Program.

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.

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TRD-9907986
Charles Cooper
Chairman, Texas Board of Mental Health and Mental Retardation
Texas Department of Mental Health and Mental Retardation
Effective date: December 12, 1999
Proposal publication date: August 6, 1999
For further information, please call: (512) 206-4516

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Subchapter F. PERSONAL FINANCES AND FUNDS

25 TAC §§406.251-406.254

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§406.251 through 406.254 of Chapter 406, Subchapter F, governing Personal Finances and Funds without changes to the text as proposed in the August 6, 1999, issue of the *Texas Register* (24 TexReg 5995). The repeal of the section is being adopted order to adopt new §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 of Chapter 419, Subchapter E, ICF/MR Programs, which address substantially the same issues.

New §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 and the repeals of §406.102 of Chapter 406, Subchapter C, governing Vendor Payment; §§406.251-409.254 of 25 TAC, Chapter 406, Subchapter F, governing Personal Finances and Funds; and §406.311 of 25 TAC, Chapter 406, Subchapter G, governing Additional Facility Responsibilities are contemporaneously proposed for public comment in this issue of the *Texas Register*. The new rules are part of a comprehensive reorganization of chapters and subchapters in TDMHMR's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by the Texas Government Code, §2001.039 as added by Senate Bill 178, §1.11, 76th Texas Legislature.

A public hearing was held on August 20, 1999, at which no public testimony was received. No written comments were received.

The repeals of the rules are adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has designated TDMHMR as the operating agency for the ICF/MR Program.

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.

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TRD-9907988
Charles Cooper
Chairman, Texas Board of Mental Health and Mental Retardation
Texas Department of Mental Health and Mental Retardation
Effective date: December 12, 1999
Proposal publication date: August 6, 1999
For further information, please call: (512) 206-4516

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Subchapter G. ADDITIONAL FACILITY RESPONSIBILITY

25 TAC §406.311

The Texas Department of Mental Health and Mental Retardation (TDMHMR) Adopts the repeal of §406.311 of 25 TAC, Chapter 406, Subchapter G, governing Additional Facility Responsibilities without changes to the text as proposed in the August 6, 1999, issue of the *Texas Register* (24 TexReg 5995 - 5996). This repeal of the section is adopted in order to adopt new §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 of Chapter 419, Subchapter E, Intermediate Care Facilities for the Mentally Retarded (ICF/MR) Programs, which address substantially the same issues.

New §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 and the repeals of §406.102 of Chapter 406, Subchapter C, governing Vendor Payment; §§406.251-409.254 of 25 TAC, Chapter 406, Subchapter F, governing Personal Finances and Funds; and §406.111 of 25 TAC, Chapter 406, Subchapter G, governing Additional Facility Responsibilities are contemporaneously proposed for public comment in this issue of the *Texas Register*. The new rules are part of a comprehensive reorganization of chapters and subchapters in TDMHMR's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by the Texas Government Code, §2001.039 as added by Senate Bill 178, §1.11, 76th Texas Legislature.

A public hearing was held on August 20, 1999, at which no public testimony was received. No written comments were received.

The repeal is adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has designated TDMHMR as the operating agency for the ICF/MR Program.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907989

Charles Cooper

Chairman, Texas Board of Mental Health and Mental Retardation

Texas Department of Mental Health and Mental Retardation

Effective date: December 12, 1999

Proposal publication date: August 6, 1999

For further information, please call: (512) 206-4516

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Chapter 419. MEDICAID STATE OPERATING AGENCY

Subchapter E. ICF/MR PROGRAMS

25 TAC §§419.201-419.203, 419.261-419.272, 419.281, 419.282, 419.296, 419.297

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§419.201 through 419.203, §§419.261 through 419.272, §§419.281 and 419.282, and §§419.296 and 419.297 of Chapter 419, Subchapter E, ICF/MR Programs, which were proposed in the August 6, 1999, issue of the *Texas Register* (24 TexReg 5996 - 6003). Sections 419.201-419.203, 419.261-419.268, 419.270, 419.272, 419.281, 419.282, and 419.296 are adopted with changes. Sections 419.269, 419.271, and 419.297 are adopted without changes. The repeals of §406.102 of Chapter 406, Subchapter C, governing Vendor Payments; §§406.251 through 406.254 of Chapter 406, Subchapter F, governing Personal Finances and Funds, and §406.311 of Chapter 406, Subchapter G, governing Additional Facility Responsibilities are published contemporaneously in this issue of the *Texas Register*. The new rules are part of a comprehensive reorganization of chapters and subchapters in TDMHMR's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by the Texas Government Code, §2001.039 as added by Senate Bill 178, §1.11, 76th Texas Legislature.

New sections describe ICF/MR Program providers' responsibilities associated with protecting individual's personal funds, arranging durable medical equipment for children, and permanency planning for children.

Minor modifications have been made throughout the subchapter to clarify language and to correct grammatical and punctuation errors. References to the terms "bank" and "banking" have either been replaced with the term "financial institution" or deleted. New language has been added to the definition of "applied income" to reflect that program providers are authorized to collect an individual's applied income based on changes in the individual's income, as authorized by TDHS procedures. In the definition of "committee," new language has been added summarizing the committee's purpose. The definition for the term "payment plan" has been deleted because the term is outdated and no longer used in the text of the rule. The definition for the term "permanency planning" has been deleted and the language has been incorporated in §419.282. Language has been added to the definition of "provider agreement" clarifying that the provider agreement obligates the provider to provide services through the ICF/MR Program. In the definition of the term "sales receipt" two of the requirements were deleted because not all merchants' sales receipts include the specific item or service purchased or the name of the seller. Clarifying language has been added in the definitions of the terms "budgeted amount," "ICF/MR Program," "mental retardation," "program provider," and "trust fund account."

Language has been added in §419.261(a) clarifying that all the provisions in the subchapter must be implemented in accordance with generally accepted accounting principles of the American Institute of Certified Public Accountants. In subsection (a) of §419.263, language has been added clarifying the timeframe in which the IDT must determine whether an individual can manage his or her personal funds and decide who manages his or her personal funds. Minor changes and clarifying language have been added to describe who and under what circumstances an individual, LAR, or other person may manage personal funds. In §419.264, a reference to

§419.265(a)(1) has been added indicating that an individual may use personal funds to purchase items or services rather than use what is furnished by the program provider. Paragraph (5) of §419.264 has been reorganized and a new clause has been added referencing §419.265(a)(6), the individual may have to replace eyeglasses using personal funds if approved by the committee. In §419.264(7), new language has been added requiring that program providers to provide individuals with specialized equipment and devices that are medically necessary or are necessary to meet the objectives in the individual's IPP. In paragraphs (16) and (17) of §419.264 and in paragraph (9) of §419.265, language has been added reflecting the program providers' responsibilities for providing recreational activities and related transportation costs.

In §419.265(a)(1)(A), language has been added explaining that if an individual does not have the ability to make a request for an item or service that the program provider is not required to provide, the individual's IDT must approve the request. In subsection (a)(5)(B) of the same section, language has been added to reflect that a third party may be reimbursed for transportation costs if documentation to support the expense is provided. Language has been added throughout the section to clarify that the provisions in §419.266 apply only to personal funds managed by the program provider. In subsection (f) of §419.266, language has been added requiring deposit slips that include deposits for more than one individual to indicate the amount allocated to each individual. In subsection (g) of the same section, language has been added clarifying that the IDT is responsible for determining whether an individual needs a budgeted amount and, if so, set the amount and that the IDT must make a recommendation to the committee to restrict an individual's use of personal funds. Section 419.266 has been reorganized and a new subsection (i)(1)(A)(ii) has been added allowing the program provider to attach documentation to a receipt showing the name of the seller and list the items purchased, if that information is not included on the sales receipt. In subsection (i)(2) of the same section, an exception for obtaining a deposit slip was added for deposits made electronically.

In §419.267, this title of the subsection has been changed to "Requests for Personal Funds from Trust Fund Accounts" and language has been added indicating who can request personal funds. Language in §419.267(2) has been deleted indicating that a check does not serve as written request for personal funds. Minor changes and clarifying language have been added in §419.270 to allow program providers to collect applied income in accordance with policies and procedures authorized by TDHS. Subsection (c)(1) of the same section has been deleted because the earned and unearned income is not information that is relevant to an applied income ledger.

A new subsection (b)(6) was added in §419.272 identifying petty cash fund ledgers as a record that must be made available during an audit. In this same section, subsections (c) through (f) were amended and subsection (g) was added. These revisions clarify the department's audit process and the actions that may be taken by the department as a result of an audit, and to clarify the circumstances under which a program provider may appeal actions taken from an audit.

A public hearing was held on Friday, August 20, 1999. No public testimony was received. Written comments were received from Beaumont State Center, Beaumont; a parent of a state school resident, Garland; Parent Association for the Mentally Retarded of Texas (PART), Austin; Gulf Bend Community MHMR Center, Victoria; Austin State School, Austin; Corpus Christi State School, Corpus Christi; Texas Council for Developmental Disabilities, Austin; Advocacy, Inc., Austin; Denton State School, Denton; and Texas Assistive Technology Partnership, Austin. Several commenters requested clarification on certain issues and recommended revisions.

Two commenters requested that the phrase "...develop and integrate goals for a family home for each child residing in the facility" replace the phrase "that is an integral part of" in the second paragraph of the preamble. The same two commenters also requested that the phrase "...Texas that each child receives the benefits of being part of a successful family as soon as possible" replace the phrase"...of helping children in ICFs/MR become part of a family" in the fourth paragraph of the preamble. The department responds that it is unable to make the suggested changes to the preamble because only the text of the rule is subject to public comment. However, the department notes that §419.282, containing similar language, tracks the requirements for providing permanency planning in Chapter 531 of the Texas Government Code.

One commenter asked if an individual received a sum of money large enough to disqualify the individual from benefits, should the program provider discuss with the individual or LAR options for depositing that money, e.g., in a master pooled account. The department responds that §419.261(b) requires the program provider to develop and implement policies and procedures that protect the individual's financial interest and notes that the program provider must notify the Medicaid eligibility worker if an individual's income changes. Specific topics appropriate for discussion with an individual are beyond the scope of this subchapter.

Regarding the definition of "budgeted amount" one commenter stated "that hopefully all funds were budgeted" and suggested using either the term "personal spending funds" or the term "discretionary funds." Additionally, the commenter stated that the term "budgeted amount" was not addressed in 419.263. The department responds that there is a definition of the term "budgeted amount" in the subchapter to avoid any confusion and declines to change it. Regarding the commenter's suggestion to reference the term "budgeted amount" in §419.263, the department responds that the term "budgeted amount" is not addressed in that section because an individual has a budgeted amount only if the program provider manages his or her personal funds, as described in §419.266(g)(1)(A).

Regarding the definition of "committee," two commenters requested that the definition be revised to include the committee's purpose and include the language from 42 CFR §483.440(f)(3)(1). The department responds by adding in the definition a summary of the committee's purpose, as set forth in 42 CFR §483.440(f)(3)(1).

Regarding the definition of "IDT (Interdisciplinary Team)," two commenters stated that "this is not the correct definition of IDT according to state law." The commenters requested that the definition be the same as that found in the Texas Health and Safety Code, §591.003(8). The commenters noted that IDTs make assessments and recommendations for an individual's IPP and the LAR makes determinations and decisions. Further, the commenters noted that no concerned person may be in an IDT meeting without the individual's or LAR's permission. The department responds that the definition is consistent

with state and federal law in its description of who may participate on the IDT and agrees that the LAR has the right to participate on the team. Additionally, the department agrees that the IDT makes recommendations for services and that the individual (or the LAR on the individual's behalf) may accept or decline those services. Regarding the commenters' issue regarding the participation of other concerned persons, the department responds by adding clarifying language that requires the individual or LAR to approve any other concerned person's participation.

Regarding the definition of the term "permanency planning," two commenters requested that language be added to clarify that the LAR's choice in meeting the individual's needs must be the most important focus of any planning process because permanency planning applies only to individuals under 18 years of age. Regarding the same term, two other commenters suggested using the definition developed by the Children with Severe Disabilities Workgroup be included in the rule. The department declines to make the suggested change and notes that the definition is consistent with the definition of "permanency planning" in Chapter 531 of the Texas Government Code. The department further notes that the definition of the term "permanency planning" has been deleted from §419.303 and has been incorporated in §419.282.

In paragraphs (1) and (2) of §419.261(b) two commenters requested that the phrase "if no LAR to decide" should be added following the term "individual." The department declines to make the requested changes in 419.261.The department notes that, because an individual has an LAR, the program provider is not relieved of the responsibility to instruct the individual in handling personal funds and allowing the individual to hold and manage personal funds, to the extent of the individual's ability and understanding.

Two commenters requested that in subsection (a) of §412.263 the phrase "if no LAR" be added following the term "determine" and in subsections (b) and (c) of §412.263 the phrase "if no LAR" should be added following the term "determination." The department declines to make the requested changes in §419.263. The department notes that, because an individual has an LAR, the program provider is not relieved of the responsibility for assessing an individual's understanding of financial management, to the extent of the individual's ability and understanding. The department notes that in accordance with subsection (d) of §419.263, the individual (or LAR on the individual's behalf) must be allowed to choose who manages the individual's personal funds.

Regarding §419.263(b), one commenter asked whether a standardized assessment has been developed. In §419.263(f), the same commenter requested that the annual reassessment requirement be deleted, which would require that reassessments occur as an individual's needs change. The commenter noted that many individuals' abilities will not change from year to year. The department responds that a standardized assessment has not been developed. The department further responds that it believes an annual reassessment is necessary to determine whether an individual's needs have changed. The department notes that the content of the reassessment is not dictated and that the reassessment should be consistent with the individual's abilities and understanding.

Concerning §419.263(d) and (e), one commenter requested clarification regarding whether a program provider is required to manage personal funds only if an individual does not have the ability to decide who will manage his or her personal funds and has no LAR, as described in §419.263(e). The department responds by adding language clarifying that another person may manage individual's personal funds if that person agrees to do so in writing. The department notes that, under the circumstances described in §419.263(e), the program provider is obligated to manage personal funds. The department further notes that the program provider must also manage personal funds if an individual or LAR requests the program provider to do so in accordance with §419.263(d).

Regarding §419.264(11), one commenter noted that, currently, individuals are allowed to purchase electric razors with a written request from the LAR. The department responds by adding language in §419.264(7) clarifying that an individual's personal funds may not be expended for an electric razor if it is medically necessary or necessary to meet the objectives in the individual's IPP.

With regard to §419.264(14), one commenter expressed concern that the subparagraph restricts individuals from purchasing bedroom furnishings and linens that are more comfortable than those provided by the facility. The commenter noted that §419.265(a)(1) allows such purchases and suggested that the phrase "unless a brand different from that provided by the program provider is requested by the individual" be add in §419.264(14). The department responds by adding in §419.264 a reference to §419.265(a)(1)(A), which specifies when an individual may be charged for a specific type or brand of item or service.

Regarding §419.265(a)(1)(A), two commenters noted that it seems to exclude the use of personal funds for individuals who are unable to produce a written request to purchase items not provided by the facility. The commenter noted that individuals who cannot produce such a request may be able to clearly communicate their choices to their IDT and should not be denied the luxury of spending their personal funds to improve their quality of life. The department responds that language has been added in §419.265(a)(1)(A) clarifying that if an individual is determined not to have the ability to make a request the IDT's approval for a specific type or brand must be documented in the individual's record.

Regarding §419.265(a)(1)(B) and (C), one commenter noted that implementing the paragraphs would require inservice training for requestors and buyers. The department acknowledges that for the purposes of implementing this subchapter the program provider staff will need to be informed of the provisions in this subchapter.

In §419.265(a)(9), one commenter expressed concern that it was made impossible for individuals who need support when off campus to use their personal funds to attend recreational activities of their own choosing and that the language in §406.252(c)(10) of the existing rule made allowances for recreational activities chosen by the individuals who require staff assistance. The commenter noted that if a person in a wheelchair wants to attend a bingo game in the community and requires staff assistance to get to and from the game, it appears that the facility would have to pay for all costs associated with the outing. The department responds by adding language in §419.264(16) and §419.265(9) clarifying that an individual's personal funds may be used to pay for activities that are not part of the program provider's recreational program, if they are independently

chosen by the individual. References to staff supervision have been deleted.

With regard to §419.266(c), one commenter asked for clarification of the terms "account ledger," "personal ledger," and "personal funds record." The same commenter also asked if the checkbook register would meet the requirement for all three. The department responds that if personal funds are maintained in a pooled account, then a "personal ledger" must be maintained in addition to the "account ledger." However, if personal funds are maintained in separate accounts, the checkbook register may represent the "account ledger" and the "personal ledger." As described in §419.266(h), the personal ledger is only one part of the personal funds record.

Two commenters noted that according to law, IDTs make recommendations and LARs make decisions. In §419.266(g)(1)(B) the phrase "if no LAR" should be added following the term "determine." The department declines to make the requested change in §419.266(g). The department notes that because an individual has an LAR, the program provider is not relieved of the responsibility for determining an individual's budgeted amount if the program provider manages the individual's personal funds. The department notes that §419.266(g) applies to personal funds managed by the program provider. Regarding §419.266(i), the same commenters expressed that some individuals with mental retardation may not be able to understand any explanation for a transaction, therefore, it would be illegal to ask an individual with an LAR to sign anything. The department responds that §419.266(i) requires a witness to sign the sales receipt if an individual does not understand the explanation for an expenditure.

In §419.266(h)(3), one commenter agreed that if personal funds are managed in a pooled account, quarterly reports are appropriate, but expressed that they are inappropriate for separate accounts. Additionally, the commenter asked whether a quarterly report must be sent if an individual or LAR indicates that receiving the quarterly statement is undesirable. The commenter noted that many individuals and LARs have asked not to be sent so much documentation. The department responds that if the individual's personal funds are managed in a separate account and the individual has access to the checkbook register, then the requirement in §419.266(h)(3) is met. Further, the department responds that regardless of the individual's or LAR's preference regarding receipt of the quarterly report, the program provider must comply with the requirement.

Regarding §419.266(i)(1)(A), one commenter expressed that there is a lot of documentation required on what may be a very small piece of paper. Further, the commenter noted that receipts from many stores and merchants in the area do not include the store's name or identify the items purchased and that perhaps a separate sheet should be attached and used to document the information. The department responds that it agrees and has revised the language to address the commenter's concern.

Concerning §419.266(i)(1)(B), one commenter questioned whether the receipts must be explained to an individual and signed immediately following a transaction. The commenter further noted that if the department intends for this action to occur immediately, it is cumbersome and abnormal and, if the action occurs later, it is subject to error. The department responds that there is no prescribed timeframe for the action to occur and that receipts should be signed at a time and place that is appropriate to circumstances of the transaction.

With regard to §419.266(i)(1)(C), one commenter expressed concern that any request made by a parent must to be honored. The department responds that all written requests for personal funds managed by the program provider, including those made by an individual's parent, are subject to the provisions §419.267. The department has added language that allows the program provider to release funds without obtaining a receipt only if the individual's IDT determines that the expenditure is in the best interest of the individual.

Concerning §419.266(i)(1)(C), one commenter expressed concern that individuals who are assessed as "unable to manage any personal funds" will be unable to purchase anything from a vending machine, Dairy Queen, or other vendor without a receipt. The commenter noted that in the existing rule, §406.253(d)(5)(C), individuals were allowed up to $3 four times a month without obtaining a receipt and asked why this provision was deleted. The commenter further noted that the existing rule allows individuals without the cognitive ability to manage money to benefit from small amounts of their personal funds. The department responds that it believes the deleted provision is incorporated in §419.266(g)(1)(A), which allows an individual to have a minimal amount of cash for discretionary spending without obtaining a receipt, e.g., $3 four times a month. The department notes that even an individual without the ability to manage personal funds may be given a small amount of cash.

Regarding §419.266(i)(2), one commenter expressed concern that bank-issued deposit slips are not issued for deposits made electronically. The department agrees and responds by adding clarifying language excepting the requirement for a deposit slip issued by a financial institution for deposits made electronically.

Concerning §419.267, two commenters requested clarification regarding whether an individual could make a request for personal funds under this subsection. Further, the commenter asked how applied income relates to personal funds. The department responds by adding language clarifying that an individual or other person, except program staff, may submit a request for personal funds. Additionally, the department notes that collecting applied income does not relate to §419.267. This section pertains to written requests for personal funds for which receipts are not required. The department further notes that requirements for collecting applied income are described in §419.270 and that §419.265(a)(17) allows personal funds to be expended for applied income.

Two commenters requested that the phrase "if no LAR" be added following the term "determines" in §419.267 because the LAR makes decisions. The department responds that, because an individual has an LAR, the program provider who manages and individual's personal funds is not relieved of the responsibility for determining whether requests for personal funds are in the individual's best interest. Further, the department has added language clarifying that if no sales receipts are required to document the expenditure, the individual's IDT is responsible for such determination.

Regarding §419.267(2), one commenter noted that a check cannot be a receipt. The department responds that it agrees with the commenter's interpretation that a check is not a receipt or a written request.

With regard to §419.267(3), one commenter expressed concern for restricting requests from program provider staff because most requests are submitted by such staff. The department responds by adding language in §419.267 clarifying that this section applies to expending personal funds without obtaining a sales receipt. Expenditures made by program provider staff must be documented with a sales receipt.

In §419.268(d), one commenter asked if this provision would replace the current escheatment policy, which is to either keep the funds or send them to Central Office for processing. The department responds that the provisions in §419.268(d) replace the escheatment provisions in Chapter 406, Subchapter F, which are contemporaneously proposed for repeal.

Regarding §419.270, one commenter expressed concern that the section conflicts with the July 16, 1998, memo from Jackie Johnson, Deputy Commissioner, Office of Programs State Office, Texas Department of Human Services that pertains to calculating applied income for state-operated ICFs/MR. The department responds by adding language clarifying that the program provider may only collect applied income in accordance with procedures authorized by TDHS. The department notes that references to the term "payment plan" have been deleted.

Concering §419.281, three commenters suggested that language be added to clarify that the facilities are responsible for providing durable medical equipment to adults as well as children. The department responds that §32.024 of the Texas Human Resources Code requires the department to implement this provision for children. The department notes that 42 CFR §483.470(g)(2) requires program providers to furnish individuals with and teach them to use medical equipment and devices.

In §419.282, two commenters requested that the phrase "This planning must also ensure the LAR's right to choice is met" be added following the term "met." The department declines to make the commenter's suggested change and notes that §419.282 is consistent with the requirements in state law regarding permanency planning. The department further notes that the LAR's choices should be considered during permanency planning and that the LAR may accept or reject the recommendations made by the IDT.

Concerning §419.282, one commenter questioned whether permanency planning for children applies to ICFs/MR only or to center-based respite as well. The commenter noted that if permanency planning is also required for center-based respite, it is cumbersome and is not consumer friendly. The department responds that §419.282 applies to children admitted to ICFs/MR for whom an IPP is developed.

Regarding §419.282, two commenters requested that the Permanency Planning Guiding Principles, which were developed by the Children with Severe Disabilities Workgroup, be included in the section. The department declines to incorporate the Permanency Planning Guiding Principles in the subsection and notes that the subsection is consistent with Chapter 531 of the Texas Government Code. The department notes that the definition of "permanency planning" from §419.203 has been incorporated in this subsection.

The new rules are adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has designated TDMHMR as the operating agency for the ICF/MR Program.

The rules affect the Texas Health and Safety Code, §532.015, Texas Human Resources Code, §32.021, and Texas Government Code, §531.021.

§419.201. Purpose.

The purpose of this subchapter is to describe:

(1) the policies and procedures for the Intermediate Care Facilities for the Mentally Retarded (ICF/MR) Program in Texas;

(2) requirements and rights of providers in the ICF/MR Program; and

(3) rights protections for individuals applying for and receiving ICF/MR Program services.

§419.202. Application.

This subchapter applies to persons who apply to participate as providers in the ICF/MR Program and to providers of ICF/MR Program services in Texas.

§419.203. Definitions.

The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applied income - The portion of an individual's cost of care that the individual is responsible for paying. The amount of an individual's applied income is determined by the policies and procedures authorized by TDHS and depends on the individual's earned and unearned income.

(2) Budgeted amount - The amount of cash that may be disbursed to an individual at regular intervals, e.g., weekly, monthly, for discretionary spending without obtaining a sales receipt for the expenditure.

(3) Committee - The specially constituted committee designated by the program provider in accordance with 42 CFR §483.440(f)(3) that consists of staff, LARs, individuals (as appropriate), qualified persons who have experience or training in contemporary practices to change individuals' inappropriate behavior, and persons with no ownership or controlling interest in the facility. The committee is responsible, in part, for reviewing, approving, and monitoring individual programs designed to manage inappropriate behavior and other programs that, in the opinion of the committee, involve risks to individuals' safety and rights.

(4) CFR - Code of Federal Regulations.

(5) Department - The Texas Department of Mental Health and Mental Retardation (TDMHMR).

(6) Facility - An intermediate care facility for persons with mental retardation or a related condition.

(7) ICF/MR Program - The Intermediate Care Facilities for the Mentally Retarded Program, which provides Medicaid-funded residential services to individuals with mental retardation or a related condition.

(8) IDT (Interdisciplinary team) - A group of people assembled by the program provider who possess the knowledge, skills, and expertise to develop an individual's IPP, including mental retardation professionals and paraprofessionals and, with approval from the individual or LAR, other concerned persons.

(9) IPP (individual program plan) - A plan developed by an individual's IDT that identifies the individual's training, treatment, and habilitation needs and describes services to meet those needs.

(10) Individual - A person enrolled in the ICF/MR Program.

(11) LAR (legally authorized representative) - A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor individual, a guardian of an adult individual, or a personal representative of a deceased individual.

(12) Mental retardation - Subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(13) Personal funds - The funds that belong to an individual, including earned income, social security benefits, gifts, and inheritances.

(14) Petty cash fund - Personal funds managed by the program provider that are maintained for individuals' cash expenditures.

(15) Pooled account - A trust fund account containing the personal funds of more than one individual.

(16) Program provider - An entity with whom the department has a provider agreement.

(17) Provider agreement - A written agreement that obligates the program provider to provide services through the ICF/MR Program.

(18) Related condition - A severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with mental retardation, and requires treatment or services similar to those required for individuals with mental retardation;

(B) is manifested before the individual reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(19) Sales receipt - A written statement issued by the seller that includes:

(A) the date it was created; and

(B) the cost of the item or service;.

(20) Separate account - A trust fund account containing the personal funds of only one individual.

(21) Trust fund account - An account at a financial institution in the program provider's control that contains personal funds.

(22) Unclaimed personal funds - Personal funds managed by the program provider that have not been transferred to the individual or LAR within 30 days after the individual's discharge.

(23) Unidentified personal funds - Personal funds managed by the program provider for which the program provider cannot identify ownership.

(24) TDHS - The Texas Department of Human Services.

§419.261. Protecting Individuals' Personal Funds.

(a) The program provider must implement §§419.261 - 419.270 of this chapter (relating to ICF/MR Programs) according to the generally accepted accounting principles of the American Institute of Certified Public Accountants.

(b) The program provider must develop and implement written policies and procedures regarding personal funds that protect the financial interest of individuals and, at a minimum, require the program provider:

(1) to instruct individuals in handling personal funds consistent with the individuals' abilities and understanding; and

(2) to allow individuals to hold and manage their personal funds to the extent of their abilities.

(c) The program provider must reimburse individuals for personal funds lost or stolen while the funds are under the program provider's control.

§419.262. Notice Regarding Personal Funds.

At the time of admission to the facility, and if changes to services or charges occur, the program provider must provide each individual or LAR with written notification containing the following information:

(1) a written explanation of §419.263(d) and (e) of this title (relating to Determining Management of Personal Funds), which describe who may manage personal funds;

(2) a list of items and services included in the program provider's ICF/MR reimbursement rate for which the individual will not be charged;

(3) a list of items and services for which the individual may be charged;

(4) a statement that the individual or LAR may have the Social Security Administration appoint a representative payee to receive the individual's federal benefits in accordance with 20 CFR Part 416, Subpart F;

(5) a statement that, if the program provider manages the individual's personal funds, the program provider will make available the individual's personal funds record, as described in §419.266(h) of this title (relating to Program Provider Managed Personal Funds), upon the request of the individual or LAR within 72 hours after receiving the request; and

(6) a statement that at the request of the individual or LAR, or if the individual is discharged or transferred from the facility, the program provider will disburse the individual's personal funds to the individual or LAR within 30 calendar days after the request or discharge, if the program provider manages the individual's personal funds.

§419.263. Determining Management of Personal Funds.

(a) Within 30 days after an individual is admitted to the facility, the IDT must determine if the individual has the ability to:

(1) manage his or her personal funds; and

(2) decide who manages his or her personal funds.

(b) The determination must be based on an assessment of the individual's understanding of financial management, including:

(1) mathematical concepts;

(2) budgeting personal funds;

(3) monetary denominations; and

(4) financial obligations.

(c) The results of the assessment and the IDT's determination must be documented, signed by the IDT, and made a part of the individual's IPP.

(d) If an individual does not have an LAR and is determined to have the ability to decide who manages his or her personal funds or if an individual has an LAR, the program provider must allow the individual or LAR to choose one of the following to manage his or her personal funds and document such choice in the individual's IPP:

(1) the individual, if the individual is determined to have the ability to manage his or her personal funds;

(2) the individual's LAR;

(3) the program provider; or

(4) another person identified by the individual or LAR who has agreed in writing to manage the individual's personal funds.

(e) If an individual is determined not to have the ability to decide who manages his or her personal funds and the individual has no LAR, the program provider must manage the individual's personal funds in accordance with this subchapter.

(f) The program provider must reassess an individual's understanding of financial management at least annually and if the program provider has reason to believe that the individual's ability has changed.

§419.264. Items and Services Provided by the Program Provider.

The program provider must not charge an individual or require an individual to expend personal funds for items and services that are the program provider's responsibility to provide, except as authorized by §419.265(a)(1) of this title (relating to Items and Services Purchased with Personal Funds), because they are included in the ICF/MR reimbursement rate or are covered by other Medicaid programs. These items and services include:

(1) medical services and therapies, e.g., physical exams, physical therapy, occupational therapy, and nutritional, speech, audiological, psychological, social, and medical evaluations;

(2) prescribed and over-the-counter medication;

(3) medical equipment and supplies, e.g., nasogastric tubes, feeding pumps, catheters, sheepskins, and egg crate pads;

(4) laboratory services;

(5) eye exams and eyeglasses, except:

(A) the difference between the Medicaid payment and the actual cost of the eyeglasses as authorized by §419.265(a)(2) of this title (relating to Items and Services Purchased with Personal Funds); or

(B) as authorized by §419.265(a)(6) of this title (relating to Items and Services Purchased with Personal Funds.

(6) non-cosmetic dental services and items, e.g., intra- and extra-oral examinations, prescribed dental treatments and follow-up visits, dentures, braces, crowns, toothbrushes, toothpaste, mouthwash, dental floss, and disclosing solution;

(7) specialized equipment and adaptive devices that are medically necessary or are necessary to meet the objectives in the individual's IPP, e.g., hearing aids, hearing aid batteries, electric razor, Velcro® shoe closures, and shoe insoles;

(8) training and rehabilitation services, e.g., vocational training, congregate training, and day activity services;

(9) behavioral reinforcers used in behavior modification programs, e.g., candy, soft drinks, cereal, coffee, toys, and magazines;

(10) meals, snacks, and special diets, as listed on the program provider's menu, whether provided at the facility or elsewhere;

(11) non-cosmetic personal hygiene items, e.g., shampoo, conditioner, soap, deodorant, anti-perspirant, body lotion, insect repellant, suncreen, shaving supplies, comb, hair brush, facial tissues, toilet tissue, sanitary napkins, tampons, and diapers;

(12) shampooing, haircutting, basic hairstyling, and shaving, including mustache and beard trimming;

(13) laundering personal clothing;

(14) facility furnishings and housewares, e.g., bedroom furniture, kitchenware, bath towels, dish towels, and bed linens;

(15) repairing and maintaining the facility's physical plant, including training and day activity areas;

(16) expenses that are associated with activities that are part of the program provider's recreational program, e.g., meals, lodging, registrations, and tickets;

(17) transportation costs to and from:

(A) an activity included in an individual's IPP, including health care services, congregate training, day activity services and supported employment, except for competitive employment; or

(B) an activity that is part of the program provider's recreational program.

(18) fees charged by financial institutions, including service fees and check printing charges, if an individual's personal funds are managed in a pooled account or if the program provider chooses to manage those funds in a separate account;

(19) managing an individual's personal funds; and

(20) a charge incurred if the program provider mismanages an individual's personal funds.

§419.265. Items and Services Purchased with Personal Funds.

(a) The program provider may charge an individual or allow an individual to expend personal funds for the following items and services:

(1) an item or service that the program provider is responsible for providing, if the individual requests a specific type or brand of item or service that the program provider does not provide, and the program provider documents in the individual's record:

(A) the individual's written, signed request for a specific type or brand and the reason a specific type or brand has been requested or if the individual is determined not to have the ability to make such a request, the IDT's approval for a specific type or brand;

(B) the type or brand that is provided at the program provider's expense; and

(C) the reason the program provider does not provide the type or brand requested;

(2) the difference between the Medicaid payment and the actual cost of the eyeglasses, if the individual chooses a style or feature not paid for by Medicaid;

(3) clothing;

(4) cosmetic dental procedures;

(5) transportation costs, other than those described in §419.264(17) of this title (relating to Items and Services Provided by the Program Provider):

(A) if reimbursement to a third party for private transportation does not exceed the current state mileage reimbursement rate; and

(B) if adequate documentation is provided by a third party to the program provider to support the expenditure;

(6) repair or replacement of personal property that is damaged, lost, or stolen by the individual, if the expenditure is approved by the committee;

(7) snacks and meals, if the individual chooses items not listed on the program provider's menu;

(8) the individual's budgeted amount;

(9) activities that are not part of the program provider's recreational program and are independently chosen by the individual;

(10) dry cleaning;

(11) hair setting, permanent waves, hair color treatments, and beauty supplies, such as hair rollers and hair spray;

(12) cosmetics and perfume;

(13) cosmetic manicures, pedicures, and facials;

(14) bed hold charges as described in §406.211(d) of Chapter 406, Subchapter E of this title (relating to Eligibility and Review);

(15) school supplies, school fees, and other educational expenses;

(16) fees charged by a financial institution, if the individual manages his or her personal funds or the individual requests that the program provider manage his or her personal funds in a separate account; and

(17) applied income.

(b) Items purchased with an individual's personal funds must not be available for general use by program provider staff or other individuals.

§419.266. Program Provider-Managed Personal Funds.

(a) Accounting for personal funds. If the program provider manages personal funds, the program provider must comply with this section and ensure that:

(1) a complete accounting of personal funds entrusted to the program provider is maintained;

(2) personal funds are not commingled with program provider funds or the funds of any person other than another individual for whom the program provider manages personal funds; and

(3) personal funds are only expended for the individual's use and benefit and in a manner and for purposes determined to be in the individual's best interest.

(b) Account Requirements. The program provider must manage personal funds in a trust fund account.

(1) The program provider may manage personal funds in a pooled account or a separate account. If the program provider chooses a pooled account, an individual may request and receive a separate account. The program provider may also maintain some personal funds in a petty cash fund.

(2) Trust fund accounts must be insured under federal or state law.

(3) The program provider must retain all statements from financial institutions regarding trust fund accounts.

(4) The program provider must reconcile such statement with the account ledger as described in subsections (c)(1)(A) and (c)(2)(A) of this section and personal ledger as described in subsection (h)(1)(F) of this section within 30 days after receiving such statement.

(c) Types of Accounts.

(1) Pooled accounts. If the program provider manages personal funds in a pooled account, the program provider must:

(A) maintain an account ledger that separately identifies each financial transaction, including:

(i) the name of the individual for whom the transaction was made;

(ii) the date and amount of the transaction, including interest; and

(iii) the balance after the transaction;

(B) title the account "Trustee (Program provider's Name), Individuals' Trust Fund Account;" and

(C) if the personal funds of Medicaid and private-pay individuals are pooled, obtain a signed, dated statement from private pay individuals allowing the program provider to release financial information to TDMHMR, TDHS, Texas Health and Human Services Commission, Texas Attorney General's Medicaid Fraud Control Unit, and US Department of Health and Human Services.

(2) Separate Accounts. If the program provider manages personal funds in a separate account, the program provider must:

(A) maintain an account ledger that identifies each financial transaction, including:

(i) the date and amount of the transaction, including interest; and

(ii) the balance after the transaction; and

(B) title the account "Trustee (Program Provider's Name), (Individual's Name) Trust Fund Account."

(d) Petty Cash Fund. If the program provider maintains some personal funds in a petty cash fund, the program provider must:

(1) set a limit on the amount maintained in the petty cash fund;

(2) set a limit on the amount of a single expenditure from the petty cash fund;

(3) maintain a petty cash fund ledger that includes:

(A) the date and amount of each transaction;

(B) the name of the individual for whom each transaction was made; and

(C) the balance after each transaction.

(e) Interest. If personal funds accrue interest, the program provider must prorate and distribute the interest earned to each participating individual.

(f) Depositing personal funds. The program provider must deposit in a trust fund account all funds that it receives on behalf of the individual. If the deposit slip documents deposits for more than one individual, the program provider must indicate on the deposit slip the amount allocated to each individual.

(g) Access to personal funds.

(1) An individual's IDT must, based on the individual's assessment described in §419.263 of this title (relating to Determining Management of Personal Funds), determine:

(A) if there is a need for a budgeted amount and, if so, set the amount; and

(B) if there is a need to restrict the individual's use of personal funds and, if so, make a recommendation to the committee.

(2) If the individual's IDT makes a recommendation to the committee to restrict an individual's use of to personal funds, the committee's decision is documented, signed by the committee members, and made a part of the individual's IPP.

(h) Personal funds record.

(1) The program provider must maintain a personal funds record for each individual that includes:

(A) the name of the individual;

(B) the name of the individual's LAR and representative payee, as applicable;

(C) the date of the individual's admission to the facility;

(D) the individual's budgeted amount;

(E) the account number and location of all accounts in which the individual's personal funds are managed;

(F) a personal ledger that includes the date and amount of each transaction and the balance after each transaction; and

(G) any contribution acknowledgment as described in §419.271 of this title (relating to Contributions).

(2) The personal ledger reconciled in accordance with subsection (b)(4) of this section must not be less than zero. If reconciled balance is less than zero, the program provider must deposit in and credit to the individual's trust fund account the amount that increases such balance to zero.

(3) At least quarterly, and within 72 hours after receiving a request from the individual or LAR, the program provider must provide to the individual or LAR a copy of the individual's personal ledger.

(i) Documenting expenditures and deposits.

(1) Expenditures.

(A) Except as provided in subparagraph (C) of this paragraph, the program provider must retain a sales receipt for each expenditure.

(i) If a sales receipt documents an expenditure for more than one individual, the program provider must indicate on the sales receipt the amount allocated to each individual.

(ii) If a sales receipt does not include the specific item or service purchased or the name of the seller, the program provider must attach such documentation.

(B) The program provider must explain each expenditure to the individual and request that the individual sign the receipt. If the program provider determines that the individual does not understand the explanation, the individual does not sign the receipt, or the individual's signature is illegible, a witness to the expenditure must sign the receipt. The witness must not be responsible for managing personal funds or responsible for supervising persons performing such duties.

(C) A sales receipt is not required for an expenditure:

(i) if the program provider makes a purchase on behalf of an individual from a vending machine;

(ii) if an expenditure is within the individual's budgeted amount and the program provider obtains an acknowledgment signed by the individual indicating that the funds were received;

(iii) if the program provider releases funds in response to a written request in accordance with §419.267 of this title (relating to Requests for Personal Funds); or

(iv) if the program provider obtains written approval for alternative documentation from the department's Office of Medicaid Administration before the expenditure is made.

(2) Deposits. Except for deposits made electronically, the program provider must retain a deposit slip issued by the financial institution for each deposit.

§419.267. Requests for Personal Funds from Trust Fund Accounts.

If the program provider receives a request from an individual or other person except program provider staff to expend an individual's personal funds without obtaining a receipt and the individual's IDT determines that the expenditure is in the best interest of the individual, the program provider may release such funds to the requestor.

(1) The request must be written, signed by the requestor, and specify the amount and purpose of the expenditure.

(2) A check is not considered a written request for personal funds, even if it is written and signed by the individual.

§419.268. Closing Trust Fund Accounts.

(a) Ownership change. Within 30 days after the effective date of a change in facility ownership, the previous program provider must:

(1) reconcile each statement issued by a financial institution with the account ledger and the personal ledger;

(2) provide the new program provider with a list of all individuals whose personal funds were managed by the previous program provider and their trust fund account balances and personal ledger balance as of the effective date of the transfer;

(3) transfer to the new program provider all personal funds managed by the previous program provider;

(4) retain a receipt from the new program provider indicating the amount of the transfer; and

(5) submit to the department any unidentified personal funds.

(b) Written notice. If the individual or LAR provides written notice that another person has been chosen to manage the individual's personal funds, the program provider must, within 30 days after receiving the notice:

(1) reconcile the individual's statement issued by the financial institution with the account ledger and the personal funds ledger;

(2) transfer all of the individual's personal funds to the person chosen;

(3) retain a receipt from the person indicating the amount of the transfer; and

(4) provide to the person a copy of the individual's current personal funds record.

(c) Discharge. If the individual is discharged from the facility, the program provider must, within 30 days after the discharge:

(1) reconcile the individual's statement issued by a financial institution with the account ledger and personal funds ledger;

(2) transfer all personal funds managed by the program provider:

(A) to the admitting facility, if the individual is discharged to another facility; or

(B) to the individual or LAR, if the individual is not discharged to another facility;

(3) retain a receipt from the admitting facility, individual, or LAR indicating the amount of the transfer; and

(4) provide to the admitting facility, individual, or LAR the individual's current personal funds record.

(d) Unclaimed personal funds. Within 180 calendar days after identifying any unclaimed personal funds, the program provider must make a good faith effort to locate the individual to whom the funds belong or LAR. If the individual or LAR:

(1) is located, the program provider must transfer the funds to the individual or LAR; or

(2) is not located, the program provider must send to TDMHMR, Attn: Cashier, P.O. Box 12668, Austin, Texas 78691:

(A) a statement that the funds are unclaimed;

(B) the program provider's name, address, and vendor identification number;

(C) the individual's name, social security number, date of birth, and last known address;

(D) the LAR's name and address;

(E) a check payable to TDMHMR for the amount of the unclaimed personal funds; and

(F) documentation of the program provider's efforts to locate the individual or LAR.

§419.270. Applied Income.

(a) The program provider may only collect applied income in accordance with the procedures authorized by TDHS.

(b) If an individual's applied income has not been determined or the individual's earned or unearned income changes, the program provider must report such information to the TDHS Medicaid eligibility worker

(c) The program provider must maintain an applied income ledger for each individual that includes the amount of the:

(1) applied income owed by the individual;

(2) applied income paid by the individual;

(3) the difference between the applied income owed and the applied income paid by the individual; and

(4) bed hold charges paid by the individual as described in §406.211 (d) of Chapter 406, Subchapter E of this title relating to (Eligibility and Review).

(d) Within 72 hours after receiving a request from the individual or LAR, the program provider must provide to the individual or LAR a copy of the individual's applied income ledger.

§419.272. Auditing.

(a) The department periodically audits the program provider to monitor compliance with this subchapter. The department notifies the program provider of its audit date.

(b) The records required by this subchapter must be made available during an audit, including:

(1) personal funds records;

(2) account ledgers;

(3) applied income ledgers;

(4) statements issued by financial institutions for trust fund accounts;

(5) sales receipts; and

(6) petty cash fund ledger.

(c) If the records required by §§419.261.419.270 of this chapter (relating to ICF/MR Programs) are not made available by the program provider or the department determines that the records are not auditable, the department may impose a vendor hold on payments due to the program provider under the provider agreement until the records are available and auditable. If the program provider does not provide such records in accordance with instructions from the department, the department may terminate the provider agreement.

(d) The department provides the program provider with a report of the audit findings, including corrective actions that must be taken by the program provider and internal control recommendations that may be followed by the program provider. Corrective actions include making refunds to individuals, entering ledger adjustments, submitting unidentified funds to the department, and establishing and maintaining records and systems. The program provider may request an administrative hearing in accordance with Chapter 409, Subchapter

B, of this title (relating to Adverse Actions) to contest corrective actions required by the department pursuant to this subsection.

(e) If the report of audit findings requires corrective actions and the program provider does not make a request for an administrative hearing in accordance with Chapter 409, Subchapter B of this title (relating to Adverse Actions), the program provider must complete corrective actions within 60 days after receiving the report of audit findings.

(f) If the program provider does not complete corrective actions required by the department within 60 days after receiving the report of audit findings, the department may:

(1) impose a vendor hold on payments due to the program provider under the provider agreement until the program provider completes corrective actions;

(2) recoup payments due to the program provider under the provider agreement to make refunds to individuals; or

(3) terminate the provider agreement.

(g) Notwithstanding the other provisions set forth in this section, the department may terminate the provider agreement for repeated non-compliance with §§419.261 - 419.270 of this chapter (relating to ICF/MR Programs).

§419.281. Children's Durable Medical Equipment.
In accordance with §32.024 of the Texas Human Resources Code, a program provider who arranges for durable medical equipment for a child residing in the facility must:

(1) ensure that the child receives the equipment prescribed, the equipment fits properly, if applicable, and the child or the child's LAR, as appropriate considering the age of the child, receives instruction regarding the equipment's use; and

(2) maintain a record of compliance with the requirements of paragraph (1) of this section in the child's record.

§419.282. Permanency Planning for Children.
As required by Texas Government Code, §531.153, a program provider must incorporate permanency planning as an integral part of the IPP for each child residing in the facility on a temporary or long-term basis. Permanency planning is a philosophy and planning process that focuses on the outcome of family support by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

§419.296. References.
Regulations and statutes referenced in this subchapter include:

(1) 42 CFR §483.440(f)(3)(i);

(2) 20 CFR Part 416, Subpart F;

(3) Texas Human Resources Code, §32.024; and

(4) Texas Government Code, §531.153.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907987
Charles Cooper
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

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TITLE 30. ENVIRONMENTAL QUALITY

Part 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Chapter 449. GENERAL PROVISIONS

30 TAC Chapter 449

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 449 to Title 30, Part 1, Chapter 449.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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Chapter 450. PLANNING AND IMPLEMENTATION FEES

30 TAC Chapter 450

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 450 to Title 30, Part 1, Chapter 450.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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Chapter 451. DISPOSAL SITE MANAGEMENT AND OPERATION

30 TAC Chapter 451

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 451 to Title 30, Part 1, Chapter 451.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part 10. TEXAS WATER DEVELOPMENT BOARD

Chapter 353. INTRODUCTORY PROVISIONS

Subchapter A. GENERAL PROVISIONS

31 TAC §353.14

The Texas Water Development Board (board) adopts the repeal of 31 TAC §353.14, Memorandum of Understanding Between Texas Water Development Board and Texas Antiquities Committee without changes to the proposed text as published in the October 1, 1999 issue of the *Texas Register* (24 TexReg 8513) and will not be republished. The repeal is adopted to reorganize the board's memoranda of understanding into a separate and distinct chapter. New 31 TAC Chapter 354, Memoranda of Understanding, is concurrently adopted which will incorporate the language being repealed in this section as well as other memoranda of understanding to which the board is a party.

No comments were received on the proposed repeal.

The repeal is adopted pursuant to Texas Water Code, §6.101, which requires the board to adopt rules necessary to carry out its powers and duties and §6.104 which authorizes the board to enter into and adopt rules relative to memoranda of understanding with other state agencies.

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.

Filed with the Office of the Secretary of State on November 17, 1999.

TRD-9907821
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 7, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

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Chapter 354. MEMORANDA OF UNDERSTANDING

31 TAC §§354.1-354.4

The Texas Water Development Board (board) adopts new §§354.1-354.4 concerning memoranda of understanding between the board and other state agencies. Section 354.3 is adopted without change to the proposed text as published in the October 1, 1999 issue of the *Texas Register* (24 TexReg 8514) and will not be republished. Sections 354.1, 354.2 and 354.4 are adopted with change to the text as published in the October 1, 1999 issue of the *Texas Register* (24 TexReg 8514). Section 354.1 is adopted with change to correct internal citations. Section 354.2 is adopted with change to standardize all references to Minute Number 279. Section 354.4 is adopted with change to correct a typographical error in §354.4(e)(1)(B)(iii) to change the word "elect" to "select." The new sections will comprise new 31 TAC Chapter 354, Memoranda of Understanding, in order to consolidate all memoranda of understanding to which the board is party. Prior to this time memoranda of understanding appeared in four different chapters of board rules.

New §354.1 is adopted to replace existing §353.14 of this title (relating to Memorandum of Understanding Between Texas Water Development Board and Texas Antiquities Committee) which is being repealed in order to compile all memoranda of understanding into one new chapter. The new section establishes a memorandum of understanding between the board and the Texas Antiquities Committee and details the terms and responsibility of each agency.

New §354.2 is adopted to replace existing §363.3 of this title (relating to Memorandum of Understanding Between the Texas Water Development Board and the International Boundary & Water Commission) which is being repealed in order to compile all memoranda of understanding into one new chapter. The new section establishes a memorandum of understanding between the board and the International Boundary and Water Commission and details the terms and responsibilities of each agency.

New §354.3 is adopted to replace existing §371.5 of this title (relating to Memorandum of Understanding Between the Texas Water Development Board and the Texas Natural Resource Conservation Commission) which is being repealed in order to compile all memoranda of understanding into one new chapter. The new section establishes a memorandum of understanding between the board and the Texas Natural Resource Conservation Commission and details the terms and responsibilities of each agency.

New §354.4 is adopted to replace existing §363.511 of this title (relating to Memorandum of Understanding between Texas Water Development Board and Texas Department of Housing and Community Affairs) which is being repealed in order to move this memorandum of understanding to new Chapter 354. New §354.4 establishes a memorandum of understanding between the board and Texas Department of Housing and Community Affairs and details the responsibility of each agency regarding the coordination of funds out of the Economically Distressed Areas Program, administered by the board, and the Colonia Fund, administered by the Texas Department of Housing and Community Affairs, so as to maximize delivery of the funds and minimize administrative delay in the expenditure of these funds. New §354.4 differs from the old version in that it has been updated to include additional responsibility for both agencies to develop and provide information to the Senate Border Affairs Committee regarding the relative costs of providing water and wastewater services, where those costs have exceeded the existing board benchmark for financial assistance, to the costs of relocating the residents of the area proposed to be served by the board financial assistance.

No comments were received on the proposed new sections.

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and §6.104 which authorizes the board to enter into memorandum of understanding with other state agencies.

§354.1. Memorandum of Understanding Between Texas Water Development Board and Texas Antiquities Committee.

(a) Introduction.

(1) Whereas, the Texas Water Development Board (hereinafter TWDB) and the Texas Antiquities Committee (TAC)/Department of Antiquities Protection (DAP) desire to enter into a memorandum of understanding (MOU) under which TWDB is granted permission under the Antiquities Code of Texas for ongoing, long-term surveys by TWDB staff archeologists for all types of archeological sites which relate to proposed development projects funded by the TWDB; and

(2) Whereas, under the provisions of the Texas Natural Resources Code, the TAC is charged with the responsibility of the protection and preservation of the archeological and historical resources of Texas; and

(3) Whereas, under the provisions of Texas Natural Resources Code, Chapter 191, Subchapter C, §191.051 and §191.053, TAC may contract with or issue permits to other state agencies for the discovery and scientific investigation of archeological deposits; and

(4) Whereas, under the provisions of Texas Water Code, Chapter 6, §6.104, TWDB may enter into a MOU with any other state agency and shall adopt by rule any MOU between TWDB and any other state agency; and

(5) Whereas, under the provisions of this MOU, an Antiquities Permit is to be issued by TAC to TWDB for each calendar year that this agreement is in effect, subject to fulfillment of stipulated conditions;

(6) Now, therefore, the Texas Water Development Board and the Texas Antiquities Committee agree to enter into this memorandum of understanding to provide archeological surveys of all projects to be constructed with financial assistance from the Texas Water Development Board.

(b) Responsibilities. In a systematic manner, TWDB will conduct surveys for all types of archeological sites on lands belonging to or controlled by any county, city or other political subdivision of the State of Texas which may be impacted by proposed development projects that are funded in whole or in part by TWDB. Where appropriate, all surveys must consist of pedestrian surveys and sample subsurface probing (either shovel or mechanical testing, as appropriate) of proposed construction or development areas that may yield evidence of cultural resources (both historic and prehistoric), including areas that may receive direct impact from construction traffic.

(1) TWDB will comply with Texas Administrative Code requirements for a principal investigator as listed in 13 Texas Administrative Code §41.5 of the TAC Rules of Practice and Procedure. Each individual, as principal investigator, must be involved in at least 25% of the field investigation performed under the agreement.

(2) TWDB's staff archeologists will send the Department of Antiquities Protection (DAP) advance written notification of the following activities: proposed reconnaissance, 100% pedestrian surveys and/or sample subsurface probing investigations. The notification letters must include information on the type of project development proposed to receive TWDB financial assistance, the kind of archeological investigation proposed, the principal investigator or co-principal investigators intending to conduct the investigation, and the expected dates of the field work.

(3) TWDB staff archeologists will send DAP a report within 30 days of the completion of each investigation, notifying DAP of the findings of the investigation. The report must contain information on the basic scope of the work, findings, a project map showing any cultural site locations recorded, copies of all state site survey forms, a project development clearance request where appropriate, and any recommendations for further work. The report should conform with the guidelines for report preparation of the Council of Texas Archeologists. In cases where the scope and/or results of a particular investigation warrant a comparatively lengthy report requiring more than 30 days to prepare, TWDB staff archeologists will send a brief interim report notifying DAP of the findings of the investigation and proposed dates for the completion and submittal of the final report to DAP.

(4) DAP is responsible for responding to the report or the interim report, as appropriate, within 30 days of receipt of such report.

(5) For projects involving federal funds, TWDB field investigations will be conducted, where applicable, consistent with the National Historic Preservation Act, §106, the Secretary of the Interior's Guidelines on Archeology and Historic Preservation, the Regulations of the Advisory Council on Historic Preservation (36 Code of Federal Regulations Part 800), and the Texas Antiquities Code.

(6) A draft annual report summarizing the past calendar year's investigations under each yearly permit will be submitted to DAP by April 1 of the following year. Each project investigation report within the annual report will be concise, but informative, and include the same levels of data required under the rule provisions of 13 TAC §41.24.

(7) Once the draft annual report is approved by DAP, TWDB will submit 20 copies of the final annual report to DAP no later than 90 days after TWDB has received DAP's approval of the draft report. The final annual report should be in a form that conforms to 13 TAC §41.24(a), pertaining to Archeological Permit Reports.

(8) Copies of field notes, maps, sketches, and daily logs, as appropriate, will be submitted to DAP along with the annual report. Where duplicates are impractical, originals may be submitted for microfilming. Upon completion of microfilming, originals will be returned to TWDB.

(9) During preservation, analysis, and report preparation or until further notice by DAP, artifacts, field notes, and other data gathered during investigations will be kept temporarily at the TWDB. Upon completion of annual reports, the same artifacts, field notes, and other data will be placed in a permanent curatorial repository at the Texas Archeological Research Laboratory, the University of Texas at Austin, or other DAP-approved repository, at no cost to the TWDB.

(10) Should the staff archeologist positions at the TWDB be eliminated, TWDB remains responsible for contracting with an individual who meets the requirements of subsection (b)(1) of this section to serve as principal investigator to complete the year-end report to the DAP.

(11) The TWDB and/or its applicants for financial assistance may find that a particular project is so extensive or under such constraints of time and need that it is more efficient and effective for the archeological or related investigations to be conducted by a qualified archeologist under contract to the applicant. In such instances, the investigations will require a project specific antiquities permit to be obtained by the contracting archeologist.

(12) The following general procedures shall apply for investigation of all projects, including but not limited to the construction of water treatment and storage facilities, wastewater and sludge treatment and disposal facilities, water distribution and wastewater collection facilities, flood control modifications, municipal solid waste facilities, and reservoirs proposed to receive financial assistance from TWDB. Subject to those exceptions outlined below, the complete project will be investigated.

(A) Archival research will be conducted at the Texas Archeological Research Laboratory, the University of Texas at Austin, and other facilities, as appropriate, to determine what cultural resources have been previously recorded in the vicinity of all proposed project construction areas. If the project can be shown to be in areas which have been extensively disturbed by previous development and/or unlikely to contain intact or significant cultural resources, then, based upon this initial review and information provided by the applicant for financial assistance, TWDB may request the DAP to allow the project to proceed to construction without further investigation.

(B) When field investigations are determined to be necessary by TWDB or stipulated by DAP review, the field methodology shall include pedestrian survey of all project areas unless preliminary inspection determines that a particular project area has been substantially altered or is physiographically situated such that it appears highly unlikely that significant cultural resources occur in the area. Appropriate to the type of project and location, TWDB archeologists may undertake limited subsurface probing in the form of mechanical or limited manual excavations in order to identify and/or evaluate buried cultural remains. When field investigations reveal that no significant cultural resources are located in the proposed project areas and, in the opinion of the principal investigator, no damage to significant cultural resources is anticipated, as reflected in a written report to DAP, the project implementation will be allowed to proceed, subject to DAP concurrence with the recommendation under subsection (b)(4) of this section. In cases where historic and/or prehistoric cultural resources are found in the vicinity of proposed construction areas, the principal investigator will assess the significance of the resources and make recommendations for avoidance, testing, or mitigation of potentially significant resources, as appropriate, in the reports on the investigations. Decisions will be based upon the need to conserve cultural resources without unduly delaying the progress of project implementation.

(13) TWDB will ensure that it does not release funds for political subdivision construction prior to disposition, or formally agreed to disposition, of archeological and/or historical resources in accordance with DAP-approved reports referenced in paragraphs (3), (4), (5), and (11) of this subsection. Conditions of the TWDB financial assistance will provide, consistent with §41.8(b) of TAC rules, that if an archeological site is discovered during project implementation, work will cease in the area of the discovery, the site will be protected, and the discovery will be reported immediately to the Texas Historical Commission.

(14) Any member or agent of DAP may, with timely notice to TWDB, inspect TWDB investigations in progress subject to the provisions of the MOU and the yearly permit issued to TWDB by DAP.

(15) Said yearly permit is authorization for reconnaissance and 100% pedestrian survey and/or limited subsurface probing of areas of less than 300 acres when one TWDB staff archeologist is to conduct the investigation. When investigations of areas greater than 300 acres are proposed, TWDB shall consult with DAP regarding the need for a project specific permit. The investigation of tracts larger than specified above may require project-specific antiquities permits regardless of whether the TWDB has them performed by staff archeologists or by contract with other qualified archeologists. The above limitations do not apply to proposed pipeline or other linear construction projects wherein the total area to be examined may cumulatively exceed the acreage limitations.

(16) Advanced archeological investigations such as archeological testing or mitigative archeological excavations are not covered under the yearly permits, and any such investigation deemed necessary by DAP will require a project-specific antiquities permit.

(17) All conditions listed in the permit form remain unaltered by these guidelines.

(c) Permits. An antiquities permit is to be issued for each calendar year that this agreement is in effect with the stipulation that the responsibilities as outlined above are to be observed. Failure to comply with the provisions of this MOU could result in cancellation of the yearly permits at the discretion of DAP. The results of the investigations will be evaluated at the end of each permit period. A new permit will be automatically issued to TWDB by DAP by January 15 of each calendar year, assuming all conditions of the previous permit and this MOU have been met.

(d) Term. This memorandum of understanding will remain in full force and effect until canceled by the written notice of either party. The MOU may be amended by mutual written agreement between TWDB and DAP.

§354.2. Memorandum of Understanding Between the Texas Water Development Board and the International Boundary & Water Commission.

(a) The United States of America (hereinafter "United States") and the Republic of Mexico (hereinafter "Mexico") under pertinent provisions of the Treaty for Utilization of the Waters of the Colorado and Tijuana Rivers and the Rio Grande, dated February 3, l944 (TS 994; 59 Stat. 1219) and the implementation of Article 3 of this treaty in International Boundary and Water Commission Minute Number 261, Recommendations for the Solution to the Border Sanitation Problems, dated September 24, 1979 (TIAS 9658) signed International Boundary and Water Commission Minute Number 279, Joint Measures to Improve the Quality of the Waters of the Rio Grande at Laredo, Texas/Nuevo Laredo, Tamaulipas, in Laredo, Texas on August 28, 1989.

(1) A Minute of the International Boundary and Water Commission (hereinafter "IBWC"), approved by the two Governments, by virtue of pertinent provisions of the 1944 Water Treaty is a binding obligation of the governments of the United States and Mexico.

(2) The United States and Mexico under Minute Number 279 agreed to jointly finance the construction of an international wastewater treatment system in Nuevo Laredo, Tamaulipas.

(3) The United States and Mexico under Minute Number 279 agreed that the international treatment system in Nuevo Laredo, Tamaulipas, will be constructed, operated and maintained in a manner that will meet water quality standards stipulated in Minute Number 279, which are identical to the water quality standards adopted by the Environmental Protection Agency (hereinafter "EPA") and the State of Texas (hereinafter "Texas") for this reach of the Rio Grande.

(4) The United States and Mexico under Minute Number 279 are obligated to carry out through the IBWC programs of reviews and inspections of the principal elements of the jointly-financed

project in Nuevo Laredo, Tamaulipas, which includes the international treatment plant.

(5) The United States and Mexico under Minute Number 279 are obligated to conclude another international agreement in the form of a Minute of the IBWC for the operation and maintenance of the jointly-financed project in Nuevo Laredo, Tamaulipas, which must include the division of costs, an operation and maintenance manual, and a specific program to ensure that the effluent standards specified in Minute Number 279 are met.

(6) The Government of Mexico in Minute Number 279 is obligated to assure the completion, at its expense, of construction of the jointly-financed project in the event that costs exceed the amount stipulated in Minute Number 279 and that part of the financing provided by the United States will be utilized in Mexico under applicable laws of Mexico and under the administration of the Mexican Section of the IBWC.

(b) Texas and the United States consider it desirable to arrange for a cooperative effort to finance the cost of the international wastewater treatment system in Nuevo Laredo, Tamaulipas so the effluent meets EPA and State approved water quality standards adopted for this reach of the Rio Grande.

(c) Under the practice of the IBWC, personnel of the Texas Water Development Board (hereinafter "board") and of the Texas Water Commission (hereinafter "TWC") may serve as technical advisors to the United States Section of the IBWC (hereinafter "Section").

(d) The 7lst Texas Legislature, General Session, l989, enacted Senate Bill 2 (hereinafter "S.B. 2") which amends Texas Water Code, §15.002, to include in the purpose of the Water Assistance Program the concern by the legislature with the serious health and sanitation problems that face the citizens of Texas from discharges of untreated and treated wastewater into the Rio Grande, and the intent of the Legislature to provide a means of coordinating and financing the development of wastewater treatment projects through cooperative efforts between Texas, the United States, and Mexico to improve the quality of water in the Rio Grande.

(e) S.B. 2 further amends Texas Water Code, §15.001, to include a definition for "federal agency" which allows the Section to apply to the Water Loan Assistance Program.

(f) The board administers the Water Loan Assistance Fund under the provisions of the Water Loan Assistance Program of Texas Water Code, Chapter 15, Subchapter C.

(g) The provisions of Texas Water Code, §15.107, allow the board to make financial assistance available to successful applicants in any manner that it considers economically feasible.

(h) The rules governing applications to the board for funds and subsequent action and release of funds by the board are set out in Rules Relating to Financial Programs, Texas Administrative Code, Title 31, Chapter 363.

(i) S.B. 2 amends Texas Water Code, §15.007, to require that the board must find that any waste treatment facility to be financed will consider cost-effective methods of treatment such as rock reed, root zone, ponding, irrigation or other nonconventional methods that may have been developed by the National Aeronautics and Space Administration or the Tennessee Valley Authority.

(j) S.B. 2 amends Texas Water Code, §15.102, to include that the loan fund may be used to provide financial assistance to federal agencies or to both political subdivisions and federal agencies acting jointly, and that a political subdivision may enter into an agreement with a federal agency to submit a joint application for financial assistance, and that the board must find that the project is designed to produce effluent that will meet United States and Texas approved water quality standards before the board may grant financial assistance under a joint application.

(k) S.B. 2 further amends Texas Water Code, §15.102, to provide that a grant or loan of financial assistance under a joint application by the federal government and a political subdivision may be made only for a project that is covered by an international agreement to which the United States is a party, and a grant or loan made under such a joint application is subject to the provisions, terms, and conditions of the international agreement to which the United States is a party.

(l) S.B. 2 amends Texas Water Code, §15.103, to provide that in an application to the board for financial assistance from the loan fund, the applicant shall include the name of the federal agency and its principal officers, a citation of the law under which the federal agency operates and was created, and a prohibition that the board may not accept an application for a loan or grant of financial assistance from the loan fund unless it is submitted in affidavit form by the chief administrator of the federal agency.

(m) S.B. 2 amends Texas Water Code, §15.104, to include the requirement that if an applicant proposes a wastewater treatment plant that is located outside of the jurisdiction of Texas and is not subject to the permitting authority of the TWC, the board must review the plans and specifications in coordination with the TWC and find that the wastewater treatment plant is capable of producing effluent that will meet United States and Texas approved water quality standards.

(n) S.B. 2 amends Texas Water Code, §15.106, to provide that the board will not require a program of water conservation to be adopted under subsection (b) of §15.106 if the project consists of construction outside the jurisdiction of Texas.

(o) S.B. 2 amends Texas Water Code, §15.114, to provide that after approval of engineering plans, a federal agency shall not make any substantial or material alterations in the plans without authorization of the Executive Administrator of the board.

(p) The board and the Section hereby enter into this Memorandum of Understanding with the intent of clarifying the administrative rules and procedures for the Section application process and to formalize certain standards of conduct by the parties in the joint participation of the construction of a wastewater treatment facility.

(1) Application rules.

(A) The amendments to Chapter 15, Texas Water Code, as recited herein from S.B. 2 will be binding on the parties and will control over the Rules Relating to Financial Programs, of this chapter, where conflicts exist between such rules and the provisions of the statute.

(B) Portions of this chapter, which clarify requirements and facilitate the application process are described in Exhibit A entitled Application Rules, as shown in subsection (q)(10) of this section.

(C) The applicant shall submit a copy of the international agreement between the United States and Mexico which addresses the division of operating and maintenance costs as discussed in Resolution Number 8 of Minute Number 279 of August 28, l989. A copy of Minute Number 279 is attached hereto and incorporated herein by reference as Exhibit B as shown in subsection (q)(10) of this section.

(2) Definitions and terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(A) Participating party - A governmental or private entity which is providing financial or managerial support of the planning, design, construction, or the operational phases of the project.

(B) Project - All phases of the planning, design, and construction of the wastewater treatment plant and related facilities through completion of construction to operation.

(C) Project costs - Costs that are specifically funded through appropriation by the United States Congress for the Nuevo Laredo Project and which have been approved by the board in the Section's application and which may include: Section's pre-construction consultant costs; Section's administrative costs for inspection; and actual construction costs in the building of the project.

(3) Plans and specifications. Three sets of the plans and specifications for the project will be provided to the board. The board will be the lead agency in coordinating with TWC any reviews or approvals needed by TWC with regard to plans and specifications.

(4) Funding and payment.

(A) The board will administer the Texas share of funding of up to 10% of the United States share of the project costs as previously addressed in Minute Number 279, Exhibit B (as shown in subsection (q)(10) of this section) but the Texas share will not under any condition exceed $2 million.

(B) The Section will be responsible for ensuring that the Texas funds which are paid by the board are used solely in accordance with the terms of the approved application.

(C) The board will reimburse the Section in five installments for the Texas share of project costs incurred, subject to the following conditions:

(i) that no payment shall be made by the board until after the board has adopted the Memorandum of Understanding and approved the application submitted by the Section;

(ii) that no payment shall be made by the board, until in cooperation with the Texas Water Commission, the board has reviewed the plans and specifications and made the finding that the proposed wastewater treatment plant is capable of producing effluent that will meet United States and Texas approved water quality standards;

(iii) that the Section will submit a State of Texas payment voucher containing documentation of incurred costs. The board reserves the right to reduce or refuse payment if a voucher is deemed insufficient; and

(iv) that the first payment will consist of 10% of the cost incurred by the Section for the preparation of the facilities plan under the architect-engineer contract dated January 18, 1990, not to exceed $61,000. The second payment will consist of one-quarter of the estimated total Texas share of project costs, minus the first payment amount, and will be paid after the project's construction is 25% complete. The third payment will consist of one-half of the estimated total Texas share of project costs, minus all previous payment amounts, and will be paid after the project's construction is 50% complete. The fourth payment will consist of three-quarters of the estimated total Texas share of project costs, minus all previous payment amounts, and will be paid after the project's construction is 75% complete. The fifth payment will consist of the balance of the Texas share of project costs and will be paid after the project's construction is 100% complete.

(D) The project's construction completion percentage shall be based on the amount of project costs that are incurred, due, and payable in comparison to the total estimated, or completed, project costs. The Section is primarily responsible for determining the completion percentage but the board reserves the right to reduce or refuse payment if the quality of the construction is determined to be inadequate.

(E) In addition to the limitations stated in paragraph (4) of this subsection, the second and subsequent payments are contingent upon:

(i) the United States share of funding for the project being authorized and the funds for federal fiscal years 1990 and 1991 being appropriated;

(ii) the submittal to and approval by the board of copies of any agreements or contracts addressed in the Application Rules, Exhibit A as shown in subsection (q)(10) of this section that were not initially filed with the application; and

(iii) the receipt of documentation, acceptable to the board, that the agreement between the United States and Mexico on the operation and maintenance is in place as addressed by Resolution Number 8, Minute Number 279, Exhibit B as shown in subsection (q)(10) of this section. The fourth and fifth payment is further contingent upon the United States appropriating sufficient funds for the completion of the project if the federal fiscal year 1990 and 1991 funding was insufficient. The fifth payment is further contingent upon the Section submitting to the board a final accounting of the project and a recapitulation of the actual project costs.

(5) Right of entry and inspection. Subject to notice to the parties, the board, through its representatives, will have right of entry and inspection during all phases of the project construction.

(6) Insurance. The international agreement in Minute Number 279 is the contractual obligation by the Governments of the United States and Mexico for the adequate and complete construction of the project in Mexico under terms specified in that agreement, including the obligation of the Government of Mexico to complete construction of all elements of the international project.

(7) Executive and adoption. This Memorandum of Understanding shall be effective when signed by the designated representatives of the board and the Section and when adopted as a rule by the board. This Memorandum may be modified by mutual, written consent of the parties, and after publication as a rule amendment by the board.

(8) Duration. This Memorandum shall continue in full force and effect for five years after the last units of the project have commenced operations.

(9) Severance provision. Should any one or more provisions of this agreement be held to be null, void, or for any reason without force or effect, such provision(s) shall be construed as severable from the remainder of this agreement and shall not affect the validity of all other provisions of this agreement which shall remain in full force and effect.

(q) First amendment to memorandum of understanding between Texas Water Development Board and United States Section, International Boundary & Water Commission.

(1) On August 28, 1989, the United States and Mexico signed International Boundary and Water Commission Minute Num-

ber 279, Joint Measures to Improve the Quality of the Waters of the Rio Grande at Laredo, Texas/Nuevo Laredo, Tamaulipas.

(2) Pursuant to provisions of S.B. 2 on July 19, 1990, the board entered into a Memorandum of Understanding with the Section to provide for the joint participation of the board and the Section with Mexico in the construction of a wastewater treatment facility in Nuevo Laredo, Tamaulipas, Mexico for the purpose of improving the water quality of the Rio Grande.

(3) In authorizing the appropriation, S.B. 2 (now Texas Water Code, §15.002(c)) states in relevant part that the legislature finds that serious health and sanitation problems face the citizens of this state from discharges of untreated and treated wastewater into the Rio Grande. It is the intent of the legislature to provide a means of coordinating and financing the development of wastewater treatment projects through cooperative efforts between this state, the United States, and the Republic of Mexico to improve the quality of water being discharged into the Rio Grande.

(4) Pursuant to the terms of the Memorandum of Understanding, the board would provide payments to the Section not to exceed $2 million as a 10% share of the U.S. estimated contribution to the project of $20 million.

(5) In accordance with the payment provisions of the Memorandum of Understanding, the board has made a first payment to the Section of $61,000.

(6) Subsection (p)(4)(E)(iii) of this section specifies that second and subsequent payments by the board are contingent upon an agreement between the U.S. and Mexico on the project's operation and maintenance, as addressed by Resolution Number 8, Minute Number 279, being in place.

(7) The Section has submitted a request to the board that the condition described in subsection (p)(4)(E)(iii) of this section requiring finalization of the operation and maintenance costs agreement between the U.S. and Mexico be waived for the second and third payments, and that the board immediately process the second and third payments, in the total amount of $939,000.

(8) The Section represents that the U.S. has paid all of its obligation on the project except for the balance of the Texas share that remains, and that payment by the board will allow the construction to proceed and will avoid disrupting the project.

(9) The board finds that it is in the best interests of public health and safety that construction of the project proceed without disruption, and that all other conditions for the second and third payments have been met.

(10) The Texas Water Development Board and the United States Section, International Boundary and Water Commission, agree to amend the condition described in subsection (p)(4)(E)(iii) of this section to read as follows: "the receipt by the board of an agreement between the United States and Mexico for specific operation and maintenance criteria to ensure compliance with the discharge standards in Minute Number 279 including commitments to adopt an operations and maintenance manual and a satisfactory division of costs before the international plant is in operation as addressed by Resolution Number 8, Minute Number 279, Exhibit B, as shown in subsection (q)(10) of this section. This applies to the second and third payments. The fourth and fifth payment is further contingent on receipt by the board of the agreement addressed in Resolution Number 8 of Minute Number 279 and upon the United States appropriating sufficient funds for completion of the project, if the federal funds appropriated and the maximum contribution by Texas of $2 million are not sufficient. The fifth payment is further contingent upon the Section submitting to the board a final accounting of the project and a recapitulation of the actual project costs."
Figure 1: 31 TAC §354.2(q)(10)
Figure 2: 31 TAC §354.2(q)(10)

§354.4. Memorandum of Understanding between Texas Water Development Board and Texas Department of Housing and Community Affairs.

(a) Recitals.

(1) Pursuant to the 1995 Appropriations Act of the Texas Legislature, and continued in the 1997 Appropriations Act of the Texas Legislature, the Texas Water Development Board (TWDB) and the Texas Department of Housing and Community Affairs (TDHCA) were required to develop an Memorandum of Understanding to detail the responsibility of each agency regarding the coordination of funds out of the Economically Distressed Areas Program, administered by the TWDB, and the Colonia Fund, administered by the TDHCA, so as to maximize delivery of the funds and minimize administrative delay in their expenditure. The TWDB and the TDHCA executed an MOU and performed pursuant to the terms of that MOU.

(2) Pursuant to the 1999 General Appropriations Act of the 76th Texas Legislature, the TWDB and the TDHCA are required to continue the coordination commenced under the Memorandum of Understanding. In addition, members of the Border Affairs Committee of the Texas Senate have requested that the TWDB and the TDHCA provide information to that committee comparing the cost of providing water and wastewater service to a community to the costs of relocating the households located in that community.

(b) Parties. This Memorandum of Understanding hereinafter referred to as "Memorandum," is made and entered into between the TDHCA, an agency of the State of Texas, and the TWDB, an agency of the State of Texas.

(c) Purpose. The purpose of this Memorandum is to assure that none of the funds appropriated under Community Development Block Grant Program, Colonia Fund, are expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the intent of the Economically Distressed Areas Program (EDAP) operated by the Texas Water Development Board, so as to maximize delivery of the funds and minimize administrative delay in their expenditure. Additionally, the purpose of this Memorandum is to provide the procedure for compiling, evaluating, and comparing information relating to the cost of providing water or wastewater service as determined by the TWDB with the cost of relocating the residents to an area with adequate water and wastewater service as well as adequate housing.

(d) Period of performance. This Memorandum shall begin on September 1, 1999 and shall terminate on August 31, 2001. This Memorandum may be extended for additional period of time to ensure compliance with TDHCA Rider Number 4 and TWDB Rider Number 8 to the General Appropriations Act, 76th Legislature for the 2000-2001 Biennium.

(e) Performance.

(1) Each party to this Memorandum shall coordinate with the other in delivering water and sewer service lines, hook-ups, and plumbing improvements to residents of selected colonias in order to connect those residents' housing units to EDAP-funded water and sewer systems.

(A) TDHCA responsibilities. The TDHCA shall be responsible for the following functions:

(i) develop an application process for projects submitted by eligible units of local government;

(ii) assist units of general local government in preparing an application to the Colonia Fund;

(iii) determine whether projects meet federal requirements;

(iv) select projects to receive funding in conjunction with the TWDB;

(v) make Colonia Fund grant awards for selected projects on an as-needed basis;

(vi) prepare and execute contracts with units of general local government (contractor localities);

(vii) provide oversight and guidance to contractor localities regarding applicable federal and state laws and program regulations (environmental, labor, acquisition of real property, relocation, procurement, financial management, fair housing, equal employment opportunity, etc.);

(viii) provide on-site technical assistance if necessary to ensure that funds are efficiently and effectively used to accomplish the activities for which they were intended;

(ix) review, approve, process, and honor valid reimbursement requests from contractor localities;

(x) monitor each project prior to contract completion to ensure compliance with applicable federal and state laws and program regulations;

(xi) consult with the TWDB regarding specific projects on an as-needed basis; and

(xii) notify communities on list provided by the TWDB of the availability of funds.

(B) TWDB responsibilities. The TWDB shall be responsible for the following functions:

(i) provide the TDHCA with descriptions of and schedules for EDAP-funded projects that need Colonia Fund assistance to provide connections and plumbing improvements at least six weeks before such assistance would be required;

(ii) assist eligible units of general local government in preparing an application for assistance through the TDHCA's Colonia Fund;

(iii) select projects to receive funding in conjunction with the TDHCA; and

(iv) provide assistance with technical project-related concerns brought forward by contractor localities or the TDHCA during the course of the project.

(2) Each party to this Memorandum shall coordinate in the compilation, evaluation, and comparison of information relating to the cost of providing water or wastewater service as determined by the TWDB with the cost of relocating the residents to an area with adequate water and wastewater service as well as adequate housing as determined by the TDHCA.

(A) TWDB responsibilities. The TWDB shall be responsible for the following functions:

(i) identify up to five projects which exceed the benchmark cost per household set by the TWDB for providing financial assistance for the construction of water or wastewater systems by no later than April 1, 2000;

(ii) for these projects, prepare an executive summary which identifies for the proposed EDAP area:

(I) average residential lot size,

(II) average number of people per household,

(III) total number of households to be served by the proposed project, and

(IV) the cost per household of providing water and wastewater service; and

(iii) for these projects, promptly provide the TDHCA the executive summary and the facility plan submitted for such project;

(B) TDHCA responsibilities. The TDHCA shall be responsible for the following functions:

(i) for each of the projects received from the TWDB under this section, prepare a market analysis for such area which will identify:

(I) the cost of developing a single family residential housing for the number of households identified for the EDAP area in the TWDB facility plan, and

(II) the cost of developing multi-family housing to serve the number of households identified for the EDAP area;

(ii) provide a copy of the market analysis for each such EDAP area together with a copy of the executive summary to the TWDB, the colonia coordinator appointed by the governor, and the Senate Border Affairs Committee by no later than September 1, 2000.

(f) Limitations. Eligible applicants shall be those counties eligible under both TDHCA's Colonia Fund and TWDB's EDAP. Non-entitlement cities located within eligible counties are also eligible applicants. Eligible projects shall be located in unincorporated colonias identified by the TWDB and in eligible cities that annexed the colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. Eligibility shall be denied to any project in a county that has not adopted or is not enforcing the Model Subdivision Rules established pursuant to §16.343 of the Texas Water Code.

(g) Reporting requirements. Each party to this Memorandum shall submit, on or before the fifteenth day of the month following the end of the calendar quarter, to the other party a report of its activities and expenditures during the previous calendar quarter. The first such report shall be due January 15, 2000. No later than September 15, 2000, the TDHCA and the TWDB shall submit a joint report to the Legislative Budget Board that describes and analyzes the effectiveness of projects funded as a result of coordinated Colonia Fund/EDAP efforts.

(h) Termination. This Memorandum shall terminate upon ten days written notice by either party to the other party in this contract.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907885

Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 9, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

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Chapter 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (board) adopts amendments, repeals and new sections to 31 TAC Chapter 363, Financial Assistance Programs. The board adopts amendments to §§363.2, 363.13, 363.16, 363.17, 363.32, 363.33, 363.42, 363.43, 363.51, 363.53, 363.54, 363.86, 363.202, 363.402, 363.602, 363.704, 363.712, 363.721, and 363.809; repeal of §§363.3, 363.81-363.84 and 363.511; and new §§363.81-363.85 without changes to the proposed text as published in the October 8, 1999 issue of the *Texas Register* (24 TexReg 8712) and will not be republished.

The changes are the result of the agency's ongoing rules review program and are intended to update, clarify, and generally assure that the rules are current and reflective of the administrative requirements and procedures of the agency.

Section 363.2, Definitions of Terms, is amended to delete the term "bonds" as duplicative of the definition of "debt." The definition of "delivery" is deleted as duplicative in most respects to "closing" and the definition of "closing" is amended to include the concept that the delivery of funds may occur by release of funds to an escrow account. The definition of "grant" is amended to clarify its meaning and to reflect its application to all financial assistance programs of the board. The definition of "release" is amended to reflect its application to grant programs as well as loan programs. The definition of "corporation" is amended to reflect changes in the statute. A new definition for the term "pre-design commitment" is added to clarify the application of §363.16, Pre-design Funding Option.

Also in §363.2, the definitions of "economically distressed area" and "emergency" are deleted in order to move them to new §363.81 under Subchapter A, Division 7, Grants for Emergency, the particular program to which they apply. Section 363.3, Memorandum of Understanding Between the Texas Water Development Board and the International Boundary and Water Commission, is being repealed in order to move it to a new Chapter 354, Memoranda of Understanding, into which several such agreements will be consolidated.

Section 363.13, Engineering Feasibility Data, is amended to make the language consistent with the relevant statutory language defining "innovative technology" which must be evaluated.

Section 363.16, Pre-design Funding Option, subsection (a), is amended to clarify the language, to more precisely describe the activities which may be funded under this option and to reflect that the board may hold or retain funds until completion of planning requirements rather than having to release them into escrow until such requirements are fulfilled. Subsection (b) is amended to clarify which of the board's financial assistance programs are not eligible for pre-design funding by deleting a partial listing of some eligible programs and completing the list of ineligible programs by including those related to storage acquisition and state participation projects.

Section 363.17, Water Loan Assistance Fund, is amended to change the title to "Grants from Water Loan Assistance Fund" to clarify the application of these provisions to non-repayable financial assistance. The section is also restructured to add subsection (a) in order to allow for the addition of a new subsection (b) to clarify that the terms of a grant will be specified in an agreement between the board and the grantee.

Section 363.32, Action by the Board on Application, is amended to clarify that the board may approve an application with conditions (rather than "amend"). The provision related to a date upon which the board's approved financial assistance will expire or no longer be available to an applicant is adopted to reflect that the date will be included in the board's commitment to provide the assistance.

Section 363.33, Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects, is amended in subsection (c)(2) so that the interest rate charged on state revolving fund variable rate loans made by the board under this subchapter will be the actual interest cost to the board for its outstanding variable rate debt plus the actual cost maintaining the variable rate debt in the fund. Currently, the rule requires that the interest rate for state revolving fund variable rate loans is the actual interest cost plus a fixed 31.5 basis points. This language unnecessarily restricts the board's ability to respond to market conditions.

Section 363.42, Loan Closing, is amended in subsection (a)(1) to limit its application to the requirements of those jurisdictional agencies which are identified by the executive administrator of the board. Currently, this rule requires the applicant to submit evidence that it has complied with "all" local, state, and federal agency requirements without any delineation of which agencies the board is requiring compliance. This amendment allows the executive administrator to identify the requirements with which the applicant will have to comply. The provisions of §363.43, subsections (a), Release of Funds for Planning, Design and Permits, and (c), Release of Funds for Building Purposes, are amended to include the same requirement for evidence of requisite jurisdictional agency permits and authorizations for each of these stages of project development, by adding new paragraphs (a)(4) and (c)(6), respectively, and renumbering the subsequent paragraphs as appropriate.

Section 363.51, Inspection During Construction, is amended to reflect that project inspection in the normal course of events, in keeping with industry standards, will be conducted "under the supervision" of a registered professional engineer rather than "by" the engineer. The last sentence of the section is deleted to remove a redundant and unnecessary provision.

Section 363.53, As Built Plans, is amended to reflect that "as-built plans" are to be received from the project contractor and retained by the political subdivision rather than submitted to the board. The former requirement has proved burdensome to both the board and to participating political subdivisions due to the voluminous nature of a complete set of project plans and drawings.

Section 363.54, Audits, is amended to reflect that the board is required to conduct environmental audits from time to time and may do so as required to ensure compliance with relevant financial assistance agreements.

A new §363.81, Definitions of Terms, is added by moving the definitions of "economically distressed area" and "emergency" from §363.2 because these definitions are applicable specifically to emergency financial assistance available from the board pursuant to the provisions of Chapter 15, Subchapter C of the Texas Water Code. Existing §§363.81-363.84 are repealed and adopted as new §§363.82-363.85 to accommodate the addition of this new section. In addition, new §363.82 (formerly §363.81) was reworded from its original version to include the specific statutory cite for this financial assistance program.

New §363.85 (formerly §363.84) was adopted to change the title to "Additional Application Information" and to clarify that the engineering and environmental information previously required by this section is in addition to the initial application information that may be required by the executive administrator for purposes of evaluation under the preceding section so that the previous provision relating to applications is not in any way in conflict with this provision but is supplemental thereto. The amendments to Section 363.86, Grant Agreement, are adopted to reflect that the current listing of required terms and conditions of a grant agreement between the applicant and the board is not intended to be exhaustive because other provisions specific to a particular grant may be required by the board in order to protect the interest of the state.

The headings to §§363.202, 363.402, and 363.602 are amended by adding "of terms" to the current headings for clarity and to achieve consistency with other sections in the chapter. Section 363.511, Memorandum of Understanding Between the Texas Water Development Board and the Texas Department of Housing and Community Affairs, is repealed in order to move it to a new Chapter 354, Memoranda of Understanding, into which several such agreements will be consolidated.

Section 363.704, Eligibility Requirements, is amended to incorporate semantic changes intended to clarify these requirements. Subparagraph (3)(D) is amended to change "and" to "or" to clarify that an emergency may exist in a situation identified by either subparagraphs (3)(A) through (3)(D) or by subparagraph (3)(E).

Section 363.712 is amended to correct a cite to another section of the chapter. Section 363.721 and §363.809 are amended to add catch lines for consistency with existing structure.

No comments were received on the proposed amendments, repeals and new sections.

Subchapter A. GENERAL PROVISIONS

Division 1. INTRODUCTORY PROVISIONS

31 TAC §363.2

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

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Suzanne Schwartz
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Texas Water Development Board
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31 TAC §363.3

The repeal is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

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Division 2. GENERAL APPLICATION PROCEDURES

31 TAC §§363.13, 363.16, 363.17

The amendments are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 3. FORMAL ACTION BY THE BOARD

31 TAC §363.32, §363.33

The amendments are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt

rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 4. PREREQUISITES TO RELEASE OF STATE FUNDS

31 TAC §363.42, §363.43

The amendments are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 5. CONSTRUCTION PHASE

31 TAC §§363.51, 363.53, 363.54

The amendments are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 7. GRANTS FOR EMERGENCY

31 TAC §§363.81-363.84

The repeals are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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31 TAC §§363.81-363.86

The amendments and new sections are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter B. STATE WATER POLLUTION CONTROL REVOLVING FUND

Division 1. INTRODUCTORY PROVISIONS

31 TAC §363.202

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter D. FLOOD CONTROL

31 TAC §363.402

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter E. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §363.511

The repeal is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter F. STORAGE ACQUISITION AND STATE PARTICIPATION

31 TAC §363.602

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter G. SMALL COMMUNITY EMERGENCY LOAN PROGRAM

Division 1. INTRODUCTORY PROVISIONS

31 TAC §363.704

The amendments are adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 2. APPLICATION PROCEDURES

31 TAC §363.712

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Division 3. CLOSING AND RELEASE OF FUNDS

31 TAC §363.721

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter H. GROUNDWATER DISTRICT LOAN PROGRAM

31 TAC §363.809

The amendment is adopted under the authority of the Texas Water Code, §§6.101, 15.403 and 15.605 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Suzanne Schwartz
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Chapter 371. DRINKING WATER STATE REVOLVING FUND

The Texas Water Development Board (board) adopts amendments to §§371.2, 371.19, 371.20, 371.21, 371.23, 371.24, 371.25, 371.26, 371.38, 371.52, 371.82, and 371.85 and repeal of §371.5 concerning the Drinking Water State Revolving Fund (DWSRF). Sections §§371.2, 371.20, 371.21, 371.23, 371.24, 371.25, 371.26, 371.38, 371.52, 371.82, and 371.85 and repeal of §371.5 are adopted without changes to the proposed text as published in the October 1, 1999 issue of the *Texas Register* (24 TexReg 8522) and will not be republished. Section 371.19 is adopted with change to the text as published to clarify paragraph (d)(7) regarding population factors. The change was published as a correction of error in the October 15, 1999 issue of the *Texas Register* (24 TexReg 9111).

The repeal of §371.5, relating to a Memorandum of Understanding (MOU) between the board and the Texas Natural Resource Conservation Commission is for the purpose of transferring the rule to a new chapter of board rules which will consist solely of MOU's to which the board is a party. The remaining amendments add a definition, add detail to clarify the rating criteria and procedures of the DWSRF program, and address the priority position of applications that seek refinancing of an eligible project.

Section 371.2 relating to Definitions, is amended to add a definition for the term "Pre-design commitment" to eliminate current confusion as to whether it is a practice of the board to permit applicants to receive a loan commitment prior to completion of the planning and design phases of a project.

Section 371.19, relating to the Rating Process, is amended to notice applicants of a new policy with respect to refinancing of debt with DWSRF funds. An increase in inquiries about refinancing has necessitated stated guidelines for how projects to be refinanced will be rated. Section 371.20 would amend procedures for the Intended Use Plan to clarify for disadvantaged community applicants the necessity for submitting information by a time certain in order to qualify as a disadvantaged community.

Section 371.21, relating to Criteria and Methods for Distribution of Funds for Water System Improvements, is amended to provide applicants for water system improvements additional time to secure a loan commitment after the submittal of an application. In addition, the section shortens the deadline for applications for the disadvantaged community program so that entities that are not ready to proceed to commitment are prevented from maintaining a reserve on funds that could otherwise be utilized by entities that are ready to proceed. These two changes also eliminate confusion by establishing a standard timeframe for all applicants to the DWSRF program.

Section 371.23, relating to Criteria and Methods for Distribution of Funds for Source Water Protection, is amended to establish by rule a process for disposition of funds previously reserved that remain uncommitted for source water protection projects. Previously, there was no stated method for distribution of such funds. The section is further amended to correct a citation to another subsection of the chapter.

Section 371.24, relating to Disadvantaged Community Program through Loan Subsidies, is amended to correct a citation.

Section 371.25, relating to Criteria and Methods for Distribution of Funds for Disadvantaged Communities, is amended to provide notice to applicants that the deadline for receiving a commitment for financial assistance is being shortened so that entities that are not ready to proceed to commitment are prevented from maintaining a reserve on funds that could otherwise be utilized by entities that are ready to proceed. The section is further amended to delete the reference to two population category lists. The deletion conforms to a change required by EPA of previous practices. The section is further amended to add the description "disadvantaged communities" where the term appears to be needed for understanding.

Section 371.26, relating to Criteria and Methods for Distribution of Funds from the Community/Noncommunity Water Systems Financial Assistance Account, is amended to provide notice to applicants that the deadline for receiving a commitment for financial assistance is being shortened so that entities that are not ready to proceed to commitment are prevented from maintaining a reserve on funds that could otherwise be utilized by entities that are ready to proceed. The section is further amended to delete the reference to two population category lists. The deletion conforms to a change required by EPA of previous practices. The section is additionally amended to add the term "private and NPNC" to "applicants" where the term appears to be needed for understanding.

Section 371.38, relating to Pre-Design Funding Option, is amended to provide notice to applicants for the purpose of eliminating confusion about whether applicants may receive a financial assistance commitment prior to completion of the planning and design of a project. Section 371.52, relating to Lending Rates, is amended to provide the board with flexibility to set variable lending rates to accommodate changing financial market conditions without the need for frequent rule amendments.

Section 371.82, relating to Inspection During Construction, is amended as a public safety factor in insuring that inspection of a project is done by a qualified inspector in a manner that is consistent with current industry practices. Section 371.85, relating to As Built Plans, is amended to clarify that as built plans should be submitted to the applicant and not to the board.

No comments were received on the proposed amendments.

Subchapter A. INTRODUCTORY PROVISIONS

31 TAC §371.2

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

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Suzanne Schwartz
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31 TAC §371.5

The repeal is adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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Subchapter B. PROGRAM REQUIREMENTS

31 TAC §§371.19-371.21, 371.23-371.26

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

§371.19. Rating Process

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acute chemical violation - A violation of the maximum contaminant level established for nitrate or nitrite as defined in 30 TAC Chapter 290 (relating to Water Hygiene).

(2) Acute coliform bacteria violation - A violation of the maximum contaminant level for coliform which is defined as an acute risk to health, as specified in 30 TAC Chapter 290 (relating to Water Hygiene).

(3) Carcinogen violation - A violation of the maximum contaminant level established for any carcinogenic contaminant listed in the following table:
Figure: 31 TAC §371.19(a)(3).

(4) Chronic chemical violation - A violation of the maximum contaminant level established for any of the contaminants listed in the following table:
Figure: 31 TAC §371.19(a)(4).

(5) Chronic coliform bacteria violation - A violation of the maximum contaminant level for total coliform as specified in 30 TAC Chapter 290 (relating to Water Hygiene).

(6) Compliance period - A three-year period for assessing compliance as defined in 30 TAC §290.102 (relating to Definitions).

(7) Geologic protection - The presence of one layer of clay 30 feet thick or thicker or the presence of thinner clay layers whose cumulative thickness is 100 feet thick or thicker between the ground surface and the top of a water producing aquifer.

(8) Maximum contaminant level - The maximum allowable level for any bacteriological chemical or radiological contaminant specified in 30 TAC Chapter 290 (relating to Water Hygiene).

(9) Ninetieth percentile copper/lead level - The level of lead or copper in a water system determined by the method specified in 30 TAC Chapter 290 (relating to Water Hygiene).

(10) Principal project - A project or group of projects included in an application which are intended to address specific system conditions which received priority points, the cost of correction of which comprises greater than 50% of the cost of all projects included in an application.

(11) Secondary chemical constituent exceedance–An exceedance of the constituent level established for any secondary chemical constituent listed in the following table:
Figure: 31 TAC §371.19(a)(11)

(12) Treatment technique violation–A violation of any surface water treatment technique as specified in 30 TAC Chapter 290 (Water Hygiene). For the purposes of this rating, these will include all 5.0% exceedances of the 0.5 NTU standard.

(13) Selected vulnerable aquifer–Aquifers identified by the commission at the time of preparation of the annual intended use plan and included by list in the letter soliciting project information as described in §371.20(b)(1) of this title (relating to Intended Use Plan) with criteria including, but not limited to: high transmissivity, rapid recharge (e.g., karst), unconfined aquifers with shallow water tables.

(14) Watershed–The contributing area of water to a surface water body such as a river or reservoir.

(b) Rating of Principal Project. Proposals for inclusion of projects in an intended use plan will be rated based upon the principal project. Additional projects which are integral to the integrity of the system may be included in a proposal and receive funding, so long as their costs comprise 50% or less of the total project costs.

(c) Rating for Refinancing. If refinancing is sought for a completed project, the project will be rated in accordance with subsections (d) through (j) of this section, based upon the conditions which existed prior to the initiation of construction of the project. A completed project can not be combined with a project for which construction has not been completed, but must be rated separately.

(d) Health and Compliance Factors. Health and compliance factors for rating purposes will be calculated as follows.

(1) The microbiological factor will be equal to the sum of: the total number of coliform bacteria violations occurring within the preceding 12 months; the total number of acute coliform bacteria violations occurring within the preceding 12 months; and the total number of treatment technique violations occurring within the preceding 12 months, minus one.

(2) The filtration factor of 12 points will be awarded to any system with one or more sources of water identified as surface water, or groundwater under the direct influence of surface water for which no filtration is provided as identified by records maintained by the TNRCC.

(3) The chronic chemical factor for each contaminant listed in the following table will be equal to the average value of chronic chemical violations occurring within the most recent compliance period for which data exist, divided by the maximum contaminant level listed.
Figure: 31 TAC §371.19(d)(3)

(4) The acute chemical factor will be equal to three times the quotient of the average value of nitrate or nitrite violations occurring within the most recent compliance period for which data exist, divided by the maximum contaminant level for nitrate or nitrite established by 30 TAC Chapter 290 (Water Hygiene).

(5) The carcinogen factor for each contaminant listed in the following table will be equal to twice the quotient of the average value of carcinogen violations occurring within the most recent compliance period for which data exist, divided by the maximum contaminant level listed.
Figure: 31 TAC §371.19(d)(5)

(6) The lead/copper factor will be equal to the product of two times the greater of: the 90th percentile lead level divided by 0.015, or the 90th percentile copper level divided by 1.3, as established in 30 TAC Chapter 290 (Water Hygiene).

(7) The population factor shall be based on the current population served by the system as follows: a factor of 0 for zero to 100 population; a factor of 1 for 101 to 1,000 population; a factor of 2 for 1,001 to 10,000 population; a factor of 3 for 10,001 to 100,000 population; and a factor of 4 for greater than 100,000 population. Current population will be based on population data maintained by the commission. The population factor will be used only when the sum of the factors listed in this paragraph and paragraphs (1)-(6) of this subsection is greater than zero. In that event, the population factor will be added to the sum of the factors listed in this paragraph and paragraphs (1)-(6) of this subsection.

(8) The secondary chemical factor for each constituent so designated in the following table will be equal to one-half the quotient of the average of the secondary chemical constituent exceedances occurring during the most recent compliance period for which data exists, divided by the secondary chemical constituent level listed in this section. A maximum of two points may be assigned to this factor.
Figure: 31 TAC §371.19(d)(8)

(9) The total health and compliance factor for each applicant shall be the sum of all individual factors calculated according to this paragraph and paragraphs (1)-(8) of this subsection.

(10) The health and compliance factors for chronic coliform, acute coliform and treatment technique will be calculated based on data maintained by the commission from the most recent consecutive 12 months for which data are maintained by the commission, resulting from monitoring conducted by the commission or from public water system monitoring required by 30 TAC Chapter 290 (Water Hygiene).

(11) The health and compliance factors for chronic chemical, acute chemical, secondary chemical and carcinogen will be calculated based on data maintained by the commission from the current compliance period, resulting from monitoring conducted by the commission or from public water system monitoring required by 30 TAC Chapter 290 (Water Hygiene).

(12) The health and compliance factor for lead/copper will be calculated based on data maintained by the commission

from the most recent complete compliance period, as defined in 30 TAC Chapter 290 (Water Hygiene), resulting from monitoring by the commission or from public water system monitoring required by 30 TAC Chapter 290 (Water Hygiene).

(e) Affordability Factor. A project which qualifies as a disadvantaged community as defined in §371.24 of this title (relating to Disadvantaged Community Program through Loan Subsidies) shall have an affordability rating factor of 1.

(f) Consolidation. In the event a project proposed for funding is to benefit two or more water systems, the combined rating factor will be the sum of the combined rating factors for each of the systems if the applicant will be wholly responsible for the ownership, operation and maintenance of the consolidated system; or will be the combined rating factor of the applicant system plus one-half the sum of the combined rating factors of each system to be consolidated if the applicant will be responsible only for supplying wholesale water to the individual system(s) and not be responsible for the ownership, operation and maintenance of the individual system(s). To receive the consolidation points, the applicant must provide documentation of agreement by the system(s) to be consolidated.

(g) Physical Deficiency Rating Criteria. All projects will be evaluated for the existence of physical deficiencies based on information submitted by the applicant. The projects will receive physical deficiency rating scores based on the following criteria.

(1) If the system has experienced documented instances of water distribution outages or water distribution pressures of less than 20 pounds per square inch the project will receive a rating score of 1.

(2) If the system is not providing disinfection the project will receive a rating score of 1.

(3) If the documented water production capability is less than 85% of the minimum required by the commission the project will receive a rating score of 0.25.

(4) If the documented treated water storage capacity is less than 85% of the minimum required by the commission the project will receive a rating score of 0.25.

(5) If the system has experienced documented instances of water distribution pressures between 20 and 35 pounds per square inch the project will receive a rating score of 0.25.

(6) If the water system is experiencing documented water distribution system losses of greater than 25% the project will receive a rating score of 0.25.

(7) If the water system exceeds any secondary constituent listed in the following table and is not designated as a secondary chemical factor, the project shall receive a rating score of 0.25.
Figure: 31 TAC §371.19(g)(7)

(8) The total physical deficiency rating score for a project will be the sum of all of the individual deficiency rating scores for that project.

(h) Combined Rating Factor. The combined rating factor for a project shall be the sum of the affordability factor, the total health and compliance factor and the total physical deficiency rating. Projects which did not receive either a health and compliance factor, a physical deficiency rating or an affordability factor shall have a combined rating factor of zero.

(i) Assignment of Points. Projects will be awarded points only if the proposed projects address the health and compliance, physical deficiency or affordability factors of the applicant system and/or system(s) to be consolidated.

(j) Tie Breaker. In the event of ties in the ratings, priority will be given to the project serving the smaller total population based on information maintained by TNRCC.

(k) Ranking for Refinancing. Completed projects, which involve refinancing, will be listed in the intended use plan as a separate group and will be placed below the group of projects for which construction has not been completed.

(l) Eligible entities that seek consideration for source water protection funding will be rated according to the following criteria.

(1) Ground Water System Vulnerability Factor.

(A) Ground water systems without the necessary water well geologic protection will receive 4 points.

(B) Ground water systems with documented Nitrate (N) concentrations of greater than two mg/l will receive 1 point.

(C) Ground water systems obtaining water from selected vulnerable aquifers will receive 1 point.

(D) Ground water systems with confirmed detections of organic chemical contamination identified in the following table will receive 2 points.
Figure: 31 TAC §371.19(l)(1)(D)

(E) No ground water system may receive more than 6 system vulnerability points. Ground water systems that receive no system vulnerability points will not be considered for source water protection funding.

(2) Surface Water System Vulnerability Factor.

(A) Surface water systems with contributing watersheds of 20 square miles or less as determined by the commission will receive 3 points.

(B) Surface water systems with confirmed detections of organic chemical contamination identified in the following table will receive 3 points.
Figure: 31 TAC §371.19(l)(2)(B)

(C) No surface water system may receive more than 6 system vulnerability points. Surface water systems that receive no system vulnerability points will not be considered for source water protection funding.

(3) No combination ground and surface water system may receive more than 6 system vulnerability points.

(4) Ability to Implement Best Management Practices Factor.

(A) Systems that receive system vulnerability points and that possess the ability and authority to implement land use controls including but not limited to zoning or ordinances, will receive 2 points.

(B) Systems that receive system vulnerability points and that possess the ability to implement other non-land use controls such as public education, contingency planning, or conducting toxic/hazardous waste collection events will receive 1 point.

(C) Systems that receive system vulnerability points and that propose to plug abandoned wells within the delineated source water protection area will receive 1 point.

(D) Systems that receive system vulnerability points and that have confirmed siting or well construction problems listed on the most recent commission sanitary survey will receive 1 point for proposals which will correct these problems.

(E) Systems that receive no Ability to Implement Best Management Practices points will not be considered for source water protection funding.

(5) Affordability Factor. A system having a service area in which the per capita income averaged 25% or more below the state average based upon the most recent census data available shall have an affordability rating factor of 1.

(6) The total source water protection rating score will be the sum of points generated from ground and surface water system vulnerability, ability to implement best management practices and affordability factors.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907850
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 8, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

♦ ♦ ♦

Subchapter C. APPLICATION FOR ASSISTANCE

31 TAC §371.38

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907851
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 8, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

♦ ♦ ♦

Subchapter D. BOARD ACTION ON APPLICATIONS

31 TAC §371.52

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907852
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 8, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

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Subchapter G. BUILDING PHASE

31 TAC §371.82, §371.85

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

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.

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TRD-9907853
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 8, 1999
Proposal publication date: October 1, 1999
For further information, please call: (512) 463-7981

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Part 15. TEXAS LOW-LEVEL RADIOACTIVE WASTE DISPOSAL AUTHORITY

Chapter 449. GENERAL PROVISIONS

31 TAC Chapter 449

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 449 to Title 30, Part 1, Chapter 449.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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Chapter 450. PLANNING AND IMPLEMENTATION FEES

31 TAC Chapter 450

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 450 to Title 30, Part 1, Chapter 450.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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Chapter 451. DISPOSAL SITE MANAGEMENT AND OPERATIONS

31 TAC Chapter 451

Editor's Note: House Bill 2954, §402.004, 76th Legislature, transfers all powers, duties, rights and rules from the Texas Low-Level Radioactive Waste Disposal Authority (TLLRWDA) to the Texas Natural Resource Conservation Commission and abolishes the TLLRWDA. Effective September 1, 1999, the Texas Register is administratively transferring Title 31, Part 15, Chapter 451 to Title 30, Part 1, Chapter 451.

A conversion chart is published in this issue under the Tables and Graphic section. The chart lists the old rule numbers and the new rule numbers that correspond to them.

Figure: 30 TAC Chapters 449, 450, 451

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

Chapter 23. VEHICLE INSPECTION

Subchapter A. VEHICLE INSPECTION STATION LICENSING

37 TAC §23.8

The Texas Department of Public Safety adopts an amendment to §23.8, concerning the required checking of gas caps on vehicles as part of the vehicle inspection program, without changes to the proposed text as published in the September 3, 1999, issue of the *Texas Register* (24 TexReg 6954) and will not be republished.

The justification for the amendment will be fewer hydrocarbon emissions because of checking for and replacing defective gas caps.

The amendment adds new paragraph (10) which provides that vehicle inspection stations must now have a department approved device for the checking of gas cap pressure in addition to the other required items indicated.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Transportation Code, §548.002 and §548.051 as amended by Senate Bill 370 and which require the testing of a fuel tank cap during a vehicle inspection using a pressurized testing device approved by the department; and Texas Government Code, §411.004(3), which authorizes the commission to adopt rules considered necessary for carrying out the department's work.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907839
Dudley M. Thomas
Director, Texas Department of Public Safety
Texas Department of Public Safety
Effective date: December 8, 1999
Proposal publication date: September 3, 1999
For further information, please call: (512) 424-2135

♦ ♦ ♦

37 TAC §23.15

The Texas Department of Public Safety adopts amendments to §23.15, concerning inspection station and certified inspector denial, revocation, suspensions, and administrative hearings, without changes to the proposed text as published in the September 3, 1999, issue of the*Texas Register* (24 TexReg 6955) and will not be republished.

The justification for the amendments will be more efficient administration of the vehicle inspection program.

Amendments to the section are necessary in order to reflect changes resulting from the re-codification of Texas Civil Statutes to Texas Transportation Code and to delete language that is already covered by statute.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Transportation Code, §548.002, which provides the department may adopt rules to administer and enforce this chapter and Texas Government Code, §411.004(3), which authorizes the commission to adopt rules considered necessary for carrying out the department's work.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907840
Dudley M. Thomas
Director, Texas Department of Public Safety
Texas Department of Public Safety
Effective date: December 8, 1999
Proposal publication date: September 3, 1999
For further information, please call: (512) 424-2135

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Subchapter G. VEHICLE EMISSIONS INSPECTION AND MAINTENANCE PROGRAM

37 TAC §23.94

The Texas Department of Public Safety adopts new §23.94, concerning alternative vehicle emissions testing as part of the vehicle inspection program, without changes to the proposed text as published in the September 3, 1999, issue of the *Texas Register* (24 TexReg 6956) and will not be republished.

The justification for the new section will be reduced emissions affecting public health.

The new section provides for circumstances under which the department may approve alternate vehicle emission testing, including onboard diagnostic testing. Language in the new section provides the rule may not be more restrictive than federal regulations governing vehicle emission testing.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Transportation Code, §548.002 and Health and Safety Code, §382.0374 as amended by Senate Bill 370 and which authorize the department to allow alternate vehicle emission testing, including onboard diagnostic testing; setting criteria for approval, and providing that the department's rule may not be more restrictive than federal regulations governing vehicle emission testing; and pursuant to Texas Government Code, §411.004(3), which authorizes the commission to adopt rules considered necessary for carrying out the department's work.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907841
Dudley M. Thomas
Director, Texas Department of Public Safety
Texas Department of Public Safety
Effective date: December 8, 1999
Proposal publication date: September 3, 1999
For further information, please call: (512) 424-2135

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Part 3. TEXAS YOUTH COMMISSION

Chapter 81. INTERACTION WITH THE PUBLIC

37 TAC §81.35

The Texas Youth Commission (TYC) adopts the repeal of §81.35, concerning Involvement of Victims, without changes to the proposed text as published in the October 22, 1999, issue of the *Texas Register* (24 TexReg 9254).

The justification for the repeal is the increased information in the acknowledgment of the rights of the victims of TYC youth.

The repeal will allow for the publication of a new section.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Human Resources Code, §61.0421, concerning Public Interest Information, which provides the Texas Youth Commission with the authority to prepare information of public interest describing the functions of the commission and describing the procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

The adopted rule implements the Human Resource Code, §61.034.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907950
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: December 16, 1999
Proposal publication date: October 22, 1999
For further information, please call: (512) 424-6244

♦ ♦ ♦

The Texas Youth Commission (TYC) adopts new §81.35, concerning Rights of Victims, without changes to the proposed text as published in the October 22, 1999, issue of the *Texas Register* (24 TexReg 9255).

The justification for the new rule is increased information in the acknowledgment of the rights of the victims of TYC youth and the provision of information requested by a victim consistent with law.

The new rule will provide for the right of information to victims of youth committed to TYC who request certain information under the Texas Family code, §57.001. A victim may request, in writing, information regarding TYC's procedures for release or transfer of a youth, the proceedings for release under supervision and other movements, and/or the youth's release under supervision and other specified movements. A victim on written request, may provide a written statement for inclusion in the youth's file and/or may request and receive permission to provide input in person at the youth's staffing for release under procedures in this section.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Human Resources Code, §61.0421, concerning Public Interest Information, which provides the Texas Youth Commission with the authority to prepare information of public interest describing the functions of the

commission and describing the procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

The adopted rule implements the Human Resource Code, §61.034.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907951
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: December 16, 1999
Proposal publication date: October 22, 1999
For further information, please call: (512) 424-6244

♦ ♦ ♦

37 TAC §81.61

The Texas Youth Commission (TYC) adopts an amendment to §81.61, concerning Notification of a Facility Opening or Relocating, without changes to the proposed text as published in the October 22, 1999, issue of the *Texas Register* (24 TexReg 9256).

The justification for amending the section is increased efficiency in providing information regarding the opening or relocating of a TYC facility in the community, consistent with law.

The amendment will clarify that a 60-day notice to a local governmental entity is only necessary when the local governmental entity has provided TYC documentation of a resolution and request to be notified of construction or operation of a correctional or parole program within 1000 feet of certain designated areas. This amendment also includes the new requirement of a sign to be posted at the site of the program when the written notification is requested.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.0421, concerning Public Interest Information which provides the Texas Youth Commission with the authority to prepare information of public interest describing the functions of the commission and describing the procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

The adopted rule implements the Human Resource Code, §61.034.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907952
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: December 16, 1999
Proposal publication date: October 22, 1999
For further information, please call: (512) 424-6244

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Part 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Chapter 151. GENERAL PROVISIONS

37 TAC §151.51

The Texas Department of Criminal Justice adopts an amendment to §151.51, concerning custodial officer certification and hazardous duty pay eligibility guidelines without changes to the proposed text as published in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8925).

The purpose for this amendment is to update and clarify eligibility criteria for authorizing custodial officer certification and hazardous duty pay to employees of the Texas Department of Criminal Justice under the authority of the Texas Government Code, §508.001, Chapter 659, Subchapter D, §§659.062, 811.001, 813.506, and 815.505; and the General Appropriations Act.

The amendment will provide clear and updated eligibility criteria for authorizing custodial officer certification and hazardous duty pay to Texas Department of Criminal Justice employees.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Government Code, §492.013, which grants the department general rulemaking authority; and Texas Government Code, §508.001, Chapter 659, Subchapter D, §§659.062, 811.001, 813.506, and 815.505; and the General Appropriations Act.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907983
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-9693

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Chapter 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.37

The Texas Department of Criminal Justice adopts an amendment to §163.37, concerning reports and records created or maintained by community supervision and corrections departments without changes to the proposed text as published in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8927).

The purpose for this amendment is to update the standard to reflect changes to Article 42.12, Section 9, Code of Criminal Procedure, concerning presentence and postsentence investigation reports that went into effect on September 1, 1999. The amendment eliminates the requirement for postsentence investigation reports. The amendment also eliminates the requirement that medical and psychological records obtained by court order be sealed within, or kept separate from, the offender's community supervision case file.

The amendment as adopted will enable a reduction in manhours and resources devoted to the preparation of postsentence reports concerning offenders.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §492.013, which grants the Texas Board of Criminal Justice general rulemaking authority; and Texas Government Code, §509.003, which grants the Community Justice Assistance Division the authority to propose, and the board to adopt, minimum standards for programs and other aspects of the operation of community supervision and corrections departments.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907984
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-9693

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37 TAC §163.41

The Texas Department of Criminal Justice adopts an amendment to §163.41, concerning medical and psychological information maintained by community supervision and corrections departments without changes to the proposed text as published in the October 15, 1999, issue of the *Texas Register* (24 TexReg 8928).

The purpose for this amendment is to update the standard to reflect changes to §614.017, Health and Safety Code, concerning the receipt and disclosure of information relating to special needs offenders among certain agencies that went into effect on June 19, 1999. It also reflects changes to Article 42.12, Section 9, Code of Criminal Procedure, that went into effect on September 1, 1999, which eliminated the requirement that medical and psychological records obtained by court order be sealed within, or kept separate from, an offender's community supervision case file.

The amendment as adopted will enable a reduction in manhours and resources devoted to community supervision and corrections departments maintaining separate medical and psychological records for offenders. Further, it will permit community supervision and corrections departments to more freely exchange medical and mental health information concerning special needs offenders with other agencies.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §492.013, which grants the Texas Board of Criminal Justice general rulemaking authority; and Texas Government Code, §509.003, which grants the Community Justice Assistance Division the authority to propose, and the board to adopt, minimum standards for programs and other aspects of the operation of community supervision and corrections departments.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907985
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-9693

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part 1. TEXAS DEPARTMENT OF HUMAN SERVICES

Chapter 79. LEGAL SERVICES

Subchapter T. ADMINISTRATIVE FRAUD DISQUALIFICATION HEARINGS

40 TAC §79.1906

The Texas Department of Human Services (DHS) adopts an amendment to §79.1906 with changes to the proposed text published in the October 8, 1999, issue of the *Texas Register* (24 TexReg 8726).

The department is adopting this amendment to clarify the existing language of the rule based on a recent rule interpretation by the Food and Nutrition Services (FNS), United States Department of Agriculture (USDA), in which FNS determined that client notice requirements are considered met whether or not the certified or first class mail is returned.

The amendment will function by ensuring that the state will be in compliance with state legislation and 7 Code of Federal Regulations (CFR) 273.16 in that the hearing official will no longer be required to receive either the first class or certified letter mail notice for a hearing to be held. Hearing officers will continue to offer a new hearing to those persons who show good cause for failing to attend the scheduled hearing within a reasonable time.

During the comment period, DHS received comments from a member of the Texas Works Advisory Council. A summary of the comments and DHS's responses follow:

Comment: The commenter stated that the rule should address the problem of DHS having received a more current mailing

address (before the hearing notice was sent) than the address used in the notice.

Response: DHS agrees with this comment and the adopted rule reflects the recommendation of the commenter.

Comment: The commenter stated that the rule should explicitly state that if a client does not attend the hearing because the client did not receive notice of the hearing, but the client later asks for the hearing to be reopened and decided anew, the hearing will be reopened and the case will be decided anew.

Response: §79.1906(b)(2) follows the language found in 7 CFR 273.16; therefore, no further clarification is added.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

§79.1906. Advance Notice of Hearing.

(a) The hearing officer sends the household member an advance notice of the hearing in sufficient time to allow receipt at least 30 calendar days before the scheduled hearing date. The notice is sent first class and certified mail, return-receipt requested, and marked "return service requested" to the address where the household member last received benefits. Delivery is not restricted to the addressee. The notice specifies the charges against the household member and a summary of the evidence (including how and where it may be examined). If the notice is returned showing a new address, it will be resent and the normal due process rules will be reapplied.

(b) Advance notice requirements are met when the notice is mailed to the most current mailing address available to any division within the department whether or not the certified or first class mail is returned. The hearing will be conducted.

(1) If the returned notice shows a new address, another notice is mailed following the procedures in subsection (a) of this section, and the 90-day time requirement for issuing a decision begins again with the date that the second notice is mailed.

(2) If the household member claims non-receipt of notice of the hearing, he has 30 days after the date of the written notice of the hearing decision to claim good cause for not appearing at the hearing. In all other instances, the household member has ten days to claim good cause for not appearing. If the household member is found to have committed an intentional program violation but a hearing officer later determines that good cause existed for not appearing, the previous decision shall no longer be valid and a new hearing will be conducted.

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.

Filed with the Office of the Secretary of State on November 18, 1999.

TRD-9907836
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 8, 1999
Proposal publication date: October 8, 1999
For further information, please call: (512) 438-3108

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Part 4. TEXAS COMMISSION FOR THE BLIND

Chapter 163. VOCATIONAL REHABILITATION PROGRAM

The Texas Commission for the Blind adopts the amendment of §§163.4, 163.11, 163.12, 163.13, 163.14, 163.18, 163.25, 163.26, 163.28, 163.34, 163.36, 163.37, 163.38, 163.40, 163.52 and the repeal of §163.15 regarding the Vocational Rehabilitation Program without changes to the proposed text published in the August 27, 1999, issue of the *Texas Register* (24 TexReg 6701-6705).

The amendments and repeal are adopted to bring the agency's state rules into conformance with federal amendments to the Rehabilitation Act of 1973. The proposed amendments are predominately the result of changes in terminology in the Act. What was formerly known as an "individualized written rehabilitation program" has been changed to an "individualized plan for employment." §163.18 contains the new mandatory components of a consumer's individualized plan for employment. The repeal of §163.15 is adopted because references to extended evaluations have been deleted in the Act and the agency is also making this conforming change.

The Commission received no comments about the proposals.

Subchapter A. GENERAL INFORMATION

40 TAC §163.4

The amendment is adopted under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907766
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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Subchapter B. BASIC PROGRAM REQUIREMENTS

40 TAC §§163.11-163.14, 163.18

The amendments are adopted under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The amendments also affect Human Resources Code §91.053 and §91.055.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907765
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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40 TAC §163.15

The repeal is adopted under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907767
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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Subchapter C. VOCATIONAL REHABILITATION SERVICES

40 TAC §§163.25, 163.26, 163.28, 163.34, 163.36-163.38, 163.40

The amendments are adopted under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The amendments also affect Human Resources Code §91.053 and §91.055.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907764
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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Subchapter D. ORDER OF SELECTION FOR SERVICES

40 TAC §163.52

The amendment is adopted under Human Resources Code, Title 5, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The amendment also affects Human Resources Code §91.053 and §91.055.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907768
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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Chapter 166. BLINDNESS EDUCATION, SCREENING AND TREATMENT PROGRAM

40 TAC §§166.1-166.3

The Texas Commission for the Blind adopts new §§166.1-166.3 pertaining to the Blindness Education, Screening, and Treatment Program without changes to the proposed text published in the August 27, 1999, issue of the *Texas Register* (24 TexReg 6705). The rules define terms, prescribe eligibility criteria for receiving vision-screening services, and delineate who may provide screening services insofar as funds available under Transportation Code, §521.421, allow.

The Commission received no comments about the proposal.

The rules are adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.027, which authorizes the commission to develop the program and adopt rules prescribing eligibility requirements.

The rules also affect Transportation Code, §521.421.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907763
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: August 27, 1999
For further information, please call: (512) 459-2611

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Chapter 167. BUSINESS ENTERPRISES PROGRAM

40 TAC §167.3

The Texas Commission for the Blind adopts the amendment to §167.3 of Chapter 167 pertaining to the Business Enterprises Program Manual without changes to the proposed text published in the June 4, 1999, issue of the *Texas Register* (24 TexReg 4219).

The Commission is required by federal regulations to have procedures for the promotion and transfer of persons licensed to manage business enterprises established by the Commission. The procedures have to be approved by federal authorities and published as state rules. The amendment updates the date on which the Rehabilitation Services Administration approved revisions to the Business Enterprises Manual in the form of revised procedures for the promotion and transfer system and revised procedures pertaining to eligibility for promotion and assignment.

The Commission received no comments about the proposal.

The amendment is adopted under Human Resources Code, Title 5, Chapter 94, §94.012, which authorizes the commission to promulgate rules and initiate procedures necessary to implement the chapter.

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.

Filed with the Office of the Secretary of State on November 15, 1999.

TRD-9907762
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: December 5, 1999
Proposal publication date: June 4, 1999
For further information, please call: (512) 459-2611

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Part 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

Chapter 181. GENERAL RULES OF PRACTICE AND PROCEDURE

Subchapter A. GENERAL PROVISIONS

40 TAC §181.9

The Texas Commission for the Deaf and Hard of Hearing adopts amendment of §181.9 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7374). This rule will update the rule to change language to reflect appropriate terminology.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other statute, code or article is affected by this section.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907871
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.19

The Texas Commission for the Deaf and Hard of Hearing adopts amendment to §181.19 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7375). This rule will clarify the time requirement in which the commission holds the required number of meetings and to update the rule to include appropriate language.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other statute, code or article is affected by this section.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907872
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.21

The Texas Commission for the Deaf and Hard of Hearing adopts amendment of §181.21 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7375). This rule will update the rule to change language to reflect appropriate terminology and to eliminate the time limit restrictions on public comments.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other statute, code or article is affected by this section.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907873
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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Subchapter H. MEMORANDA OF UNDERSTANDING WITH STATE AGENCIES

40 TAC §181.911

The Texas Commission for the Deaf and Hard of Hearing adopts amendment to §181.911 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7376). This rule will eliminate the requirement for Commission Memoranda of Understandings to be established in rule, but does not eliminate the requirement of Memoranda of Understandings with state agencies.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

This amendment affects 40 TAC §§181.912, 181.913, 181.914, 181.915, 181.916, 181.917, and 181.918. These sections will be repealed.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907874
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.912

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.912 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7377).

This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received regarding the repeal of this rule.

The repeal of this rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other Statute, code or article is affected by this repeal.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907875
David Myers
Executive Directors
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.913

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.913 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7377).

This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received regarding the repeal of this rule.

The repeal of this rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other Statute, code or article is affected by this repeal.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907876
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.914

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.914 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7377).

This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received regarding the repeal of this rule.

The repeal of this rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other Statute, code or article is affected by this repeal.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907877
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.915

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.915 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7378).

This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received regarding the repeal of this rule.

The repeal this rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other Statute, code or article is affected by this repeal.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907878
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.916

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.916 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7378). This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907879
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.917

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.917 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7379). This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907880
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §181.918

The Texas Commission for the Deaf and Hard of Hearing adopts repeal of §181.918 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7379). This repeal will eliminate the Commission Memoranda of Understandings in rule, but does not eliminate the Memoranda of Understanding with the state agency.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907881
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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Chapter 182. SPECIALIZED TELECOMMUNICATIONS DEVICE ASSISTANCE PROGRAM

Subchapter H. PROGRAM REQUIREMENTS

40 TAC §182.20

The Texas Commission for the Deaf and Hard of Hearing adopts amendment to §182.20 without changes to the text as published in the September 17, 1999 issue of the *Texas Register* (24 TexReg 7379). This rule will broaden the program to include persons with disabilities other than impairment of speech or hearing.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907868
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §182.23

The Texas Commission for the Deaf and Hard of Hearing adopts an amendment to §182.23 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7380).

This rule will broaden the program to include services which allow access to the telephone network to be provided through the program.

No comments were received regarding adoption of the amendment.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907869
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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40 TAC §182.25

The Texas Commission for the Deaf and Hard of Hearing adopts an amendment to §182.25 without changes to the text as published in the September 17, 1999, issue of the *Texas Register* (24 TexReg 7380).

This rule will broaden the program to include services which allow access to the telephone network to be provided through the program.

No comments were received regarding adoption of the amendment.

This rule is adopted under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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.

Filed with the Office of the Secretary of State on November 19, 1999.

TRD-9907870
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Effective date: December 9, 1999
Proposal publication date: September 17, 1999
For further information, please call: (512) 407-3250

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Part 21. TEXAS COUNCIL FOR DEVELOPMENTAL DISABILITIES

Chapter 878. TRAUMATIC BRAIN INJURY ADVISORY BOARD

40 TAC §878.1

The Texas Council for Developmental Disabilities adopts the repeal of Chapter 878, Traumatic Brain Injury Advisory Board, §878.1, concerning Traumatic Brain Injury Advisory Board, without changes to the proposes text as published in the

October 8, 1999, issue of the *Texas Register* (24 TexReg 8730)and will not be republished.

The section and chapter are repealed because funding for the Traumatic Brain Injury Board has expired and operations of the Board have ceased.

No comments were received regarding adoption of the repeal.

The repeal is adopted under the Human Resources Code, §112.020.

No other statutes, articles or codes are affected by the adopted repeal.

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.

Filed with the Office of the Secretary of State on November 16, 1999.

TRD-9907784

Roger A. Webb

Executive Director

Texas Council for Developmental Disabilities

Effective date: December 6, 1999

Proposal publication date: October 8, 1999

For further information, please call: (512) 424-4080

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TITLE 43. TRANSPORTATION

Part 1. TEXAS DEPARTMENT OF TRANSPORTATION

Chapter 9. CONTRACT MANAGEMENT

Subchapter B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.10-9.20

The Texas Department of Transportation adopts amendments to §§9.10-9.20, concerning Highway Improvement Contracts. Section 9.20 is adopted with changes to the proposed text as published in the September 10, 1999, issue of the *Texas Register* (24 TexReg 7191). Sections 9.10-9.19 are adopted without changes, and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the Texas Department of Transportation receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the commission has previously adopted §§9.10-9.20 to specify the process by which the department will administer and manage highway improvement contracts.

All statutory references contained in §§9.10-9.20 have been revised to refer to the current amended or new statutory citations. In addition, several wording and grammatical revisions have been incorporated for clarification. Where sections have been added or deleted, the remaining sections have been renumbered accordingly.

All references to electronic bidding contained in §§9.10-9.20 have been removed, as they are now obsolete. Transportation Code, §223.013 provides authority for the department to develop an electronic bidding system. Pursuant to this authority, the department is developing a new automated system to facilitate electronic bidding. This system is based on emerging technology that will require the adoption of new administrative procedures when the automated system is completed.

Section 9.10

This section has been amended to refer to the proper statutory citation.

Section 9.11

Definitions have been added, revised, and numbered to provide clarification, reference proper statutory authority, and conform to the Texas Register numbering style. The definition for a disadvantaged business enterprise (DBE) has been revised in accordance with new federal regulations contained in Title 49, Code of Federal Regulations, §26.5.

Section 9.12

New federal regulations, contained in Title 49, Code of Federal Regulations, Part 26 will require the department to develop and maintain a listing of all contractors and subcontractors that bid on all department contracts. The department will adopt new administrative procedures outlining this requirement once federal approval has been obtained. For this rulemaking, the title of §9.12 and all references and requirements relating to the registration of subcontractors are being deleted since they are not inclusive of all contract types and have not received federal approval.

In subsection (a)(1)(A)(i), the deadline for the submittal of a confidential questionnaire relating to contractor bidding requirements has been shortened from 15 days to 10 days prior to the last day of bid opening. This revision is expected to facilitate a more competitive bidding process by providing an extended opportunity for more contractors to become eligible to bid.

Reference to a public accountant in subsection (a)(1)(A)(ii) has been removed, as the term is now obsolete. In order to be eligible to practice as a public accountant rather than a certified public accountant, an individual must have been in practice prior to the passage of the Public Accountancy Act of 1945.

The increased technical nature of many department contracts now requires a higher than normal degree of bidder competence. Examples of these types of highly technical contracts include installation of fiber optic cables, maintenance of video monitoring equipment, computerized traffic monitoring systems, etc. Therefore, subsection (a) been revised to allow for the inclusion of bidder technical qualification requirements in certain bid proposals, including those for building contracts.

New subsection (b) has been added describing what a potential bidder must do to be eligible to bid on a building contract. The department will determine when to include in a bid proposal any additional requirements and the necessary information to be submitted by prospective bidders in order to demonstrate compliance. Additional requirements will be based upon the complexity and scope of the work included in the bid proposal.

Since federal requirements no longer mandate that prospective bidders submit a Certification of Eligibility Status form with each request for a bid proposal, information related to the completion of the form has been moved from §9.13 (Notice of Letting and Issuance of Proposals) to §9.12(a)(2)(B)(iv)

(Qualification of Bidders). This revision moves the point of evaluation for eligibility certification to the bidder qualification stage, thereby reducing the impact of information collection on both the department and prospective bidders.

Subsection (a)(1)(D) is further revised to allow for an automatic three month grace period of qualification prior to the expiration date of the bidder's statement in order to allow for preparation and submittal of current audited information. Potential bidders will no longer be required to request the three month grace period. Revisions to the department's automated processes have made this requirement obsolete.

Instances when the department may require current audited information have been clarified in subsection (a)(1)(E). This information may be required at any time if circumstances develop which may be considered as factors that could alter the firm's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern. The department will make the determination regarding whether the circumstances may affect the potential bidder's capability to perform work for the department.

Waiver of the bidder financial qualification requirements in subsection (a)(2)(A) has been amended to apply to contracts with an engineer's estimate of $300,000 or less rather than $250,000 or less. This increase is necessary as the previous estimate amount subject to the waiver is insufficient for the type and size of projects now bid under this type of qualification. This revision is also expected to facilitate bidding opportunities for small businesses. The level of authority to deny the waiver of a project otherwise subject to the waiver has been modified to reflect changes in the department's organizational structure and to allow dissemination of authority to the appropriate level within the department as determined by the executive director.

As with the increase in the engineer's estimate amount subject to the waiver of the financial qualification requirements, the bidding capacities established by the department for highway improvement contract bidders have likewise been increased. Therefore, subsection (a)(2)(C)(i)-(ii) is amended as follows. For those bidders with no prior experience in construction or maintenance, the bidding capacity will be established at $300,000 in lieu of $100,000. This revision is expected to facilitate bidding opportunities for small businesses. Bidding capacity levels for those bidders with sufficient working capital and financial capability, as determined by the department, and which meet the experience and number of satisfactorily completed project requirements, have been increased from $300,000, $500,000, and over $500,000 to $500,000, $1,000,000, and over $1,000,000, respectively. These revisions are necessary, as the previous estimate amounts were insufficient for the size and type of projects now being bid with the department.

For those bidders subject to a bidding capacity of over $1,000,000, the bidding capacity will be established by multiplying the net working capital by a factor determined by the department. This multiplication factor will be based upon the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. This revision is necessary in order to ensure a competitive bidding process by enabling a sufficient number of eligible bidders the opportunity to bid on highway improvement contracts.

Section 9.13

The department's advertising procedures and detailed information relating to the department's Notice to Contractors mailing list has been deleted in subsection (a)(1). These procedures and requirements are presently listed in various statutes. Therefore, in order to allow for future statutory revisions, only the appropriate statutory citations regarding the mailing list and advertising requirements will be referenced in this section.

Subsection (a) has been further revised to increase the fee for receiving the Notice to Contractors by mail from $25 to $65 per year. This increase is necessary due to the increased costs incurred by the department associated with mailing the notices to those persons who have applied to have their name placed on the Notice to Contractors mailing list.

In addition, since federal requirements no longer mandate that requests for proposals for federally funded projects be made in writing, subsection (d)(2)(B) has been deleted. Subsection (d)(2) is further revised to indicate that requests for a proposal form for any highway improvement contract, regardless of funding source, may be made either orally or in writing. This revision will reduce unnecessary paperwork for both the department and prospective bidders.

When submitting a bid proposal to the department, a bidder is assuring that the unit price bid for each item of work represents the actual cost for performing that item of work plus additional amounts for reasonable overhead and profit. A contract that is mathematically and materially unbalanced would not represent the lowest cost to the state. Due to the inflated payments associated with the unbalanced bid items, the state would experience a loss of interest revenue. Subsection (e)(1)(B) has therefore been revised to prohibit a bidder who previously submitted a mathematically and materially unbalanced bid from being issued a proposal for the same project when it is re-bid. This additional reason for non-issuance of a proposal is necessary in order to protect the integrity of the competitive bidding process by creating a deterrent regarding the submittal of mathematically and materially unbalanced bids.

Clarification is also being provided in paragraph (1)(C) of subsection (e) regarding issuance of a proposal to a bidder who is in the process of satisfying the requirements for qualification as a bidder. A bidder may be issued a temporary approval to submit a bid if the bidder qualification process has been initiated and information submitted to date is determined to be acceptable by the department.

Subsection (e)(2) has been added regarding issuance of a proposal for a building contract to a bidder who is in compliance with bidder qualifications described in §9.12(b) which includes financial, experience, technical, or other requirements. Instances for non-issuance of a building contract proposal have also been added to this section. A building contract proposal will not be issued if the bidder is disqualified from program participation by the federal government, is suspended or debarred by the commission, or is prohibited from re-bidding a specific project because of default of the first awarded contract. These revisions are necessary in order to maintain uniformity with bid issuance for construction and maintenance contracts.

Section 9.14

As mentioned previously, all references to electronic bidding have been removed from this section. The provisions in new subsection (d)(1) regarding proposal guaranty checks and money orders have been revised to provide clarification. The

face of the check or money order must indicate the type of instrument (i.e. cashier's check, teller's check, official check, money order, etc.). In addition, checks or money orders more than 90 days old will not be accepted. These revisions are necessary because of the proliferation of the types of banking instruments currently being used by the banking industry and the increased possibility of a check not being honored that is more than 90 days old. This new requirement regarding the date of the check is intended to protect the integrity of the proposal guaranty check.

Subsection (d)(2) has been added to allow for the acceptance of bid bonds for those contracts estimated to involve less than $300,000. This revision provides for a new form of proposal guaranty that is expected to enable bidders more flexibility regarding the submittal of a proposal guaranty. The threshold of $300,000 was determined in an effort to enable a greater number of small businesses the ability to compete on department maintenance contracts as the majority of these contracts fall below $300,000. This threshold will enable the department, on a limited scale, to evaluate the effectiveness of bid bonds as an alternate form of proposal guaranty. Future policy regarding proposal guaranties may be revised based on the department's evaluation of bid bonds as a form of proposal guaranty on contracts estimated at less than $300,000.

Paragraph (4) of subsection (d) has been added which states that the commission will establish by order proposal guaranty amounts for checks, money orders, and bid bonds. Amounts established for bid bonds may be greater than amounts for checks or money orders due to the increased administrative costs associated with bid bonds. While checks and money orders are payable on demand, bid bonds may require additional procedures to secure collection. These additional procedures will result in an increase in administrative costs for the department.

Section 9.15

The department's procedures regarding the public reading of bids have been deleted from subsection (a)(1). These procedures and requirements are presently listed in Transportation Code, §223.004 and §223.005. Therefore, in order to allow for future statutory revisions, only the appropriate statutory citation is referenced.

SB 178, passed by the 76th Legislature, 1999, revised Chapter 2161, Government Code, concerning historically underutilized businesses. One of the requirements associated with this new subchapter involves the inclusion of a historically underutilized business subcontracting plan in certain bids in order for the bid to be considered responsive. Pursuant to this statutory amendment and to maintain conformity with the state historically underutilized business program, subsection (b) has been revised to include instances when the bid does not include a historically underutilized business subcontracting plan if such plan is required.

Subsection (b) is further revised to remove the requirement that a proposal will not be read if the proprietor, partner, majority shareholder, or substantial owner is 30 or more days delinquent in providing child support under a court order or a written repayment agreement. Family Code, §231.006, provides that a delinquent child support obligor is ineligible to receive payments under a state contract, but does not prohibit the award of a contract to the obligor.

Instances when the bidder fails to properly acknowledge receipt of all addenda has also been added to subsection (b) as a reason for not reading a proposal. This additional reason is necessary to ensure that those bids considered by the department are based on the most recent bidding information.

This section has been further revised by adding new subsection (e) prohibiting bidders determined by the department to have submitted a mathematically and materially unbalanced bid from being considered on future bids for the same project. As stated previously in this preamble, a contract that is mathematically and materially unbalanced would not represent the lowest cost to the state. This revision is necessary in order to protect the integrity of the competitive bidding process by creating a deterrent regarding the submittal of mathematically and materially unbalanced bids.

Section 9.16

All references to electronic bidding have been deleted from this section.

Section 9.17

SB 555, passed by the 76th Legislature, 1999, amended Transportation Code, Chapter 223, to allow the department to award a maintenance contract involving an amount less than $100,000 to the second lowest bidder if the lowest bidder withdraws its bid prior to contract award or fails to execute the contract. Contract award may be made to the second lowest bidder only if the second lowest bidder agrees to accept the unit bid prices of the lowest bidder. This amended statute further directs the department to adopt rules governing the conditions under which the withdrawal of the bid of the lowest bidder and consideration of contract award to the second lowest bidder will be allowed. Pursuant to this statutory amendment, subsection (d) has been added to allow for contract award to the second lowest bidder in certain instances.

In order to preserve as much as possible the competitive aspect of the bidding process, the rules place strict limitations on awards to second lowest bidders. The second lowest bidder must agree to perform the work at the unit bid prices of the lowest bidder, so as to prevent collusion between the two bidders. The executive director will recommend award to the second lowest bidder only when the need to preserve competition is outweighed by the need to avoid certain detrimental effects of delay. The executive director may make such recommendation only when the delay associated with reletting the contract would have detrimental effects on the cost, health and safety of the traveling public, or structural integrity of the highway itself.

Section 9.18

Subsection (a)(1) has been revised to add that, when required, the successful bidder submit within 15 days from written notification of contract award, written evidence of current good standing from the Comptroller of Public Accounts. In the past, the department required a bidder to self-certify good standing status with the comptroller in the bid proposal. However, the comptroller has advised that this process is not producing the desired results. The comptroller further requires state agencies to verify with her office the current standing of any successful bidder prior to contract execution. The department will therefore verify a successful bidder's status with the comptroller subsequent to contract award but prior to contract execution. If the comptroller advises that the successful bidder is not in good standing with her office, the department will require written ev-

idence of current good standing with the comptroller from the successful bidder prior to executing the contract.

Subsection (a)(3) is further revised to specify that information required of the successful bidder concerning the DBE or HUB goal be submitted within the time specified in the contract rather than within 15 days after contract award. In addition, this section is further revised to refer to the appropriate section within Subchapter D of Chapter 9, concerning Business Opportunity Programs for DBE or HUB contract requirements. These revisions are necessary to ensure uniformity with DBE or HUB program requirements as may be revised within this chapter.

References to unbalanced bids have also been deleted from this section. The paragraph concerning unbalanced bids has been revised and moved to §9.15

Section 9.19

Subsection (a) has been revised to refer to the proper statutory citation of the Transportation Code. In addition, the level of authority required for emergency certification associated with the award of a contract utilizing emergency contracting procedures in subsection (b) has been amended to limit delegation of authority to a level not below the level of deputy executive director. This revision is necessary in order to maintain uniformity with the remainder of this section regarding delegation of authority.

Section 9.20

Transportation Code, §223.010, requires the department to retain 5.0% of the contract price until the entire improvement has been completed and accepted. The department is further permitted to deposit this retained amount under a trust agreement with a state or national bank domiciled in this state provided the interests of the state are protected.

SB 1195, passed by the 76th Legislature, 1999, amended Transportation Code, §223.010 to require the department to retain 4.0% of the contract price until the entire improvement has been completed and accepted on any construction and preventive maintenance contract that includes the use of recycled materials. Section 9.20(2) is amended to reflect this statutory revision. In order to protect the health and safety of the traveling public, this paragraph is further amended to restrict recycled material utilization to those materials defined by the department.

HB 2159, passed by the 76th Texas Legislature, 1999, amended Transportation Code, §223.010 to allow the department to release a portion of the retained amount prior to acceptance of the entire improvement provided the amount retained is sufficient to ensure compliance with the contract. This partial release of the retained amount applies only to contracts involving a separate vegetative establishment, maintenance, or performance period following the construction of an improvement. Section 9.20(3) is amended to reflect this statutory revision.

This statutory amendment will ensure that the retained amount withheld on certain contracts is sufficient to ensure completion of separate vegetative establishment, maintenance, or performance periods while increasing the working capital of contractors bidding on department contracts, thereby increasing competitiveness and ultimately lowering contract costs. Partial release of the retained amount by the department is also expected to facilitate prompt payment of retained amounts to subcontractors performing on department projects.

HB 2066, passed by the 76th Legislature, 1999, amended Transportation Code, §223.010 to allow the department, at the request of the contractor and with the approval of the department and the comptroller of public accounts, to deposit the amount retained for a construction contract under a trust agreement with a state or national bank that has its main office or a branch office in this state. Previously, this section only required that the amount retained be deposited under a trust agreement with a state or national bank domiciled in Texas. Section 9.20 is amended to comply with HB 2066.

COMMENTS

Written comments were received from the Associated General Contractors of Texas (AGC) and are addressed as follows. AGC suggested a revision to the definition of bidding capacity in §9.11(3) to refer to the maximum dollar value a contractor may bid rather than the amount a contractor may have under contract. The concerns raised in AGC's suggestion are addressed in the definition of "available bidding capacity," §9.11(1). To make any revisions would create a conflict between the definitions.

AGC also suggested a change to §9.20(2) concerning the retainage amount applicable for contracts involving the use of recycled materials. AGC recommended the section be revised to delete references to contract specifications and special provisions and simply state that "nonhazardous recycled materials will be defined by the department." The department agrees with the comment since the method by which the information needed to comply with these requirements is provided does not need to be stipulated in the rule. The department is therefore adopting §9.20 with these changes to paragraph (2).

AGC further recommended the removal of the requirement that contractors identify the nonhazardous materials to be used on a project prior to the beginning of work.

The department disagrees with this suggestion. In order for the department to establish the retainage percentage to be utilized for the project, a contractor must identify whether nonhazardous recycled materials will be used on a project prior to the beginning of work. The department maintains various recordkeeping and automated procedures related to contractor payments that must be established for each project prior to the beginning of the contracted work. In order to ensure the appropriate payments are issued for a particular project, the department must know what retainage percentage to use prior to the beginning of the work.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §§223.001-223.013, which authorize the Texas Department of Transportation to competitively bid highway improvement contracts.

§9.20. Partial Payments.

Highway improvement contracts may provide for partial payments.

(1) Construction and preventive maintenance contracts. Construction contracts and preventive maintenance contracts will provide for partial payments of an amount not exceeding 95% of the value of the work done, except as provided in paragraph (2) of this section. The department will retain 5.0% of the contract price until the entire work has been completed and accepted, except as provided in paragraphs (2) and (3) of this section.

(2) Construction and preventive maintenance contracts involving the use of nonhazardous recycled materials. Construction contracts and preventive maintenance contracts involving the use of nonhazardous recycled materials approved by the department will provide for partial payments of an amount not exceeding 96% of the value of the work done. Prior to beginning of work, the contractor must identify the quantities of nonhazardous recycled materials to be used in the contracted work. Once the contractor's commitment to utilize nonhazardous recycled materials has been established, the department will retain 4.0% of the contract price until the entire work has been completed and accepted, except as provided in paragraph (3) of this section.

(3) Construction and preventive maintenance contracts involving separate vegetative establishment, maintenance, or performance periods. The department may release a portion of the amount retained under paragraph (1) or (2) of this section when the work is completed, provided a sufficient amount of the contract price is retained to ensure satisfactory completion of the separate vegetative establishment, maintenance, or performance period.

(4) At the request of a contractor and with the approval of the department and the comptroller of public accounts, the retained amount may be deposited under the terms of a trust agreement with a state or national bank that has its main office or a branch office in Texas as selected by the contractor, provided that the contract price exceeds $300,000. The trust agreement shall provide that:

(A) interest earned on deposited funds will be paid to the contractor unless otherwise specified under the terms of the agreement;

(B) all expenses incident to the deposit and all charges made by the escrow agent for custody of the securities and forwarding of interest shall be paid solely by the contractor;

(C) the department may, at any time and with or without reason, demand in writing that the bank return or repay, within 30 days of the demand, the retainage or any investments in which it is invested; and

(D) any other terms and conditions prescribed by the department and the comptroller of public accounts as necessary to protect the interests of the state.

(5) Routine maintenance and professional services contracts. The department will not retain funds for routine maintenance contracts or contracts for the making of all necessary plans and surveys preliminary to construction, reconstruction, or maintenance.

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.

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Richard Monroe
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

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Subchapter C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

43 TAC §§9.31, 9.37-9.39, 9.43

The Texas Department of Transportation adopts amendments to §§9.31, 9.37-9.39, and 9.43, concerning contracting for architectural, engineering, and surveying services. Section 9.43 is adopted with changes to the proposed text as published in the October 15, 1999, issue of the *Texas Register* (24 TxReg 8935). Sections 9.31, and 9.37-9.39 are adopted without changes, and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The amendments are necessary to: comply with the Federal Highway Administration's adoption of the new Disadvantaged Business Enterprise (DBE) regulations, Title 49, Code of Federal Regulations, Part 26; to provide greater flexibility during the negotiation period for multiple contracts that have been awarded from a single advertisement; to increase eligibility for indefinite delivery contracts; and to clarify the architecture work category requirement.

The amendments to §9.31 are necessary to revise the definitions of Disadvantaged Business Enterprise, DBE/HUB goal participation, and DBE/HUB special provision to have those terms comply with and refer to new federal regulations found at 49 CFR, Part 26.

The amendments to §9.37 provide that, in accordance with federal and state regulations, the department may, but is not required to, assign DBE or HUB goals on each contract.

The amendments to §9.37(g)(1) are necessary to make the department's requirements consistent with the new federal disadvantaged business regulations requiring that prime providers submit a list of all suppliers and subproviders that have been contacted regarding the project. The language of this subsection has been clarified to better explain the provider's obligation to submit documentation to the department.

Section 9.37(g)(2) is amended to clarify the time period in which a provider must negotiate and sign the contract resulting from an award. New provisions allow automatic extensions for a period of days for multiple contracts that have been awarded from a single advertisement and which will be negotiated simultaneously. The number of days available under these automatic extensions depends on the anticipated dollar value of the contracts. If the anticipated value is $1 million or more, the negotiating period is extended for five working days for each contract that is being negotiated. For contracts with an anticipated value of less than $1 million, the negotiating period is extended for an additional five working days for each two contracts. Dividing contracts into groups of greater than or less than $1 million allows the department to establish longer initial negotiating periods that are consistent with the relative complexity of the contracts without unduly delaying contract execution. The new initial negotiating periods for multiple contracts allows the consultant and the department to arrive at a contract based on a fair and reasonable price.

Section 9.37(g)(2) has been reorganized and revised by adding subparagraph (B)(ii) to allow the deputy executive director the same authority as the executive director to grant a single 10 working day additional extension. The deputy executive director

has been included to improve the department's flexibility in responding to requests for these extensions. New subparagraph (B)(iii) has been added to permit the executive director or the deputy executive director to grant a final five working day extension to the negotiating period in the case where multiple contracts are selected under one advertisement and upon the submission of written justification by the managing officer indicating that adequate progress is being made to bring the negotiations to a successful resolution. The discretionary extensions allow the department and the consultant to better negotiate contracts that result in a fair and reasonable price. Subparagraph (C) has been added to permit the administration to adopt a negotiating schedule different from that specified in these rules for large corridor development projects with anticipated construction costs in excess of $500 million. Unique negotiating schedules allow the department to efficiently negotiate these contracts, which, by their size and complexity, cannot reasonably be expected to be negotiated under the negotiating periods set out in this chapter.

Section 9.37(g)(4) has been amended to require that providers selected to perform services for the department submit documentation that either the provider has met any DBE/HUB goal that has been established on the project, or that it has exercised good faith efforts to meet the goal. Failure to submit the required documents will result in the department refusing to contract with the selected provider and initiating negotiations with the next highest ranked provider. This change has been made to bring department practice into compliance with the federal requirements found in 49 CFR, Part 26.

Section 9.38(1) has been revised to describe the means in which HUB/DBE goals can be met. The revised rule specifies that the HUB goal can be satisfied if a HUB prime provider performs at least 25% of the work with its own forces. In order to satisfy the DBE goal, the DBE provider must perform the work with its own forces or the work must be performed by a DBE subprovider. Paragraph (2) is amended by adding a provision which states that any work performed by a non-DBE subprovider cannot be counted towards satisfying the DBE goal on federal-aid projects. This change has been made to bring department practice into compliance with the federal requirements found in 49 CFR, Part 26.

Section 9.39(3) has been amended to raise the dollar cap for work authorizations for indefinite delivery contracts from $500,000 each to a total of $5 million for those districts headquartered along the border with Mexico and those serving the five largest metropolitan areas of the state. $5 million is also the limit for the total value of work orders under indefinite delivery contracts in those districts. For all other areas of the state, the maximum value for each individual work authorization and the total value for all work authorizations for an indefinite delivery contract is $2 million.

Using a $5 million cap for individual work authorizations and the total value for work orders allows department staff greater flexibility in those geographic areas of the state where large projects are most likely to occur. Retaining the $2 million cap for all other districts helps small and disadvantaged businesses by limiting the size of contracts that the department may offer for bid.

Section 9.43(b)(15) has been revised to combine the two work categories "architecture-buildings" and "architecture-other structures" into a single work category. Combining the two categories reduces the burden on consultants and the department in the pre-certification review of consultant employees. This paragraph is adopted with a change to the catch line by adding language which was inadvertently omitted at the proposed stage. This revision is non-substantive and merely for informational purposes. No other changes are being made.

COMMENTS

On October 26, 1999, the department held a public hearing to receive comments on the proposed amendments. No oral comments were received at the public hearing.

Comment: One written comment was received from the Consulting Engineers Council of Texas (CEC-T). The comment was in general support of the amendments but asked that the proposed rules be clarified to indicate that the new higher maximum allowable dollar amounts for indefinite delivery contracts do not prohibit the issuance of smaller contracts.

Response: The proposed rules make clear that the $5 million amount referenced in connection with indefinite delivery contacts is a "not to exceed" amount. The new $5 million cap will only be allowed in the 5 metropolitan districts and 3 border districts. All other districts retain the previous, lower maximum dollar amount for indefinite delivery contracts. The department will communicate that the $5 million dollar amount is only a cap and that contracts should vary in size depending on the anticipated workload and work type. This explanation will be provided in procedural guidance to the districts.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation; and more specifically, Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act, which sets forth requirements for selection and contracting of professional services providers.

§9.43. Qualification Requirements by Work Group.

(a) Requirements.

(1) Eligible employees. Prime providers and subproviders may be precertified in the technical groups and categories in accordance with subsection (b) of this section by providing the listed requirements. A firm may only use an individual who is employed by that firm at the time of submittal for precertification.

(2) Experience. The experience used to meet requirements may be either prior to or after licensure unless otherwise stated in a specific category. For the purpose of experience for precertification, the professional provider may be licensed to practice in any state for which that experience is recognized by the:

(A) Texas Board of Professional Engineers for engineers;

(B) Texas Board of Architectural Examiners for architects; or

(C) Texas Board of Professional Land Surveying for land surveyors.

(3) Contract execution. For the purposes of executing a contract and doing work in the state, the professional provider must be licensed by the:

(A) Texas Board of Professional Engineers for engineers;

(B) Texas Board of Architectural Examiners for architects; or

(C) Texas Board of Professional Land Surveying for land surveyors.

(b) Work Categories.

(1) Group 1 - transportation systems planning.

(A) Category 1.1.1 - policy planning. This category includes the investigation and development of transportation planning and strategies to meet current or future needs at the state or local level. The firm must employ:

(i) one professional engineer with training and experience in areas directly related to policy planning; or

(ii) one planner with training and experience in areas directly related to policy planning.

(B) Category 1.2.1 - systems planning. This category includes development of state or local transportation plans to create complete integrated systems to support movement of people and goods. The firm must employ:

(i) one professional engineer with training and experience in areas directly related to systems planning; or

(ii) one planner with training and experience in areas directly related to systems planning.

(C) Category 1.3.1 - subarea/corridor planning. This category includes the study of the feasibility of all modes of transportation corridors at the state or local level to determine the cost effectiveness of the various alternatives to meet specific goals and may include actual route location as a final product. The firm must employ:

(i) one professional engineer with training and experience in areas directly related to subarea/corridor planning; or

(ii) one planner with training and experience in areas directly related to subarea/corridor planning.

(D) Category 1.4.1 - land planning/engineering. This category includes planning and engineering in support of assessing the impacts that proposed transportation improvements may have on public and private property. The firm must employ:

(i) one professional engineer with training and experience in comprehensive planning or areas directly related to assessing impacts to private property; or

(ii) one planner with training and experience in comprehensive planning or areas directly related to assessing impacts to private property.

(E) Category 1.5.1 - feasibility studies. This category includes investigation of programs or specific projects to determine if they are cost effective and meet the department's desired goals. The firm must employ one professional engineer who has:

(i) proficiency in civil engineering; and

(ii) completed a minimum of two feasibility studies.

(F) Category 1.6.1 - major investment studies. This category includes the investigation of modal and financing alternatives for major transportation projects at the state or local level. The firm must employ:

(i) one professional engineer with proficiency in civil engineering and experience or education in urban planning and economic, or environmental impact assessment; and

(ii) one person with a bachelor's degree in a physical or a natural science with related experience.

(2) Group 2 - environmental studies.

(A) Category 2.1.1 - traffic noise analysis. This category includes the performance of a traffic noise analysis for a roadway project. The firm must employ one person with:

(i) a bachelor's degree or equivalent experience in environmental studies, urban planning, civil or environmental engineering, or a related field; and

(ii) demonstrated experience in use/application of Traffic Noise Guidelines, traffic noise modeling software, and appropriate sound measuring equipment through the accurate completion of a traffic noise analysis for a minimum of two highway projects at the FONSI level or above.

(B) Category 2.2.1 - air quality analysis. This category includes the performance of an air quality analysis for a roadway project. The firm must employ one person with:

(i) a bachelor's degree or equivalent experience in environmental studies, urban planning, civil or environmental engineering, or a related field; and

(ii) demonstrated experience in use/application of air quality guidelines and air quality modeling software through the accurate completion of an air quality analysis for a minimum of two highway projects at the FONSI level or above.

(C) Category 2.3.1 - wetland delineation. This category includes the performance of a wetland delineation according to the U.S. Army Corps of Engineers requirements. The firm must employ one person with:

(i) a minimum of one year of field experience in wetland delineation; and

(ii) completion of a Wetland Training Institute or an equivalent one week wetland delineation class.

(D) Category 2.4 - U.S. Army Corps of Engineers permits. This category includes the following permits:

(i) Category 2.4.1 - nationwide permit. The firm must employ one person with working knowledge of the nationwide permit process and a minimum of one year of experience in nationwide permit determination.

(ii) Category 2.4.2 - §404 (Title 33, United States Code, §1344) individual permits (including mitigation and monitoring). The firm must employ one person with working knowledge of the individual §404 permit process, with one year of experience, and who has applied for and received one individual permit.

(iii) Category 2.4.3 - U.S. Coast Guard and U.S. Army Corps of Engineers §10 (Title 33, United States Code, §403) permits. The firm must employ one person with one year of experience and working knowledge of the Rivers and Harbors Act, §10 who has applied for and received one navigation-related permit.

(E) Category 2.5.1 - water pollution abatement plan. This category includes geologic field assessment and the preparation of pollution abatement plans as they relate to the Edwards Aquifer Rules. The firm must employ one person with:

(i) a background in geology, environmental studies, civil or environmental engineering or a related field; and

(ii) working knowledge of the Edwards Aquifer Rules.

(F) Category 2.6 - protected species coordination. This category includes the following types of biological issues and coordination.

(i) Category 2.6.1 - protected species determination (habitat). This category involves the determination of the potential presence or absence of a protected species or important habitat. The firm must employ one person with knowledge of currently protected species and/or habitats, and a demonstrated ability to perform basic inventory work sufficient to comply with FHWA National Environmental Protection Act (NEPA) requirements.

(ii) Category 2.6.2 - impact evaluation assessments. This category requires demonstrated ability to use habitat and species determination and biological survey data to analyze impacts to biological resources. The firm must employ one person with demonstrated ability to prepare a biological impact analysis for NEPA documentation or to support the Federal Endangered Species Act (ESA) Section 7 consultations, including the preparation of a biological assessment, or ESA Section 10.a. permit applications.

(iii) Category 2.6.3 - biological surveys. This category requires demonstration of ability to conduct biological resource field studies. The firm must employ one person:

(I) with demonstrated ability to survey the project site and classify the vegetation community, list animal species associated with that community, and identify special habitat features within the community;

(II) who has required state and federal permits; and

(III) with experience in appropriate survey protocols for specific protected species.

(G) Category 2.7.1 - §4(f) (Title 23, United States Code of Federal Regulations, §771.135) and/or §6(f) (Title 49, United States Code, §303) evaluations. This category includes §4(f) evaluations, identified in the Department of Transportation Act of 1966, which are conducted when right of way is acquired from publicly owned parks, recreation areas, wildlife or waterfowl refuges, or historic sites, and §6(f) evaluations which apply when federal land and water conservation funds are used for improvements to the site. The firm must employ one person:

(i) with a minimum of one year of experience in applying §4(f) and/or §6(f) requirements;

(ii) who has completed a minimum of one successful evaluation; and

(iii) who has received FHWA or other federal agency approval.

(H) Category 2.8.1 - surveys, research and documentation of historic buildings, structures, and objects. This category includes surveys, research, and documentation efforts carried out in accordance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (Volume 48 of the Federal Register, 44716) to comply with §106 (Title 16, United States Code, §470f) of the National Historic Preservation Act of 1966, as amended, and other state and federal historic preservation related laws and regulations. Associated activities include: delineation of the area of potential effects for projects with the potential to affect historic properties; field surveys and photographic and written documentation on historic properties located within a project's area of potential effects; development of historic contexts that provide an organizational and thematic format for evaluating historic properties; determination of National Register eligibility for identified historic properties; preparation of historic documentation on affected properties in accordance with the documentation requirements of the Historic American Buildings Survey and the Historic American Engineering Record; evaluation of the effect of projects on significant properties; and the development of management and preservation plans for historic properties. The firm must employ one person with experience working with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (Volume 48 of the Federal Register, 44716), 36 CFR Part 800, and documentation requirements of the Historic American Buildings Survey and Historic American Engineering Record and:

(i) a master's degree in architectural history, historic preservation or a closely-related field, with course work in American architectural history and a minimum of one year of direct experience performing surveys, research or documentation of historic buildings, structures, and objects;

(ii) a bachelor's degree in architectural history, historic preservation or a closely-related field, with course work in American architectural history and a minimum of two years of direct experience performing surveys, research or documentation of historic buildings, structures, and objects; or

(iii) a minimum of ten years of direct experience performing surveys, research, or documentation of historic buildings, structures, and objects, including scholarly publications and presentations at professional meetings.

(I) Category 2.9.1 - historic architecture. This category includes architectural work to ensure compliance with the Secretary of the Interior's Standards for Historic Preservation projects (Volume 48 of the Federal Register, 44716). Associated activities include detailed investigations of historic structures, preparation of historic structure research reports, preparation of plans and specifications for historic preservations projects, development of management plans for individual properties, and preparation of measured drawings for affected historic properties. The firm must employ a registered architect:

(i) with a minimum of two years of full-time experience managing historic preservation projects; or

(ii) with a minimum of one year of full-time experience managing historic preservation projects and completion of a minimum of one year of graduate study in preservation architecture.

(J) Category 2.10.1 - archeological surveys, documentation, excavations, testing reports and data recovery plans. This category includes: reconnaissance or intensive archeological surveys performed in accordance with the criteria listed in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (1982), Reports Relating to Archeological Permits in the Rules of Practice and Procedure for the Antiquities Code of Texas, and performance standards as outlined in the Council of Texas Archaeologists (CTA) Guidelines; documentation of operations that use archeological techniques to obtain and record evidence of human activity or behavior important in history or prehistory; testing and preparation of testing reports to describe the results of work following the investigation and evaluation of archeological sites and/or other historic properties; and data recovery plans that address appropriate

strategies and methodologies for excavation and data recovery. The firm must employ a principal investigator:

(i) with a master's degree in archeology, anthropology, or closely-related field, who has a minimum of one year of full-time professional experience or equivalent specialized training in archeological research or administration;

(ii) who has a minimum of one year of supervised field and analytic experience in archeology;

(iii) who is a professional archeologist who meets the standards of a principal or co-principal investigator, as defined by state standards, with a minimum of one year of full-time professional experience at a supervisory level in archeological resources;

(iv) who has served as principal or co-principal investigator on a minimum of five archeological projects, of equivalent scope that were successfully completed under the jurisdiction of the National Historical Preservation Act, the Antiquities Code of Texas, or an equivalent law in another state; and

(v) who has the equipment and personnel necessary to perform the work.

(K) Category 2.11.1 - historical and archival research. This category includes historical and archival research on historic properties or historic archeological sites, the development of research designs to guide historical research efforts, and the development of historic contexts to provide an organizational and thematic format for further research and evaluation of historic properties and historic archeological sites. The firm must employ one person with:

(i) a master's degree in history or a closely related field with a minimum of one year of full-time experience in historical research, writing, teaching, or other demonstrated professional historical activity and archival research and documentation; or

(ii) a bachelor's degree in history or a closely related field with a minimum of two years of full-time experience in research, writing, teaching, interpretation, or other demonstrated professional activity with an academic institution, historical organization or agency, museum, or other professional institution, and a minimum of one year of experience managing historical and archival research.

(L) Category 2.12.1 - socio-economic and environmental justice analyses. This category includes: analyzing U.S. Census data for the affected area; identifying changes in land use, land values, and the local tax base; identifying impacts to the business environment to include relocations, construction period impacts, accessibility issues, and effects to employees and customers; estimating the number and type of residential relocations; identifying the availability of comparable replacement housing in accordance with the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970; identifying impacts to community cohesion and the effects to public facilities and services; and identifying and addressing disproportionately high and adverse health and environmental impacts to minority populations and low-income populations in accordance with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations (February 11, 1994). The firm must employ one person with:

(i) a bachelor's degree in sociology, economics, urban planning, engineering, or a related field described in this category;

(ii) a minimum of one year of full-time experience performing socio-economic analysis for environmental documents; and

(iii) knowledge of applicable federal, state, and local regulations.

(M) Category 2.13.1 - hazardous materials initial site assessment. This category includes the performance of an initial site assessment to identify known or possible hazardous materials and determine the potential for encountering them during project development. The assessment shall be in general accordance with the American Society for Testing and Materials Environmental Site Assessment standard practices, ASTM 1528 and ASTM 1527, or satisfy due diligence and appropriate inquiry requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The appropriate level of inquiry for assessing existing and previous land use, regulatory databases (list search) and files, site visit and/or field surveys, and interviews shall be made with consideration of project design and right of way requirements. This category also includes the determination of whether additional research or investigation is necessary during subsequent stages of project development. The firm must employ one person with:

(i) a minimum of one year of experience performing Phase I environmental site assessments/hazardous material assessments; and

(ii) working knowledge of pertinent federal, state and local environmental laws and regulations, ASTM standard practices for environmental site assessments, and hazardous material assessments/investigations.

(N) Category 2.14.1 - environmental document preparation. This category includes the preparation of environmental documents for transportation projects as identified in §2.43(c), (d) and (e) of this title (relating to Highway Construction Projects - State Funds). The firm must employ one person:

(i) with a bachelor's degree or equivalent experience in environmental studies, urban planning, civil or environmental engineering, or a related field, and with knowledge of pertinent federal, state, and local environmental regulations;

(ii) in responsible charge of the review and preparation of, and/or participation in any management that developed five or more moderate to large projects which were approved as environmental assessment-FONSI; or

(iii) in responsible charge of the review and preparation of, and/or participation in any management that developed 10 or more small to moderate projects which were approved as environmental assessment-FONSI; or

(iv) in responsible charge of the review and preparation of, and/or participation in any management that developed one project which was approved as an environmental impact statement .

(3) Group 3 - schematic development. The firm must employ sufficient production staff to perform the work described in the following categories.

(A) Category 3.1.1 - route studies & schematic design - minor roadways. This category includes the preliminary alignment and layout of minor roadways as described in Category 4.1.1. The firm must employ one professional engineer with a minimum of three years experience in:

(i) design of minor roadways; and

(ii) capacity and level of service analysis.

(B) Category 3.2.1 - route studies & schematic design - major roadways. This category includes the preliminary alignment and layout of major roadways as described in Category 4.2.1. The firm must employ one professional engineer with a minimum of three years experience in:

(i) design of major roadways; and

(ii) capacity and level of service analysis.

(C) Category 3.3.1 - route studies & schematic design - complex highways. This category includes the preliminary alignment and layout of complex highways as described in Category 4.3.1. The firm must employ one professional engineer with a minimum of:

(i) five years experience in the area of complex highway design; and

(ii) one year of experience in capacity and level of service analysis.

(D) Category 3.4.1 - minor bridge layouts. This category includes the preliminary alignment and layout of minor bridges as described in Category 5.1.1. The firm must employ one professional engineer with a minimum of three years experience in:

(i) design of minor roadways; and

(ii) capacity and level of service analysis.

(E) Category 3.5.1 - major bridge layouts. This category includes the preliminary alignment and layout of major bridges as described in Category 5.2.1. The firm must employ one professional engineer with a minimum of:

(i) three years experience in design of major roadways; and

(ii) one year of experience in capacity and level of service analysis.

(F) Category 3.6.1 - multi-level interchange and exotic bridge layout. This category includes the preliminary alignment and layout of multi-level interchanges as described in Category 5.3.1 and 5.4.1. The firm must employ one professional engineer with a minimum of:

(i) five years experience in complex highway design; and

(ii) one year of experience in capacity and level of service analysis.

(4) Group 4 - roadway design. The firm must employ sufficient production staff to perform the work described in the following categories.

(A) Category 4.1.1 - minor roadway design. This category includes the design of small urban and rural roadways involving repair, resurfacing, and rehabilitation that do not include major reconstruction, and urban and rural roadways that involve substantial capacity improvements. Associated activities include utility relocation and miscellaneous minor design services. The firm must employ one professional engineer with a minimum of three years of roadway design experience on two projects.

(B) Category 4.2.1 - major roadway design. This category includes design of urban and rural roadways that involve major reconstruction or substantial capacity improvements through a developed area. Associated activities include utility relocation plans, stormwater permits, maintenance of traffic plans, and traffic engineering applications. The firm must employ one professional engineer with a minimum of three years of roadway design experience on two separate projects.

(C) Category 4.3.1 - complex highway design. This category includes the design of expressways, limited access facilities, diamond interchanges, freeways, and new roadway and reconstruction work on complex projects including complex geometrics. Associated activities include substantial drainage evaluation and design features, traffic engineering applications, utility relocation plans, and maintenance of traffic plans. The firm must employ one professional engineer with a minimum of four years experience in complex highway design on two separate projects.

(D) Category 4.4.1 - major freeway interchanges and direct connectors. The firm must employ one professional engineer with a minimum of five years experience in design of a minimum of two separate projects involving major freeway interchanges and direct connectors.

(5) Group 5 - bridge design. The firm must employ sufficient production staff to perform the work described in the following categories.

(A) Category 5.1.1 -minor bridge design. This category includes the design of conventional, non-complex bridges, bridge replacements, simple bridge widening, railroad overpasses, non-standard retaining walls, and pedestrian bridges. The firm must employ one professional engineer with a minimum of two years structural bridge design experience after licensure as a professional engineer.

(B) Category 5.2.1 - major bridge design. This category includes the design of bridges with complex geometry, complexity of design, spans less than 350 feet, non-conventional substructures, substructures requiring ship impact design, design of dolphins for bridge pier protection, railroad underpasses, complex bridge widening, steel truss spans, and concrete arch bridges. The firm must employ one professional engineer with a minimum of five years of structural bridge design experience after licensure as a professional engineer.

(C) Category 5.3.1 - multi-level interchange design. This category includes design of bridges with three levels or more. The firm must employ one professional engineer with a minimum of seven years of structural bridge design experience in multi-level interchanges after licensure as a professional engineer.

(D) Category 5.4.1 - exotic bridge design. This category includes the design of bridges with spans greater than 350 feet, suspension bridges, cable-stayed bridges, precast, post-tensioned segmental bridges, bridges requiring unique analytical methods, and movable bridges. The firm must employ one professional engineer with a minimum of seven years of structural bridge design experience in exotic bridge design after licensure as a professional engineer.

(6) Group 6 - bridge inspection. The firm must employ sufficient National Highway Institute (NHI) trained bridge inspectors and other technical personnel as required to perform inspection of bridges included in this category.

(A) Category 6.1.1 - routine bridge inspection. This category includes the inspection of on-system and off-system bridges, inspection and load rating for culverts, prestressed beam bridges, cast-in-place concrete bridges, steel girder bridges, steel truss bridges, and timber bridges. The firm must employ:

(i) a project manager who is a registered professional engineer, is qualified for registration as a professional engineer under the laws of a state, or has a minimum of 10 years experience

in bridge inspection assignments in a responsible capacity and has completed the comprehensive NHI training course "Safety Inspection of In-service Bridges;" and

(ii) a team leader who has the qualifications specified for the project manager in subdivision (i) of this subparagraph, or a minimum of five years of experience in bridge inspection assignments in a responsible capacity and has completed the comprehensive NHI training course "Safety Inspection of In-service Bridges," or is currently certified as a Level III or IV Bridge Safety Inspector under the National Institute for Certification in Engineering Technologies (NICET).

(B) Category 6.2.1 - complex bridge inspection. This category includes the inspection of on-system and off-system bridges, inspection and load rating for precast segmental structures, steel arch structures, cable stayed structures, fracture critical inspections, and movable bridges. The firm must employ:

(i) one professional engineer, to serve as project manager, with a minimum of seven years of bridge inspection or design experience, including one year of inspection or design of bridges included in this category, and who has completed the comprehensive NHI training course "Safety Inspection of In-service Bridges;" and

(ii) a person to serve as the inspection team leader who has a minimum of six years of experience in bridge inspection or design, including one year of inspection or design of bridges included in this category, and who has completed the comprehensive NHI training course "Safety Inspection of In-service Bridges."

(7) Group 7 - traffic engineering and operations studies.

(A) Category 7.1.1 - traffic engineering studies. This category is defined as the study of the traffic operations of a roadway. Associated activities include preparation of or performance of traffic counts, signal warrants, collision diagrams, travel time and delay, capacity and level of service analysis, intersection analysis, signing, and pavement marking. The firm must employ one professional engineer with demonstrated experience performing traffic engineering studies.

(B) Category 7.2.1 - highway-rail grade crossing studies. This category includes the study of the operations of highway-rail grade crossings. Associated activities include preparation of or performance of corridor analysis, diagnostic inspections to determine appropriate type and location of active warning devices, advance warning signs and pavement markings, and other geometric or operational improvements. The firm must employ one professional engineer with demonstrated experience performing highway-rail grade crossing studies.

(C) Category 7.3.1 - traffic signal timing. This category includes analysis, development, and implementation of timing for traffic signals. Associated activities include data collection, intersection analysis, computerized timing programs (development of phase intervals and sequence), and timing implementation. A firm must employ:

(i) one professional engineer with demonstrated experience in traffic signal timing and the application and interpretation of traffic flow and signal timing models; and

(ii) sufficient personnel with experience using traffic engineering software applications, loading timings into field equipment, and loading databases into central computers for retiming.

(D) Category 7.4.1 - traffic control systems analysis, design and implementation. This category includes the use of electrical engineering, electronics engineering, computer science and traffic engineering to analyze, design, and implement real-time traffic control systems. The firm must employ:

(i) one professional engineer with experience in activities associated with traffic control systems; and

(ii) sufficient production staff to perform these activities.

(E) Category 7.5.1 - Intelligent Transportation System. This category includes conducting ITS planning studies. Associated activities include the study of transportation systems, identification of ITS applications to mitigate transportation problems, development of short term and long term ITS implementation plans, and assessment of the impact of ITS projects on the transportation system. The firm must employ:

(i) one professional engineer with a background in transportation engineering and experience in activities associated with the development of ITS; and

(ii) sufficient production staff to perform these activities.

(8) Group 8 - traffic operations design.

(A) Category 8.1.1 - signing, pavement marking and channelization. This category includes the design and preparation of plans for signing, pavement marking, and channelization. The firm must employ one professional engineer with a minimum of two years experience in this category.

(B) Category 8.2.1 - illumination. This category includes the design and preparation of plans for continuous roadway lighting, safety lighting, underpass lighting, tunnel lighting, and high mast lighting. The firm must employ one professional engineer with:

(i) a minimum of two years experience in design and production of illumination plans meeting IESNA and AASHTO guidelines; and

(ii) demonstrated experience in electrical engineering and the National Electric Code.

(C) Category 8.3.1 - signalization. This category includes the design and preparation of plans for traffic signalization. The firm must employ one professional engineer with a minimum of two years experience in the design and production of traffic signalization.

(D) Category 8.4.1 - ITS control systems analysis, design, and implementation. This category of work includes the use of transportation engineering, electronics engineering, and computer science to analyze, design and implement transportation control systems. Associated activities include system performance and cost analysis, system hardware and software design, communication system design, development of management plans, supervision of system installation and operation, system testing and debugging, preparation of system documentation, and the training of operations personnel. The firm must employ:

(i) one professional engineer, with a background in electrical engineering, system engineering, or software engineering, with a minimum of two years experience in either the design and production of ITS plans or the operation of ITS; and

(ii) sufficient personnel with experience in systems engineering, communications, system integration, or software development for ITS applications and ITS equipment.

(E) Category 8.5.1 - highway-rail grade crossings. This category includes the design and preparation of plans for active warning devices, advance warning signs, pavement markings, and other geometric or operational improvements at highway-rail crossings. The firm must employ one professional engineer with a minimum of two years experience in this category.

(9) Group 9 - bicycle and pedestrian facilities. Category 9.1.1 - bicycle and pedestrian facility development includes the design of bicycle and pedestrian facilities. The firm must employ:

(A) one professional engineer with a minimum of one year experience in the design of bicycle and pedestrian facilities, and with knowledge of drainage design; and

(B) sufficient production staff to perform these activities.

(10) Group 10 - hydraulic design and analysis.

(A) Category 10.1.1 - hydrologic studies. This category includes rainfall, runoff determination, reservoir routing, and channel routing. The firm must employ one professional engineer with a minimum of two years experience in analysis of complex watersheds.

(B) Category 10.2.1 - basic hydraulic design. This category includes storm drain systems, culverts, sedimentation filtration systems, and detention/retention ponds. The firm must employ one professional engineer with a minimum of two years experience in hydrologic analysis, hydraulic design, and storm water quality evaluation.

(C) Category 10.3.1 - complex hydraulic design. This category includes hydraulic design of bridges over waterways, flood plain analysis, and channel modifications. The firm must employ one professional engineer with a minimum of two years experience in river geomorphology, sediment transport and scour analysis, flood plain analysis, river training techniques, and federal and state regulations and permit compliance.

(D) Category 10.4.1 - pump stations-hydraulics. This category includes the design of pump stations for conveyance of storm waters. The firm must employ one professional engineer with a minimum of two years experience in hydrologic analysis and storm drain and pump station design.

(E) Category 10.4.2 - pump stations-electrical. This category includes the design of pump motor control centers, controls, generators, and large distribution equipment stations for conveyance of storm water. The firm must employ one professional engineer with a minimum of five years experience in the design of large motor control centers and generating equipment, the National Electrical Code, and control systems.

(F) Category 10.4.3 - pump stations-structures. This category includes the structural design of walls, roofs, foundations, and wells of pump stations for conveyance of storm water. The firm must employ one professional engineer with a minimum of two years of structural pump stations design experience.

(G) Category 10.5.1 - bridge scour evaluations and analysis. This category includes hydrologic analysis, channel and bridge hydraulic analysis and sediment transport modeling for evaluating the potential for scour of bridges. The firm must employ one professional engineer with a minimum of two years experience, after licensure as a professional engineer, in river geomorphology, sediment transport and scour analysis, and flood plain analysis.

(11) Group 11 - construction management. The firm must employ sufficient technical personnel with construction engineering inspection experience to staff projects under this category of work.

(A) Category 11.1.1 - roadway construction management and inspection. This category includes the performance of construction management duties for all categories of roadways and highways, and minor bridges as described in Category 5.1.1. The firm must employ one professional engineer with a minimum of two years of responsible charge experience as a project engineer on roadway and bridge construction projects.

(B) Category 11.2.1 - major bridge construction, management, and inspection. This category includes the performance of construction management duties for major bridges, multi-level interchanges, and exotic bridges as described in Category 5.2.1. The firm must employ one professional engineer with a minimum of two years demonstrated major bridge construction experience, after licensure as a professional engineer.

(12) Group 12 - materials inspection and testing.

(A) Category 12.1 - material testing. The firm must have available in-house equipment and employ qualified, certified staff necessary to perform the work specified in this category.

(i) Category 12.1.1 - asphaltic concrete. This category includes testing of asphaltic concrete material. The firm must employ one professional engineer with a minimum of three years of experience in testing roadway construction materials and a minimum of one person with the proper Hot Mix Asphalt Specialist Certification (Level 1A minimum).

(ii) Category 12.1.2 - portland cement concrete. This category includes testing of portland cement concrete. The firm must employ one professional engineer with a minimum of three years of experience in testing roadway and bridge construction materials, and one person with the proper concrete certification (ACI certification Grade 1).

(B) Category 12.2.1 - plant inspection and testing. This category includes inspection of the following types of facilities and inspection of materials and finished products within these facilities: fabrication plants, mines and quarries, mills, refineries, processors, and producers. The firm must employ:

(i) one professional engineer with a minimum of three years of responsible experience in inspection and testing bridge and roadway construction materials; and

(ii) sufficient technical personnel with construction engineering experience to properly staff this type of work.

(13) Group 14 - geotechnical services.

(A) Category 14.1.1 - soil exploration. This category includes acquisition and reporting of subsurface material to be used for the planning, design, construction, and performance of transportation facilities. The field classification of materials and acquisition of soil and rock samples is also included. The firm must:

(i) employ one professional engineer with a minimum of one year demonstrated experience in the activities normally associated with the category under consideration; and

(ii) have available the equipment necessary to perform the work.

(B) Category 14.2.1 - geotechnical testing. This category includes sampling and conducting tests on soil and rock according to the department's approved procedures for the purpose of classifying materials and/or identifying their physical properties. The firm must:

(i) employ one professional engineer with a minimum of one year demonstrated experience in the activities normally associated with the category under consideration; and

(ii) have available in-house equipment and employ qualified staff necessary to perform the work.

(C) Category 14.3.1 - transportation foundation studies. This category includes producing reports which contain selection of the type and depth of foundation for bridges, retaining walls, signs, and other types of transportation foundations. Working with bearing capacity, predicted settlement, stabilization, and construction on soft ground will be required. The firm must employ one professional engineer with a minimum of three years demonstrated experience in the activities normally associated with this category.

(D) Category 14.4.1 - building foundation studies. This category includes producing reports which contain selection of the type and depth of foundation for buildings. Working with bearing capacity, predicted settlement, stabilization and construction on soft ground will be required. The firm must employ one professional engineer with a minimum of three years demonstrated experience in the activities normally associated with this category.

(14) Group 15 - surveying and mapping.

(A) Category 15.1 - right of way surveys. This category includes the performance of on the ground surveys and preparation of parcel maps, legal descriptions, and right of way maps. The firm must employ one registered professional land surveyor and two technical personnel, all with demonstrated experience in the applicable category of work and the following subcategories:

(i) Category 15.1.1 - survey;

(ii) Category 15.1.2 - parcel plats;

(iii) Category 15.1.3 - legal descriptions; and

(iv) Category 15.1.4 - right of way maps.

(B) Category 15.2.1 - design and construction survey. This category includes performance of surveys associated with the gathering of survey data for topography, cross-sections, and other related work in order to design a project, or during layout and staking of projects for construction. The firm must:

(i) employ one registered professional land surveyor with a minimum of one year experience in roadway construction staking;

(ii) employ sufficient staff to undertake the requirements normally associated with this type of work; and

(iii) have available the proper equipment to perform the work.

(C) Category 15.3.1 - aerial mapping. This category involves the collection and reduction of aerial survey data, and preparation of site maps and topographic maps. Associated activities include category 15.4.1. The firm must:

(i) employ sufficient lead technical personnel with a minimum of five years of experience each in aerial mapping;

(ii) have available the proper equipment meeting national mapping standards and other equipment required to perform the work; and

(iii) employ sufficient technical production staff to perform this type of work.

(D) Category 15.4.1 - horizontal and vertical control for aerial mapping. This category involves the establishment of the horizontal and vertical control for aerial mapping. The firm must:

(i) employ one registered professional land surveyor;

(ii) have available the proper equipment to perform the work; and

(iii) employ sufficient staff to undertake the requirements normally associated with this type of work.

(E) Category 15.5.1 - state land surveying. This category includes the performance of land surveying associated with "the location or relocation of original land grant boundaries and corners; the calculation of area and the preparation of field note descriptions of both surveyed and unsurveyed land or any land in which the state or the public free school fund has an interest; the preparation of maps showing such survey results; and the field notes and/or maps of which are to be filed in the General Land Office," as quoted in the Surveyors Act. The firm must employ one registered professional land surveyor with demonstrated experience in state land surveying as defined in the category description.

(15) Group 16 - architecture. Category 16.1.1- buildings and other structures. This category includes architectural services for buildings and other related structures such as, but not limited to, radio towers, fuel island canopies, equipment slabs, equipment and/or material storage structures. The firm must employ sufficient project management and technical staff to provide services normally associated with this type of work. The firm must employ one registered architect with a minimum of two years experience in the areas identified.

(16) Group 18 - miscellaneous. Category 18.1.1 - value engineering. This category includes the study of transportation related projects or selected processes by multidisciplined teams to determine the most cost effective use of resources to accomplish the given functions. The firm must employ:

(A) one professional engineer who:

(i) is a certified value specialist with experience in the value engineering process and team leadership related to transportation projects as evidenced by having conducted a minimum of five transportation related value engineering studies, including one freeway project exceeding $20 million initial estimated cost;

(ii) has taught a minimum of two transportation related value engineering classes in the last five years; and

(iii) has knowledge of and experience with federal, state, and local regulations, public involvement, professional engineering standards, project management, and cost estimating related to transportation projects; and

(B) sufficient production staff to perform transportation related value engineering team leadership, produce final value engineering study reports, and teach classes on the principles and practices of value engineering.

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.

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Richard Monroe
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Chapter 18. MOTOR CARRIERS

Subchapter A. GENERAL PROVISIONS

43 TAC §18.2

The Texas Department of Transportation adopts amendments to §18.2, concerning Definitions. The amendments are adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TxReg 8942), and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 775, 76th Legislature, 1999, amended Transportation Code, Chapter 643, Subchapter A to amend and clarify the definition of commercial motor vehicle. The amendments implement Senate Bill 775 and clarify the definitions of household goods and Type B household goods carrier.

Section 18.2, Definitions, is amended to exclude vehicles operated by governmental entities from the definition of commercial motor vehicle as a result of Senate Bill 775. Additionally, the amendments clarify the definition of household goods by removing the words, "and paid for," to clarify that when a shipment is arranged by the manufacturer, retailer, or similar company, it is not a shipment of household goods subject to these rules. The department removes these types of goods to be consistent with the federal definition of household goods. Section 18.2 is also amended to clarify the definition of Type B household goods carrier to exclude carriers who do not use a vehicle or combination of vehicles with a gross weight, registered weight, or gross weight rating in excess of 26,000 pounds. This change has been made to clarify the distinction between Type A and Type B household goods carriers.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 643, which authorizes the department to carry out the provisions of those laws governing motor carriers.

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.

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Subchapter B. MOTOR CARRIER REGISTRATION

43 TAC §§18.13, 18.14, 18.17

The Texas Department of Transportation adopts amendments to §§18.13, 18.14, and 18.17, concerning Motor Carrier Registration. The amendments are adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TxReg 8943), and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 775, 76th Legislature, 1999, amended Transportation Code, Chapter 643, Subchapter B, which authorizes the department to establish varied application fees for registration periods of less than one year. This bill establishes vehicle registration fees and requires that the registration listing issued to a motor carrier be valid for the same duration of time as the motor carrier's certificate of registration. The amendments implement Senate Bill 775 and also streamline language and change references due to recodification and new federal citations relating to the Single State Registration System.

On July 15, 1999, the statutory Vehicle Storage Facility/Tow Truck Rules Advisory Committee met and waived preliminary and final review of the amendments.

Section 18.13, Application for Motor Carrier Registration, is amended to establish varied application fees for registration periods of less than one year as a result of Senate Bill 775. The amendments also establish vehicle registration fees according to the length of registration period so that fees are commensurate to the time period for which they are valid. Further, as a result of Senate Bill 775, the department adopts amendments to require that the registration listing issued to a motor carrier be valid for the same duration of time as the motor carrier's certificate of registration.

Section 18.14, Expiration and Renewal of Commercial Motor Vehicle Registration, is amended to require that the registration listing issued to a motor carrier be valid for the same duration of time as the motor carrier's certificate of registration.

Section 18.17, Single State Registration System, is amended to update references to be consistent with federal regulations and practices. Over the past several years, the federal government has recodified regulations relating to the Single State Registration System. The department adopts several amendments so that department rules are consistent with federal regulations. The amendments also remove language specifying information to be entered onto the application for single state registration for motor carriers. The amendment to §18.17 will eliminate repetitive information to be entered onto the single state registration

application that is already required by the federal government. Such removal will provide the department with more flexibility to change the form, as necessary, without initiating administrative rule changes. Section 18.17 is also amended to remove the requirements for the carrier to file proof of insurance, correct the application, or complete the application within 45 days after notice by the department. These requirements are removed because the department will hold the application until proof of insurance is filed or the application is corrected or completed. Applications are held electronically by the department, and holding the applications past 45 days adds no burden to the department. Additionally, the amendments remove the requirement for registrants to submit a written request for a registration receipt because the department determines that a telephone request is sufficient notice. Finally, the amendments will allow the department greater flexibility to receive and verify electronic filings of proof of insurance when all necessary preparations have been achieved. By receiving and verifying such electronic filings, the department would greatly enhance the efficiency in processing these filings.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 643, which authorizes the department to carry out the provisions of those laws governing the regulation of motor carriers.

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.

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Subchapter E. CONSUMER PROTECTION

43 TAC §§18.50, 18.54, 18.57, 18.62

The Texas Department of Transportation adopts amendments to §§18.50, 18.54, 18.57, and 18.62, concerning Consumer Protection. The amendments are adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8947), and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Senate Bill 775, 76th Legislature, 1999, amended Transportation Code, Chapter 643, Subchapter E, to allow household goods carriers to sell insurance to customers for stored goods. The amendments implement Senate Bill 775 and modify the purpose and scope of this subchapter to exclude certain shipments of household goods from consumer protection rules. Additionally, the department proposes to modify information requirements for moving services contracts and clarify language regarding department-sponsored mediation.

Section 18.50, Purpose, is amended to clarify that consumer shipments transported that are subject to a United States government bill of lading or a written agreement with the United States Department of Defense are exempt from §§18.53 through 18.63 of this subchapter. Under current federal regulations, owners of household goods are already afforded consumer protection through the household goods carriers' contracts with the federal government. Additional consumer protection through the department appears to be unnecessary and may add confusion due to differing requirements between government contracts and department rules.

Section 18.54, Selling Insurance to Shippers, is amended to allow a household goods carrier to sell insurance to its customers for stored goods as a result of Senate Bill 775.

Section 18.57, Moving Services Contract, is amended to require that the moving services contract include a notice concerning insurance information for property that is stored, if such insurance is sold by the carrier. The amendments are necessary to provide notice to the consumer of available insurance through the carrier.

Section 18.62, Mediation by the Department, is amended to clarify the conditions under which the department may accept requests for mediation from the consumer. Since the original promulgation of §18.62, the department has determined that the language is not precise enough to effectively administer the rule as recommended by the statutory Household Goods Carrier Advisory Committee. The department has received requests for mediation when it appears that the period in which the department is allowed to accept requests has ended. These amendments identify when the timeline for requesting mediation begins so that the department can determine when the period ends. Additionally, the amendments allow the department to accept requests for mediation when both parties agree to the mediation, regardless of the timeline.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, Chapter 643, which authorizes the department to carry out the provisions of those laws governing motor carriers.

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Chapter 22. USE OF STATE PROPERTY

Subchapter B. USE OF STATE HIGHWAY RIGHT-OF-WAY

43 TAC §22.15, §22.16

The Texas Department of Transportation adopts the amendment of §22.15, concerning authorized temporary signs, and new §22.16, concerning authorized permanent signs. The amendment and new section are adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8949), and will not be republished.

EXPLANATION OF ADOPTED AMENDMENT AND NEW SECTION

The department is reorganizing Subchapter B of Chapter 22 by changing the title of §22.15, from "Signs" to "Authorized Temporary Signs," and proposing new §22.16, Authorized Permanent Signs. Section 22.15 is amended to change the section title, which is necessary to clarify the type of signs this rule governs. Subsection (b) is amended to cite the current statutory authority. Subsection (d)(1)(B)(iii) is amended for clarification.

Senate Bill 1220, 76th Legislature, 1999, amended Transportation Code, Chapter 392 to add new §392.0325, concerning authorized signs that encroach on state highway right-of-way. Section 392.0325 authorizes a person to request department approval to maintain certain signs that are attached to a building located off state highway right-of-way, but where the sign itself encroaches onto state highway right-of-way.

New §22.16 prescribes the policies and procedures by which a person may obtain approval to maintain certain signs that encroach on state highway right-of-way. Subsection (a) describes the purpose of the new section. Subsection (b) defines terms used in the section. Subsection (c) describes the information a person must submit to the department for approval of a sign. The information required by subsection (c) is necessary to enable the department to make its determination under subsection (d).

Section 22.16(d) describes the conditions under which the department will approve or deny a request. The conditions listed in paragraph (1) are required by Transportation Code, §392.0325. Paragraph (2) lists circumstances under which the department will not approve a request. The Texas Transportation Commission determines that a sign will constitute a safety hazard in violation of §392.0325 if the sign: encroaches into the clear zone as defined by the Texas Manual on Uniform Traffic Control Devices; has utilities located above or below the proposed sign; will distract drivers from directional or other official signs authorized by law; or will unduly distract the traveling public. The commission also determines that a sign will interfere with the construction, reconstruction, operation, or maintenance of the highway facility in violation of §392.0325 if the sign: is attached in any manner to a structure on the right-of-way; encroaches on right-of-way that is scheduled for future construction or rehabilitation in the department's Unified Transportation Program; or has utilities located above or below the sign.

Subsection (e) requires a person whose sign has been approved to enter into an agreement with the department. The agreement will include any additional terms and conditions deemed necessary by the director to protect the safety of the traveling public, an indemnification provision, and a statement that if the highway facility is improved, the requestor or owner is responsible for removal or relocation of the sign. The agreement is necessary to ensure compliance with terms and conditions necessary to protect public safety and to protect the state and its agents from claims and liabilities arising from or connected with the use of state highway right-of-way. To ensure adequate protection for the state and ensure compliance if the requestor is not the owner of the building, the owner is required to be a party to the agreement.

Subsection (f), in order to protect the safety of the traveling public, ensure compliance with state and federal law, and prevent interference with the construction, reconstruction, operation, or maintenance of the state highway system, provides that a violation of this section or a term of an agreement under subsection (e) will render the sign an illegal encroachment subject to enforcement and removal under applicable law.

Subsection (g) ensures proper notice to a person whose request has been denied. Subsection (h) allows a person denied approval to file an appeal with the executive director or the director's designee. This process will help to ensure proper department administration of the section.

COMMENTS

No comments were received on the proposed amendment to §22.15. Four comments were received concerning new §22.16 from members of state and local organizations representing the interests of downtown and main street associations, and from municipal representatives. The comments were general in nature, with one expressing opposition to the rules, and the others seeking some form of mitigation of the impact of the new section. The comments did not address any specific provision of the rules.

Comment: Ms. Lucy Buck, a Texas Downtown Association (TDA) board member and chair of its Legislative Committee, expressed the concern of the TDA and its member organizations with the impact of the permitting process on their organizations and towns. Ms. Buck feared that if every sign, awning, or banner on every state highway needs a permit and none of these are grandfathered, there might be an avalanche of applications to every district office of the department. Ms. Buck asked whether, in order to reduce paperwork, a consolidated application, covering all of the signs on a block, a street, or in a historic downtown would be considered.

Response: The department notes that Transportation Code, Chapter 392, Subchapter B already generally makes it illegal to place or maintain a sign on state highway right-of-way, including signs that encroach on state highway right-of-way, and that those signs are subject to removal by the department. Accordingly, there would be no legal signs to grandfather from the requirements of §392.0325 and these rules. Moreover, those requirements do not apply to every sign, awning, or banner, but only to those signs that encroach on state highway right-of-way.

The department also notes that neither §392.0325 nor new §22.16 specifies or defines who is a "person" that may submit a request to the department for approval to maintain signs

that encroach on state highway right-of-way. A consolidated application, including one submitted by a municipality, for all of the signs on a street or within a historical area would be sufficient, provided all of the information required by §22.16(c) is included for each sign. However, §22.16(e) would require a separate agreement with each building owner.

Comment: Ms. Amy Miller, Economic Development Director for the City of Elgin, similarly requested that a one-time submittal by a municipality for a central business district or historic business district be considered. Ms. Miller proposed a one-time submittal with updates every two years. Ms. Miller also asked for consideration of adding a time limit for department review of applications, with outstanding applications deemed approved after that time. Ms. Miller indicated her concern that a lengthy department review could be detrimental to conducting business in a central business district by denying signage to those businesses.

Response: As noted above, a consolidated application, including one submitted by a municipality, for all of the signs on a street or within a historical area would be sufficient, provided all of the information required by §22.16(c) is included for each sign. However, there currently are a number of illegal sign and awning encroachments on state highway rights-of-way throughout the state, some of which may constitute safety hazards, and which may interfere with the construction, reconstruction, operation, or maintenance of state highways. Updates every two years could result in a period of unsafe installation, or an installation that would hinder maintenance or construction activities until the next review, and which therefore would not be acceptable.

Regarding a time limit for department review of applications, the department notes that Chapter 392, Subchapter B, including §392.0325, generally prohibits signs encroaching on state highway right-of-way because of possible safety hazards and interference with highway improvements, as well as required compliance with the requirements of federal law. Section 392.0325 delegates to the department the responsibility for ensuring those conditions are satisfied prior to granting an exception to the general prohibition. That section requires an affirmative action by the department and, if the highway is eligible for future Federal-aid, an affirmative action by the Federal Highway Administration. As these rules cannot alter the clear terms and conditions set forth by state law, no time limit or presumed approval can be considered. The department will endeavor to process all requests for approval in a timely manner.

Comment: Ms. Bette Holcomb of the Pittsburg Main Street Program indicated that her organization is not in favor of the new regulation. Ms. Holcomb references a proposed regulatory change for signs encroaching on the right-of-way of state highways, and indicates it is an egregious new regulation on small communities, small businesses, and historic downtown districts. Ms. Holcomb states that the new regulation would add to the cost of signs for small businesses and would impose a burden on these businesses in the extra time it will take to get signage approved.

Response: The department again notes that this is not a regulatory change for signs encroaching on state highway right-of-way. Those signs have been illegal for some time. Section 392.0325 and new §22.16 may actually reduce the burden on businesses and historic districts by allowing certain encroaching signs to remain in their current location, or to be erected in a location more conducive for business. Moreover, those requirements do not apply to every sign, awning, or banner, but only to those signs that encroach on state highway right-of-way.

Comment: Mr. Hugo A. Gardea of the City of Grapevine indicated his understanding and appreciation of the department's concern for safety, but also stated his deep concern about the potential delays, paperwork, and problems new §22.16 will cause private property owners or their tenants. Mr. Gardea indicated that the state has many small communities whose commercial core fronts onto a state highway, and that the proposed regulation will only encumber small business owners. Mr. Gardea finally stated that the regulation and permitting of signs should be left to the local municipalities, not the State of Texas.

Response: As previously stated, §22.16 implements the requirements of Senate Bill 1220 and Transportation Code, §392.0325. The proposed rules provide guidelines and criteria, and detail the process for making an application for and obtaining approval to maintain a sign that encroaches on state highway right-of-way. Though municipalities and property owners may not be in favor of this regulation, any change would require a legislative amendment to Transportation Code, Chapter 392. In that chapter, the Texas Legislature has delegated to the department the responsibility for ensuring certain conditions are satisfied prior to granting an exception to the general prohibition of these signs. The department also notes that §392.038 provides that the requirements of Chapter 392, Subchapter B prevail over a conflicting law or local ordinance, unless the other law or ordinance is more restrictive.

STATUTORY AUTHORITY

The amendment and new section are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation and, more specifically, Transportation Code, §392.037, which authorizes the Texas Transportation Commission to adopt rules to enforce Transportation Code, Chapter 392, Subchapter B, concerning signs on state highway right-of-way.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907943
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-8630

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43 TAC §22.16

The Texas Department of Transportation adopts the repeal of §22.16, concerning memorial markers. The repeal is adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8951), and will not be republished.

EXPLANATION OF ADOPTED REPEALS

As part of a reorganization of Subchapter B, the department is repealing existing §22.16, Memorial Markers, and simultaneously readopting the section in its entirety under new §22.17 with the same title. The repeal of §22.16 is necessary to provide an organized structure to the rules in this subchapter due to concurrent rulemakings affecting the subchapter.

COMMENTS

No comments were received on the proposed repeal.

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907944
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-8630

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43 TAC §22.17

The Texas Department of Transportation adopts new §22.17, concerning memorial markers. The new section is adopted without changes to the text as proposed by publication in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8951), and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

As part of a reorganization of Subchapter B, the department is repealing existing §22.16, Memorial Markers, and simultaneously readopting the section in its entirety under new §22.17 with the same title. Minor changes to the readopted section include updating the name of the division and non-substantive clarifications in subsection (d). New §22.17 is necessary to provide an organized structure to the rules in this subchapter due to concurrent rulemakings affecting the subchapter.

COMMENTS

No comments were received on the proposed new section.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907945
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: December 12, 1999
Proposal publication date: October 15, 1999
For further information, please call: (512) 463-8630

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Chapter 30. AVIATION

Subchapter E. REGULATION OF AIRCRAFT ON WATER

43 TAC §§30.401-30.405

The Texas Department of Transportation adopts new §§30.401-30.405, concerning regulation of aircraft on water. The new sections are adopted without changes to the text as proposed by publication in the September 10, 1999 issue of the *Texas Register* (24 TexReg 7212), and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

House Bill 1620, 76th Legislature, 1999, enacted Transportation Code, Chapter 26, relating to the regulation of aircraft on water. House Bill 1620 provides that a governmental entity that owns, controls, or has jurisdiction over a navigable body of water may not, in an area in which motorized boats are permitted, prohibit the takeoff, landing, or operation of an aquatic aircraft, or regulate or require a permit or fee for the operation of an aquatic aircraft, without approval of the Texas Department of Transportation. New §§30.401-30.405 implement and administer the department's responsibilities under Chapter 26.

Section 30.401 describes the purpose for the regulation of aquatic aircraft operations on water.

Section 30.402 provides definitions for words and terms used in this subchapter.

Section 30.403 describes the application procedures for governmental entities applying to the department for approval of a prohibition or limitation of aquatic aircraft operations on waters within their jurisdiction. The information required is necessary to enable the department to evaluate the approval criteria described under §30.404.

Section 30.404 provides that the commission will, as provided by Transportation Code, Chapter 26, approve the proposed prohibition or limitation by order if it determines that safety concerns justify the prohibition or limitation. In making this determination, the commission will consider various criteria prescribed by statute. The section also provides that the commission will consider the recommendation of the executive director and, to ensure comprehensive consideration of all safety-related factors, any other factors that relate to the safe operation of aquatic aircraft, such as migratory waterfowl patterns, seasonal hunting, fishing, and tourism.

To comply with House Bill 1620 and to ensure proper notice to all interested parties, §30.405 provides that the commission will publish notice of the approval of a prohibition or limitation in the Texas Register, and requires the governmental entity to publish the approved prohibition or limitation in a local daily newspaper and notify the Federal Aviation Administration.

COMMENTS

No comments were received on the proposed new sections.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to promulgate rules for the conduct of the work of the Texas Department of Transportation; and more specifically, Transportation Code, Chapter 26, which requires the department to adopt rules for the regulation of aircraft on water.

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.

Filed with the Office of the Secretary of State on November 22, 1999.

TRD-9907946
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: December 12, 1999
Proposal publication date: September 10, 1999
For further information, please call: (512) 463-8630

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action

The Commissioner of Insurance, at a public hearing under Docket Number 2427 held at 9:00 a.m., November 23, 1999 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual), Rule 134, Leasing or Rental Concerns, and Rule 141, Rental Car Companies, and the Texas Standard Provisions for Automobile Insurance Policies (the Standard Provisions), auto rental liability policies, by adding a new Amendatory Endorsement RC 001. The amendment's purpose is to implement the provisions of the Insurance Code, Article 21.09, Section 2, adopted by the 76th Legislature in Senate Bill 957. Staff's petition (Ref. Number A-1099-18-I) was published in the October 22, 1999 issue of the *Texas Register* (24 TexReg 9316).

Manual Rule 134 will be amended by condensing and clarifying it in a manner that will conform to new statutory wording. Section A will be preceded by an introductory sentence on applicability, including a reference to Rule 141 for provisions governing the sale of automobile rental liability coverage to renters or prospective renters. Section A will be shortened to one sentence, reading, "For automobiles leased or rented with drivers refer to the truckers rule or the public automobile classification rule."

Rule 141.A.1. currently sets forth the types of vehicles that are eligible for coverage under auto rental liability policies, and the amendment revises the list of such vehicle types and adds certain vehicle equipment, as required by new statutory wording. The revised listing is considerably more inclusive than the current one, as the new listing includes motorcycles, motor homes, trailers weighing 10,000 pounds or less, and trucks weighing 26,000 pounds or less, as well as cartop carriers, tow bars, and tow dollies designed for use with a vehicle.

The Manual and the Standard Provisions are amended by adding a new Amendatory Endorsement RC 001, which amends the Texas Automobile Rental Liability Policy and the Texas Automobile Rental Liability Excess Policy. This new endorsement will amend the definition of "Auto" to include the types of vehicles and vehicle equipment required by new statutory wording.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. Number A-1099-18-I, which are incorporated by reference into Commissioner's Order Number 99-1567.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.10, 5.96, 5.98, 5.101, and 21.09.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, such amendments being adopted to become effective on January 1, 2000, and that the Standard Provisions are amended as described herein, such amendments being adopted for policies becoming effective on or after January 1, 2000.

TRD-9908036
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: November 24, 1999

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) proposes to review Title 4, Texas Administrative Code, Part 1, Chapter 18, relating to Organic Standards and Certification, pursuant to the Texas Government Code, §2001.039 and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999 (Section 9-10.13). Section 9-10.13 and §2001.039 require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

As part of the review process, the department proposes amendments to Title 4, §§18.1-18.17, new §18.18 and §18.25 and the repeal of §18.18. These may be found in the proposed rule section of this publication of the *Texas Register*. The assessment of Title 4, Chapter 18, by the department at this time indicates that the reason for adopting or readopting these rules as proposed continues to exist.

The department is accepting comment on the review of Chapter 18. Comments on the review may be submitted within 30 days following the publication of this notice in the *Texas Register* to Leslie McKinnon, Coordinator for Organic Certification, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas, 78711.

TRD-9907957
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: November 22, 1999

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Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes the review of Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements.

The commission proposes to review these rules as required by the General Appropriations Act, Article IX, §9-10.13. Section 9-10.13 requires state agencies to review and consider for readoption each of their rules every four years. The reviews must include an assessment that the reason for the rules continues to exist. The commission has reviewed the rules in Chapter 288 and determined that the reason for adopting those rules continues to exist. The rules are necessary because these plans are required by statute and for the regulation of state water by the commission.

Chapter 288, concerning Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, adopted under Texas Water Code, §§11.134(b), 11.1271, and 11.1272, is necessary to protect the public health, safety, and welfare, by establishing reasonable minimum standards for water conservation plans and drought contingency plans in order to assure that the state's water resources are beneficially used and efficiently managed, not wasted, during water shortages.

The commission concurrently proposes amendments to Chapter 288 in the Proposed Rules section of this issue of the *Texas Register*. The purpose of the proposed amendments is to clarify the rules and incorporate recent legislative changes. The specific changes are noted in the proposed rule preamble.

Comments on the commission's review of the rules contained in Chapter 288 may be submitted to Lisa Martin, TNRCC Office of Environmental Policy, Analysis, and Assessment, MC 205, P. O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 99037-288-WT. Comments must be received by January 3, 2000. For further information or questions concerning this proposal, please contact Todd Chenoweth, Policy and Regulations Division, (512) 239-4483, or Ray Pizarro, Policy and Regulations Division, (512) 239-2588.

TRD-9907971
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 22, 1999

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Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (commission) files this notice of intention to review §3.1, relating to Organization Report; Retention of Records; Notice Requirements, and §3.58, relating to Oil, Gas, or Geothermal Resource Producer's Reports. This review and consideration is being conducted in accordance with Government Code §2001.039.

The commission is concurrently proposing amendments of these rules. The proposed amendments may be found in the Proposed Rule section of the Texas Register. As required by Government Code §2001.039, the commission will accept comments regarding whether the reason for readopting the rules with the proposed amendments continues to exist.

Any questions pertaining to this notice of intention to review or the proposed amendments should be directed to Boyd Johnson, Director of Enforcement, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via the internet at boyd.johnson@rrc.state.tx.us. Comments are due no later than 5:00 p.m. on the 30th day after publication in the *Texas Register*.

TRD-9907781
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas
Filed: November 16, 1999

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State Securities Board

Title 7, Part 7

The State Securities Board (Agency), beginning December 1999 will review and consider for readoption, revision, or repeal Chapters 107, Terminology; 127, Miscellaneous; and 131, Guidelines for Confidentiality of Information, in accordance with the rule review plan filed by the Agency pursuant to the 1997 General Appropriations Act, Article IX, Section 167, 75th Legislature, and Texas Government Code, Section 2001.039. The rules to be reviewed are located in Title 7, Part VII, of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for readopting these chapters continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Rules Proposed" section of the Texas Register and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the Texas Register, to David Weaver, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to Mr. Weaver at (512) 305-8310. Comments will be reviewed and discussed in a future Board meeting.

TRD-9908024
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: November 23, 1999

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Texas Department of Transportation

Title 43, Part 1

Notice of Intention to Review: In accordance with the General Appropriation Act of 1999, House Bill 1, Section 10.13, Article IX, and Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature, the Texas Department of Transportation (the "department") files this notice of intention to review Title 43 TAC, Part I, §§2.1-2.4, Comprehensive Policy on the Environment; §§2.21-2.25, Memoranda of Understanding with Natural Resource Agencies; and §§2.40-2.51, Environmental Review and Public Involvement for Transportation Projects.

The department will accept comments regarding whether the reason for adopting these rules continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comment or questions regarding this rule review may be submitted in writing to Dianna F. Noble, Director, Environmental Division , Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483, or at (512) 416-3034.

TRD-9907933
Richard D. Monroe
General Counsel
Texas Department of Transportation
Filed: November 22, 1999

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Adopted Rule Reviews

Texas Commission for the Deaf and Hard of Hearing

Title 40, Part 6

The Texas Commission for the Deaf and Hard of Hearing completed its review of Chapter 181, General Rules of Practice and Procedures in accordance with Chapter 1275, Acts of the 75th Legislature, 1997, Section 55 and the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature, 1997, §167 (§167) as published in the September 17, 1999 issue of the *Texas Register* (24 TexReg 7773).

The Commission proposed amendments to §§181.9, 181.19, 181.21 and 181.911. The Commission also proposed repeal of §§181.912-181.918. The proposed amendments and repeals were published in the Proposed Rules section of the September 17, 1999 *Texas Register* (24 TexReg 7374).

The Commission reviewed this chapter and determined that it should be readopted, in part, with the amendments to and repeals of Chapter 181 previously set forth. The Commission finds that the reasons for this chapter, with the adopted changes, continue to exist. These amendments will be adopted without changes to the proposed text published in the September 17, 1999 *Texas Register*.

The Commission did not receive any comments regarding the review of this chapter.

TRD-9907882
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Filed: November 19, 1999

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Fire Fighters' Pension Commission

Title 34, Part 11

Pursuant to the requirements of 1997 Texas General Appropriations Act, Art. IX, §167, the State Board of Trustees for the Texas Statewide Emergency Services Personnel Retirement Fund has reviewed all of its rules, which are contained in Chapter 301 of Title 34 of the Texas Administrative Code.

With the exception of the rules the Board proposes be added, amended or repealed, the Board finds the reasons for originally adopting the rules continue to exist.

No comments were received to the "Proposed Notice of Intent to Review," which was published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 4032).

The Board found that the following rules should be added, amended or repealed: §§301.1-301.3, 301.5, 301.6, 301.9, 301.10, and 301.12. The proposed changes to the rules appeared in the "Proposed Rules" section in the November 19, 1999, issue of *Texas Register* (24 TexReg 10305).

This concludes the review of 34 TAC Chapter 301.

TRD-9908023
Morris E. Sandefer
Commissioner
Fire Fighters' Pension Commission
Filed: November 23, 1999

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State Pension Review Board

Title 40, Part 17

The State Pension Review Board (PRB) has reviewed all of its rules which are contained in Chapters 601 and 603. The proposed review was published in the September 10, 1999, issue of the *Texas Register* (24 TexReg 7286).

No Comments were received.

The PRB finds the reasons for originally adopting its rules continue to exit. On November 18, 1999, the PRB readopted all of its rules.

TRD-9907991
Lynda Baker
Administrative Technician
State Pension Review Board
Filed: November 22, 1999

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Texas Department of Transportation

Title 43, Part 1

The Texas Department of Transportation readopts without changes Title 43, TAC, Part I, Chapter 1 (Management); §§3.10-3.14, Access to Official Records; and §9.2, Contract Claim Procedures. This review was conducted in accordance with the General Appropriation Act of 1999, House Bill 1, Section 10.13, Article IX, and Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature, 1999.

The proposed review was published in the October 15, 1999, issue of the *Texas Register* (24 TexReg 9060). No comments were received regarding the readoption of these rules. The Texas Transportation Commission has reviewed these rules and determined that the reasons for adopting them continues to exist.

TRD-9907934
Richard D. Monroe
General Counsel
Texas Department of Transportation
Filed: November 22, 1999

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Texas Water Development Board

Title 31, Part 10

Pursuant to the notice of proposed rule review published in the September 24, 1999 issue of the *Texas Register*, (24 TexReg 8321), the Texas Water Development Board (board) has reviewed and considered for readoption, revision or repeal 31 TAC Chapter 363, Financial Assistance Programs, excluding Subchapter E, Economically Distressed Areas Program, in accordance with the Government Code, §2001.039.

The board considered, among other things, whether the reasons for adoption of these rules continues to exist. No comments were received on the proposed rule reviews.

As a result of the board's review, the board determined that the rules are still necessary because they govern the board's programs of financial assistance and readopts the sections except as noted. The board concurrently adopts: amendments to §§363.2, 363.13, 363.16, 363.17, 363.32, 363.33, 363.42, 363.43, 363.51, 363.53, 363.54, 363.86, 363.202, 363.402, 363.602, 363.704, 363.712, 363.721, and 363.809; repeal of §§363.3, 363.81-363.84 and 363.511; and new §§363.81-363.85.

TRD-9907815
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: November 17, 1999

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Texas Youth Commission.

Title 37, Part 3

In accordance with the General Appropriation Act, Article IX, §167, 75th Legislature, the Texas Youth Commission is adopting the review of Title 37, Part 3, Chapters 91, 93, and 95, concerning Program Services, Youth Rights and Remedies, and Youth Discipline. The proposed review was published in the October 29, 1999, issue of the *Texas Register* (24 TexReg 9653).

The Commission has determined that the reason for adopting these rules continues to exist.

The Commission has adopted new 37 TAC §91.86 and amendments to 37 TAC §91.89 and §93.1, the text of which may be found in the Proposed Rules section of the September 10, 1999, issue of the *Texas Register* (24 TexReg 7185). In addition, the Commission has adopted amendments to 37 TAC §91.15 as proposed in the October 8, 1999, issue of the *Texas Register* (24 TexReg 8724), and 37 TAC §91.21, which may be found in the October 15, 1999 issue of the *Texas Register* (24 TexReg 8922). These rules will be effective on December 16, 1999.

Comments or questions pertaining to this notice should be directed to Gail Graham, Policy and Manuals Manager, Texas Youth Com-

mission, 4900 North Lamar, P.O. Box 4260, Austin, Texas, 78765 or send e-mail to: Gail.Graham@tyc.state.tx.us

TRD-9907902
Steve Robinson
Executive Director
Texas Youth Commission
Filed: November 19, 1999

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on. Multiple graphics in a rule are designated as "Figure 1" followed by the TAC citation, "Figure 2" followed by the TAC citation.

Graphic Material will not be reproduced in the Acrobat version of this issue of the *Texas Register* due to the large volume. To obtain a copy of the material please contact the Texas Register office at (512) 463-5561 or (800) 226-7199.

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas Department of Agriculture

Notice of Public Hearing

The Texas Department of Agriculture (the department) will hold a public hearing to take public comment on proposed amendments to §20.22, of the department's cotton stalk destruction program regulations, concerning requirements for Pest Management Zone 9. The proposal will be published in the November 26, 1999 issue of the *Texas Register*. The hearing will be held on Friday, December 10, 1999, beginning at 2:30 p.m. at the Reeves County Agricultural Extension Office, 700 Daggett, Suite E, Pecos, Texas 79772.

For more information, please contact Ronald Bertrand, Regional Director, Texas Department of Agriculture, 4502 Englewood Avenue, Lubbock, Texas, 79414 (806)799-8555.

TRD-9908025
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: November 23, 1999

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Brazos Valley Council of Governments

Request for Procurement

Brazos Valley Workforce Centers/Brazos County and Grimes County

The Brazos Valley Workforce Development Board has authorized its fiscal agent, The Brazos Valley Council of Governments, to release a procurement for locations that will house programs managed by the Workforce Board and its partnering agencies. These locations will manage employment and training services for Brazos and Grimes County.

Written responses must be received at the offices of Brazos Valley Council of Governments no later than 4:00 p.m. on December 17, 1999.

Details on building specifications and requirements may be obtained by contacting:

Tom Wilkinson, Jr.

Executive Director

Brazos Valley Council of Governments

Physical Address: 1706 East 29th Street

Bryan, TX 77802

Mailing Address: P. O. Drawer 4128

Bryan, TX 77805-4128

Phone: (409) 775-4244 Fax: (409) 775-3466

Email: dhawn@bvcog.org

TRD-9907910
Tom Wilkinson, Jr.
Executive Director
Brazos Valley Council of Governments
Filed: November 19, 1999

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were received for the following projects(s) during the period of November 12, 1999, through November 18, 1999:

FEDERAL AGENCY ACTIONS:

Applicant: H. Kempner Unic.; Location: The project site is located on Offatts Bayou at 8405 Teichman Road, Galveston, Galveston County, Texas. CCC Project No.: 99-0407-F1; Description of Proposed Action: The applicant proposes to extend the time to conduct the work authorized by permit 17071(03). The authorization concerns placement of riprap, and fill material, excavation of a canal, construction of a bulkhead with sloped or riprap revetment, dredging of a channel and conducting mitigation. Type of Application: U.S.A.C.E. permit application #17071(04) under §10 of the Rivers

and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review. Further information for the applications listed above may be obtained from Ms. Janet Fatheree, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or janet.fatheree@glo.state.tx.us. Persons are encouraged to submit written comments as soon as possible within 30 days of publication of this notice. Comments should be sent to Ms. Fatheree at the above address or by fax at 512/475-0680.

TRD-9908032
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: November 24, 1999

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 11/29/99 - 12/05/99 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 11/29/99 - 12/05/99 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-9908009
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 23, 1999

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Texas Department of Criminal Justice

Request for Information on Non-Lethal Electric Fencing– 696-SO-0-I023

Texas Department of Criminal Justice, Purchasing and Leases Division, Contracts Branch, hereafter referred to as the Department, requests information pertaining to modern state of the art non-lethal electric fencing systems to be used as perimeter security fencing at one or more of the Department's Prison System Units. This information will be used by the Department to explore the nature and feasibility of non-lethal electric fencing in a prison system environment.

As an aid to the Department in its search for information, we are requesting that the data submitted address all aspects of non-lethal electric fencing, except cost/pricing. Additionally, we ask that each respondent to this request address, when and where possible, the following security and technical questions, considerations, and/or issues.

A. General Information Requested -

1. The information submitted should address the potential formulation of a definition for "non-lethal" electric fencing, along with any related technical requirements to meet such a definition.

2. The information submitted should address possible indemnification of the Department, if non-lethal fencing is utilized.

B. Security Information Requested -

1. The information should address electric fence alarms and related systems, i.e. alarm types, numbers, locations, activation systems, monitoring devices (hardwired and wireless), etc.

2. It should address false alarms, including any existing standards.

3. It should address integration of the non-lethal electric fencing into/onto existing security systems, i.e. alarms, buildings, guard towers, chain link fences, razor ribbon, etc.

4. It should address electric fencing control systems, including personnel requirements for system monitoring and operations.

5. It should address system power-up and power-down procedures and durations, along with procedures and durations for restart after power outages.

6. It should address questions related to system vulnerabilities, such as; what actions or measures would be necessary to compromise the 'security' of the fence? Could heavy-duty gloves be used to scale the fence? Could a person striking or ensnaring the fence render it inoperable for a time? What alarms would sound? ETC.?

7. It should address the physical effects and consequences of actual contact with the fence.

8. It should address alarms and zones of detection, charge zones and levels of charge, etc.

B. Technical Information Requested -

1. Please provide technical information addressing environmental considerations for usage in varying geographic areas, especially where and when climatic hazards and conditions may affect performance.

2. Provide technical information regarding training provisions for the owner's personnel; include security, operations and maintenance training by the manufacturer and/or installer.

3. Provide information related to maintenance requirements.

4. Provide information addressing performance testing standards and/or requirements.

5. Provide information on the potential for warranties and technical support of systems by manufacturers and installers.

6. Provide information regarding the availability of domestic/local parts, components and service.

7. Provide technical data, including specifications where possible, regarding computer hardware and software requirements for related systems and components.

8. Provide information related to power requirements and any related 'special' power considerations.

After the review of the information submitted by interested parties as a result of this notice, a request for proposal may follow. Submission and participation in this request for information by interested firms

shall be at no cost to the Texas Department of Criminal Justice. Materials received will not be returned, and the Department shall have no obligation to any firm should it develop or use any idea suggested by firms participating in this process. All material submitted shall become the property of the Department. The closing date for receipt of information will be close of business, December 9, 1999.

Forward all submissions to: Daniel J. Madison, Texas Department of Criminal Justice, P.O. Box 4014, Huntsville, Texas 77342, Phone: (409) 294-2153, Fax: (409) 294-6986, Email: daniel.madison@tdcj.state.tx.us.

TRD-9907831
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: November 18, 1999

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Deep East Texas Council of Governments

Request for Proposal for Phase I Environmental Site Assessment

Introduction

The Deep East Texas Council of Governments (DETCOG) is seeking proposals from qualified consultants to conduct a Phase I Environmental Site Assessment on a 25 acre tract of land located in Nacogdoches County. The Union Pacific Railroad is considering the relocation of their railyard from downtown Nacogdoches, Texas to a site located off of County Road 525 a.k.a. Press Road in Nacogdoches County. This site relocation would allow for the expansion of the railyard from 150 cars to 300 cars. It would also allow for the development of an industrial park that rail shippers could utilize in expanding their business in the Deep East Texas region.

Purpose and Scope of Work

The purpose of the Phase I Environmental Site Assessment is to determine the environmental condition of a property and comply with the due diligence property inspection requirements of the Innocent Landowner Defense under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and subsequent amendments. The scope of work for the Phase I Environmental Site Assessment consists of the following:

1. Prior Use History

2. Visual Inspection

3. Limited Preliminary Asbestos Survey

4. Underground Storage Tank Search

5. Aboveground Storage Tank Search

6. PCB Electrical Equipment Identification

7. Review of Environmental Databases (CERCLA, NPL, RCRA, RST LRST, and Landfills)

8. Review of aerial photographs for interpreting past use activities in the site area

9. Contact with regulatory agencies for recorded information regarding possible hazardous material handling, spills, storage, or reproduction at the subject property or in the vicinity of the subject property

10. Review of available information to characterize the general geology and hydrology at the subject property.

The findings, including conclusions and recommendations shall be summarized in a written report to DETCOG.

Selection Criteria

The DETCOG will evaluate the proposals based on the following criteria:

* Experience of the consultant with projects of similar size, scope and nature.

* Experience working with local and regional governments.

* Cost of completing the project.

The deadline for submitting proposals is 5:00 p.m., Monday, December 13, 1999. Two (2) copies of the proposal should be addressed to:

Walter G. Diggles, Executive Director, Deep East Texas Council of Governments, 274 East Lamar Street, Jasper, Texas 75951

Phone: (409)384-5704 Fax: (409)384-5390

All inquiries regarding the RFP should be directed to Rusty Phillips.

TRD-9907862
Walter G. Diggles
Executive Director
Deep East Texas Council of Governments
Filed: November 18, 1999

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General Land Office

Request for Qualifications for Professional Services

Request for Qualifications for Professional Services: Pursuant to Texas Government Code, §2254 et seq., the Texas General Land Office is currently implementing a coastal erosion planning and response program under the authority of the Coastal Erosion Planning and Response Act (CEPRA), which was passed by the 76th Texas Legislature in 1999. The CEPRA appropriated $7.5 million of state funds in each of the next two years (fiscal 2000 and 2001) for erosion avoidance, planning and remediation. The program will seek matching funds from local, state and federal entities as well as private sources to leverage the total amount available for coastal erosion response projects. Qualification statements are sought from firms willing to enter into a contract for professional services with the Land Office. The Land Office may issue delivery orders to selected firms for the planning, analysis, engineering design and other activities necessary to implement construction projects. Firms are encouraged to visit the Land Office's erosion program website at www.glo.state.tx.us/coastal/erosion for more information about the scope of the program.

The following information is intended to allow interested firms to focus their responses to this solicitation. The Land Office plans to enter into contracts with multiple firms reflecting a diversity of capabilities and expertise. The number will depend on the quantity and quality of submissions and the breadth of expertise included within individual submissions. The arrangement contemplated by the Land Office is an indefinite delivery contract to contain terms and conditions of service, areas of expertise, and a schedule of professional fees to be negotiated following the firm's selection. One or more individual delivery orders may be issued during the contract term. The decision to issue a delivery order will reside with the Land Office, acting in accordance with applicable procurement law. The contract term will be one year, with the Land Office's option to extend for two additional one-year periods. The maximum award will be $1,000,000 per delivery order and $1,000,000 per contract per

year. There is neither a minimum award nor a guarantee of award implied by the issuance of a contract. The Land Office reserves the right to issue supplementary requests for qualifications at its sole discretion for individual projects.

One or more of the following areas of expertise may be required by the Land Office in implementing the erosion response program. No priority is implied by the order of the following list:

1. Beach morphology; beach face/nearshore processes; dune dynamics 2. The mechanics and dynamics of waves, currents and sediment transport; interaction with structures 3. Protection and restoration methods for beaches, dunes, bay shorelines and coastal marshes 4. Flora/fauna and habitats of beaches, coastal marshes and other intertidal and subtidal environments 5. Design of shore protection projects and coastal structures; specification of shore protection products 6. Economic analysis of public, private, recreational and environmental benefits; cost allocation strategies 7. Development of construction plans and specifications; bid documents; bid analysis 8. Regulatory issues; permitting; NEPA process 9. Construction management and oversight 10. Monitoring and data collection in the beach/nearshore environment; marsh/wetland monitoring 11. Geographic Information System application to coastal projects 12. Assessment of vessel wakes and surges 13. Hydraulics of channels, bays and inlets 14. Sediment budget; inlet management planning; sediment source identification/ quantification 15. Storm hazard analysis; failure analysis; probability and certainty 16. Long-term response to coastal hazards; sea level rise; hurricane; tsunami 17. Sustainable coastal development in eroding areas 18. Dredging and the beneficial use of dredged material 19. Local, state and federal authorities and funding strategies for erosion response and disaster recovery 20. Inter-governmental coordination; public outreach; consensus building

The capability of a firm to provide expertise in more than one (or all) of the areas identified above is deemed neither an advantage nor a disadvantage in the Land Office's selection process.

To be considered responsive to this solicitation, firms must submit the latest version of federal Standard Forms 254 and 255. Any expertise described in a firm's submittal that is to be obtained via one or more subcontractors or joint ventures shall be clearly indicated. Five (5) stapled or bound copies and one (1) unbound copy of the submittal must be included. Only those submittals limited to a two-page cover letter, Standard Forms 254 for the prime consultant and each sub-consultant or joint venture member (if any), and a single Standard Form 255 consisting of not more than ten (10) single-sided printed pages will be forwarded to the selection team for consideration. Blocks 7 and 10 of Standard Form 255 are appropriate locations to provide relevant narrative information. Block 9 may be omitted, if desired.

Selection criteria to be applied by the Land Office, in order of relative importance, include: 1) demonstrated capability in one or more areas of expertise indicated above; 2) familiarity with coastal issues, coastal processes, and eroding areas within the Texas coastal zone; 3) demonstrated ability to deliver quality professional services within contract terms and timelines; and 4) demonstrated use of Historically Underutilized Business subcontractors.

Submittals will be accepted until the close of business on Friday, December 17, 1999, by mail or delivery to: Bill Worsham, Director of Coastal Projects, Texas General Land Office, 1700 North Congress Avenue, Room 617, Austin, Texas 78701.

TRD-9908043
Larry R. Soward
Chief Clerk
General Land Office
Filed: November 24, 1999

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Texas Department of Health

Licensing Action for Radioactive Materials

The Texas Department of Health has taken actions regarding licenses for the possession and use of radioactive materials as listed in the table below. The subheading labeled "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

Licensing Actions for Radioactive Materials

NEW LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
THROUGH OUT TEXAS	FAFGO CONSULTANTS INC	L05300	DALLAS	0	11/09/99
THROUGH OUT TEXAS	SOUTH TEXAS NUCLEAR PHARMACY	L05304	FRIENDSWOOD	0	11/09/99

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
ABILENE	NC-SCHI INC ABILENE REGIONAL MEDICAL CENTER	L02434	ABILENE	57	11/10/99
ABILENE	HENDRICK MEDICAL CENTER	L02433	ABILENE	62	11/03/99
AUSTIN	TEXAS DEPARTMENT OF TRANSPORTAION CONSTRUCTION DIV	L00197	AUSTIN	85	11/09/99
AUSTIN	LOWER COLORADO RIVER AUTHORITY	L02738	AUSTIN	27	11/09/99
AUSTIN	COLUMBIA ST DAVIDS HEALTHCARE SYSTEM LP	L03273	AUSTIN	35	11/10/99
AUSTIN	AMBION INC	L04307	AUSTIN	09	11/09/99
AUSTIN	HTI/ADC VENTURE	L04910	AUSTIN	20	11/04/99
BAYTOWN	SAN JACINTO METHODIST HOSPITAL	L02388	BAYTOWN	34	11/08/99
BIG SPRING	FINA OIL AND CHEMICAL	L4950	BIG SPRING	01	11/08/99
BROWNWOOD	MINNESOTA MINING & MANUFACTURING COMPANY TRAFF/CON	L00918	BROWNWOOD	33	11/05/99
CARROLLTON	ALPHA ENERGY LABORATIORIES INC	L02814	CARROLLTON	12	11/12/99
CARROLLTON	TENET HEALTH SYSTEM HOSPITALS	L03765	CARROLLTON	28	10/29/99
CORPUS CHRISTI	N-SPEC QUALITY SERVICES INC	L05113	CORPUS CHRISTI	04	11/04/99
DALLAS	METHODIST HOSPITAL OF DALLAS	L00659	DALLAS	37	10/29/99
DALLAS	SAINT PAUL MEDICAL CENTER	L01065	DALLAS	48	11/09/99
DALLAS	COLUMBIA HOSPITAL AT MEDICAL CITY DALLAS	L01976	DALLAS	119	11/03/99
DALLAS	TENET HEALTH SYSTEM HOSPITALS DALLAS INC	L02314	DALLAS	37	10/29/99
DALLAS	FUGRO SOUTH INC	L03461	DALLAS	19	11/05/99
DALLAS	MALLINCKRODT INC	L03580	DALLAS	37	11/08/99
DALLAS	REED ENGINEERING GROUP INC	L04343	DALLAS	08	11/12/99
DALLAS	TEXAS CARDIOLOGY CONSULTANTS	L04997	DALLAS	15	11/04/99
DALLAS	ST PAUL MEDICAL CENTER	L05075	DALLAS	02	11/01/99
DEL RIO	VAL VERDE REGIONAL MEDICAL	L01967	DEL RIO	17	11/08/99
DENTON	METRO NORTH CLINIC	L05235	DENTON	02	11/08/99
EL PASO	EL PASO INSPECTION	L04599	EL PASO	25	11/09/99
FLORESVILLE	WILSON MEMORIAL HOSPTIAL	L03471	FLORESVILLE	10	10/28/99
GEORGETOWN	GEORGETOWN HOSPITAL	L03152	GEORGETOWN	21	11/04/99
HALLETVILLE	LAVACA MEDICAL CENTER	L04397	HALLETSVILLE	03	11/04/99
HARLINGEN	VALLEY BAPTIST MEDICAL CENTER	L01909	HARLINGEN	46	11/02/99
HEREFORD	HOLLY SUGAR CORPORATION	L00725	HEREFORD	15	11/04/99
HOUSTON	PROFESSIONAL SERVICE INDUSTRIES INC	L00203	HOUSTON	107	11/09/99

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
HOUSTON	MEMORIAL HERMANN HOSPITAL SYSTEM	L00439	HOUSTON	62	10/29/99
HOUSTON	SYNCOR INTERNATIONAL CORP	L01911	HOUSTON	106	11/03/99

SAN ANTONIO	NIX MEDICAL CENTER	L03531	SAN ANTONIO	16	11/01/99
SEGUIN	DYNAMIC WIRELINE INC	L05177	SEGUIN	01	11/04/99
STEPHENVILLE	HARRIS METHODIST ERATH COUNTY	L03097	STEPHENVILLE	20	11/09/99
SUGARLAND	SCHLUMBERGER TECHNOLOGY CORP	L01833	SUGARLAND	114	11/12/99
TEMPLE	SCOTT AND WHITE MEMORIAL HOSPITAL	L00331	TEMPLE	60	10/28/99
TEXAS CITY	MARATHON ASHLAND PETROLEUM LLC	L04431	TEXAS	12	11/03/99
THROUGH OUT TEXAS	SOUTHWEST RESEARCH INSTITUTE	L00775	SAN ANTONIO	62	10/29/99
THROUGH OUT TEXAS	H & G INSPECTION COMPANY INC	L02181	HOUSTON	130	11/03/99
THROUGH OUT TEXAS	NON DESTRUCTIVE INSPECTION CORPORATION	L02712	LAKE JACKSON	68	11/01/99
THROUGH OUT TEXAS	METCO	L03018	HOUSTON	89	10/29/99
THROUGH OUT TEXAS	METCO	L03018	HOUSTON	90	11/09/99
THROUGH OUT TEXAS	EGLE X-RAY	L03246	MONT BELVIEU	61	11/08/99
THROUGH OUT TEXAS	HALLIBURTON ENERGY SERVICES INC	L03284	ALVARADO	23	11/10/99
THROUGH OUT TEXAS	VIA NDT ENGINEERING AND TESTING	L04322	CHANNEL VIEW	45	11/09/99
THROUGH OUT TEXAS	STEEN NDT SUPPLY INC	L04915	BELLAIRE	04	11/04/99
THROUGH OUT TEXAS	PM ENGINEERING & TESTING	L05298	HOUSTON	00	11/08/99
TYLER	TRINITY MOTHER FRANCES HEALTH SYSTEM	L01670	TYLER	73	11/05/99

RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
CONROE	DRILLING SPECIALTIES COMPANY	L04825	CONROE	05	11/05/99
COURPUS CHRISTI	CORPUS CHRISTI EYE INSTITUTE	L00506	CORPUS CHRISTI	15	10/28/99
EL CAMPO	WEST WHARTON COUNTY HOSPITAL DISTRICT	L02664	EL CAMPO	13	11/01/99
ELECTRA	ELECTRA MEMORIAL HOSPITAL	L03227	ELECTRA	11	11/03/99
SEALY	JONES G FINKE INCORPORATED	L04807	SEALY	01	11/09/99
TEXARKANA	CHRISTUS HEALTH ARK-LA-TEX	L04805	TEXARKANA	08	10/28/99

CONTINUED RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
THROUGH OUT TEXAS	WILLIAMS BROTHERS CONSTRUCTION	L04823	HOUSTON	01	11/09/99
THROUGH OUT TEXAS	FRONTERA MATERIALS INC	L04830	WESLACO	05	11/03/99
VERON	WEST TEXAS UTILITIES COMPANY	L03481	VERNON	13	11/08/99

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
FORT WORTH	CARTER BLOOKCARE	L03676	FORT WORTH	11	11/09/99
FORT WORTH	COLLINSWORTH	L05119	FORT WORTH	04	11/01/99
HOUSTON	SPERRY-SUN	L02603	HOUSTON	47	10/25/99
HOUSTON	NATIONAL K WORKS INC	L02866	HOUSTON	10	11/02/99
SAN ANTONIO	NIX PROFESSIONAL	L01025	SAN ANTONIO	18	11/03/99

In issuing new licenses and amending and renewing existing licenses, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities, and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the license(s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable special requirements in 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or "person affected" within 30 days of the date of publication of this notice. A "person affected" is defined as a person who is resident of a county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage due to emissions of radiation. A licensee, applicant, or "person affected" may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189.

Any request for a hearing must contain the name and address of the person who considers himself affected by Agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated.

Copies of these documents and supporting materials are available for inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, from 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays).

TRD-9907994
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: November 22, 1999

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Texas Health and Human Services Commission

Public Hearing-Proposed Payment Rate for the Texas Commission for the Blind (TCB) Case Management for Children who are Blind or Visually Impaired

The Texas Health and Human Services Commission (HHSC), the Texas Department of Human Services (TDHS), and the Texas Commission for the Blind (TCB) will conduct a public hearing to receive public comment on the proposed payment rate for the TCB Case Management for Children who are Blind or Visually Impaired. The hearing will be held in compliance with 1 TAC §335.105(g), which requires public hearings on proposed payment rates for medical assistance programs. The hearing will be held on December 21, 1999 at 1:30 p.m. in Room 460 of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas (Fourth Floor, West Tower). Written comments regarding payment rates set by the Health and Human Services Commission may be submitted in lieu of testimony until 5:00 p.m. of the day of the hearing. Written comments may be delivered by U.S. mail or express delivery to the attention of Ms. Barbara Tejero, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711. Hand deliveries will be accepted at 4900 North Lamar Boulevard, Fourth Floor, Austin, Texas 78751. Alternatively, written comments may be delivered via facsimile to Ms. Tejero at (512) 424- 6586. Interested

parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates on or after December 7, 1999 by contacting Ms. Debbie Price, TDHS, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, (512) 438-4817.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Ms. Price, TDHS, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, telephone number (512) 438-4817, by December 14, 1999, so that appropriate arrangements can be made.

TRD-9907995
Steve Aragón
Agency Liaison
Texas Health and Human Services Commission
Filed: November 22, 1999

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Texas Department of Housing and Community Affairs

Announcement of the Opening of the Public Comment Period for the 2000 Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules - *Draft for Public Comment*

The Texas Department of Housing and Community Affairs ("the Department") announces the opening of the public comment period for the 2000 Low Income Housing Tax Credit Program Qualified Allocation Plan and Rules - *Draft For Public Comment*. The 30 day public comment period begins December 3, 1999 and continues until 5:00 p.m., January 2, 2000.

The Low Income Housing Tax Credit Program assists in building affordable housing through the issuance of federal tax credits used to fund new construction and rehabilitation of multifamily residential developments. The tax credits allow the developments to be leased to qualified families at below market rents. The Qualified Allocation Plan and Rules (QAP) required under §42 of the Internal Revenue Code governs the administration of the program, provides application submission requirements and describes the policies and procedures by which the federal tax credits are distributed.

The 2000 Low Income Housing Tax Credit Program Qualified Allocation Plan And Rules - *Draft For Public Comment* will be available at the Department's web site at www.tdhca.state.tx.us. The Department will hold a series of public hearings at the following times and locations to gather comment on the QAP:

Saturday, December 4, 11:00 A.M.

Holiday Inn Select-Airport

77 Northeast Loop 410

San Antonio, TX. 78216

800-337-4990

Saturday, December 11, 2:00 P.M.

The Renaissance Worthington Hotel

200 Main Street

Fort Worth, TX 76102

817/882-1787

Wednesday, December 15, 11:00 A.M.

TDHCA Headquarters

507 Sabine

Boardroom, 4th Floor

Austin, TX 78701

512/475-3340

Saturday, December 18, 11:00 A.M.

Radisson Hotel & Conference Center Hobby

9100 Gulf Freeway

Houston, TX. 77017

713/943-7979

Individuals who require auxiliary aids or services for these hearings should contact Gina Arenas ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Written comment on the proposed QAP is also encouraged. Such comment should be sent to the Texas Department of Housing and Community Affairs, LIHTC Program, P.O. Box 13941, Austin, TX 78711-3941. Alternatively, comment may be faxed to the Department at (512) 475-0764 or sent via email to sschottm@tdhca.state.tx.us. For more information on the program or to order copies of the draft QAP, please contact the LIHTC Program staff directly at (512) 475-3340.

TRD-9908027
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 23, 1999

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Houston-Galveston Area Council

Request for Qualifications

Request for Qualifications (RFQ) for Intermodal Congestion Quick Response Team

The Houston-Galveston Area Council (H-GAC) is requesting qualifications submittals for the Intermodal Congestion Quick Response Team. The purpose of the project is to develop an intermodal Quick Response Team (QRT) and program to respond to congestion problems identified by the goods movement industry. The program is designed to provide low-cost, fast, and/or temporary solutions. The team would consist of staff from one or more of the jurisdictional agencies, freight industry representatives, the H-GAC, and representatives from the consulting team.

Services required are:

Traffic Engineering-necessary for the understanding of traffic signals, signing, pavement marking and channelization, minor roadway design, traffic control system analysis, and other roadway characteristics.

Intermodal Transportation Planning-necessary for an understanding of intermodal facilities and their operation.

Qualification Statements are due Tuesday, December 28, 1999 promptly at 4:00 p.m. 12 copies typewritten, bound/stapled, and signed are required. All copies should be submitted to the attention of Tung-Lung Cheng, Transportation Engineer, Houston-Galveston Area Council, P.O. Box 22777, 3555 Timmons Lane, Suite 500, Houston, Texas 77227.

A pre-proposal submission meeting, scheduled for Tuesday, December 7, 1999, will be held at the offices of H-GAC, 3555 Timmons Lane, Second Floor, Conference Room A beginning at 3:00 p.m. During the meeting, there will be a short presentation, followed by a session for questions and answers. For more information, please contact Tung-Lung Cheng, Transportation Engineer at (713) 627-3200.

TRD-9907863
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: November 18, 1999

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Texas Department of Human Services

Request for Offer-EBT-2 Central Processing Contract

The Texas Department of Human Services (TDHS) is currently seeking to obtain offers to handle the Central Processing for the Electronic Benefits Transfer (EBT) system. TDHS anticipates securing a total EBT system through multiple vendors that includes all hardware, software, and applications support; as well as training, maintenance, and all other services necessary to successfully operate an EBT system, except for TDHS local office staff used for EBT operations. This multi-vendor approach and the resulting EBT system that will be developed out of this RFO is referred to as "EBT-2".

DESCRIPTION OF SERVICES: Under this RFO, TDHS is seeking vendors for the functional area Central Processing. The awarded vendor will be responsible for the uninterrupted operation and maintenance of the central site hardware; and possibly development and maintenance of software applications; management of telecommunications networks; and operation and management of associated equipment.

TDHS expects that the EBT-2 system will evolve in response to industry changes, technological advances, State of Texas strategic initiatives, and the overall changing EBT environment. The vendor(s) selected as a result of this procurement must be willing and capable of supporting additional TDHS, Federal direct, and other state agencies' programs.

CLOSING DATE AND TIME: Offers must be received by the Department by 3:00 PM on Monday, January 17, 2000.

CONTACT PERSON FOR RFO: To obtain a Request for Offer packet, visit the TDHS website at: **http://www.dhs.state.tx.us/providers/business/index.html** or contact Chris Wilson, TX Dept. of Human Services, Lone Star Technology Dept (MC Y-980), 8407 Wall St., Suite N340, Austin, TX 78754 by calling (512) 231-5763, fax (512) 231-5836 or email **chris.wilson@dhs.state.tx.us**.

QUESTIONS/INQUIRIES: Potential Contractors must submit questions pertaining to the RFO to the attention of Chris Wilson. All questions must be received by TDHS by 5:00 PM on Monday, December 13, 1999.

RFO CONFERENCE: December 17, 1999, 9:00 AM; J. J. Pickle Research Campus - The Commons; 10100 Burnet Road, Bldg. 137, Room 1.122; Austin, TX 78758.

TRD-9908010
Paul Leche
Agency Liaison
Texas Department of Human Services
Filed: November 23, 1999

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application for admission to the State of Texas by QUALITAS COMPANIA DE SEGUROS, S.A. DE C.V., a foreign fire and casualty company. The home office is in Cuajimalpa, Mexico.

Application to change the name of THE LONDON FIRE INSURANCE ASSOCIATION to CGU INSURANCE COMPANY OF NEW JERSEY, a foreign fire and casualty company. The home office is in Mount Laurel, New Jersey.

Application to change the name of VALLEY NATIONAL INSURANCE COMPANY to WATERFORD INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Topeka, Kansas.

Application to change the name of TRAILBLAZER INSURANCE COMPANY to LONE STAR INSURANCE COMPANY, a domestic life company. The home office is in Richardson, Texas.

Application to change the name of CAROLINA CONTINENTAL INSURANCE COMPANY to CONTINENTAL AMERICAN INSURANCE COMPANY, a foreign life company. The home office is in Columbia, South Carolina.

Application for admission to the State of Texas by GREAT AMERICAN LIFE ASSURANCE COMPANY, a foreign life company. The home office is in Cincinnati, Ohio.

Application to change the name of NYLCARE HEALTH PLANS OF THE GULF COAST, INC. to HMO OF THE GULF COAST, INC., a health maintenance organization. The home office is in Richardson, Texas.

Application to change the name of NYLCARE HEALTH PLANS OF THE SOUTHWEST, INC. to HMO OF THE SOUTHWEST, INC., a health maintenance organization. The home office is in Richardson, Texas.

Application by MNM-1997, Inc. to use the assumed name ORAQUEST DENTAL PLANS, a domestic health maintenance organization. The home office is in Houston, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas, 78701.

TRD-9908046
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: November 24, 1999

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Notice of Application to Increase the Texas Stamping Office Fee

The Directors of the Surplus Lines Stamping Office of Texas have approved a motion requesting the Commissioner of Insurance to authorize an increase in the stamping fee rate to 0.25% (0.0025) from its current rate of 0.15% (0.0015), pursuant to the Plan of Operation of the Surplus Lines Stamping Office of Texas under 28 Texas Administrative Code §15.101(e)(4). The proposed effective

date for the increase is April 1, 2000. This request is now before the Commissioner of Insurance and is under consideration.

The Surplus Lines Stamping Office of Texas was created in 1987 and is a non-profit corporation subject to the supervision of the Commissioner of Insurance. The Stamping Office monitors the sale of surplus lines insurance policies and evaluates the eligibility of surplus lines insurers that write surplus lines insurance in Texas. Pursuant to Article 1.14-2, §6 of the Texas Insurance Code, the Stamping Office has petitioned the Commissioner of Insurance for an increase in the stamping fee charged by the Stamping Office on the gross premium resulting from surplus lines contracts. The petition requests that the fee be increased by 0.1%, beginning April 1, 2000, from 0.15% to 0.25%.

Any comments must be filed with the Texas Department of Insurance, by December 23, 1999, and addressed to the attention of Betty Patterson, Senior Associate Commissioner of the Financial Program, 333 Guadalupe Street, M/C 305-2A, Austin, Texas, 78701.

TRD-9908045
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: November 24, 1999

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of The Grant Nelson Group of Texas, Inc., a domestic third party administrator. The home office is Dallas, Texas.

Application for admission to Texas of Private Healthcare Systems, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Application for admission to Texas of I.P.A. Management Associates, L.P., (doing business under the assumed name of North American Medical Management of Texas), a foreign third party administrator. The home office is Nashville, Tennessee.

Application for admission to Texas of International Solutions, LLC, (doing business under the assumed name of Texas International Solutions, LLC), a foreign third party administrator. The home office is Wilmington, Delaware.

Application for admission to Texas of Medical Pathways Management-Texas, Inc., a foreign third party administrator. The home office is Newport Beach, California.

Application for admission to Texas of CNA Health Partners, Inc., a foreign third party administrator. The home office is Chicago, Illinois.

Application for admission to Texas of National Worksite Advantage, Inc., a foreign third party administrator. The home office is Mequon, Wisconsin.

Application for admission to Texas of Meyer and Associates, a foreign third party administrator. The home office is Chatham, New Jersey.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas, 78714-9104.

TRD-9908020
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: November 23, 1999

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Texas Natural Resource Conservation Commission

Enforcement Orders

An amendment of agreed order was entered regarding TEXAS AIRCRAFT MILLING, INCORPORATED, Docket No. 1996-1120-AIR-E; TNRCC ID DB-0797-R; Enforcement ID No. 160 on November 15, 1999.

Information concerning any aspect of this order may be obtained by contacting Carl Schnitz, Enforcement Coordinator at (512)239-1892 or John Sumner, Staff Attorney at (512)239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding COLONIAL FULL SERVICE CAR WASH, INC., Docket No. 1997-1076-PST-E; SOAH Docket No. 582-98-1796 on November 1999 assessing $9,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary R. Risner, Staff Attorney at (512)239-6224 or Sushil Modak, Enforcement Coordinator at (512)239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DAN GRIFFIN DBA GRIFFIN OIL COMPANY, Docket No. 1997-1135-PST-E on November 15, 1999 assessing $17,000 in administrative penalties with $17,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Ali Abazari, Staff Attorney at (512)239-5915 or Sushil Modak, Enforcement Coordinator at (512)239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding FAISAL NAZIR, K F MANAGEMENT SERVICES, INC. & N R MANAGEMENT, INC., Docket No. 1998-0283-PST-E; SOAH Docket No. 582-99-0434 on November 16, 1999 assessing $13,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Mary Risner, Staff Attorney at 239-6224, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JOE DANESHPAYEH, Docket No. 1998-0601- PST-E; TNRCC ID No. 11782; Enforcement ID No. 12548 on November 15, 1999 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Peeler, Staff Attorney at (512)239-3506 or Craig Fleming, Enforcement Coordinator at (512)239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ANTONIO HAGHNEBECK Y DE LA LAMA FOUNDATION, Docket No. 1998-1255-PST-E; PST Facility ID No. 63226 on November 15, 1999 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Scott McDonald, Staff Attorney at (512)239-6005 or Gayle Zapalac, Enforcement Coordinator at (512)239-1136, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding DOUGLAS H. RANEY DBA AZTEC RENTAL CENTER OF SAN ANTONIO, Docket No. 1999-0673-PST-E; TNRCC Facility ID No. 34504; Enforcement ID No. 13764 on November 17, 1999.

Information concerning any aspect of this order may be obtained by contacting John Wright, Staff Attorney at (512)239-2269 or Sushil Modak, Enforcement Coordinator at (512)239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding SALIM MERCHANT DBA NEIGHBOR MINI MART, Docket No. 1999-0677-PST-E; TNRCC Facility ID No. 5938; Enforcement ID No. 13775 on November 17, 1999.

Information concerning any aspect of this order may be obtained by contacting John Wright, Staff Attorney at (512)239-2269 or Sushil Modak, Enforcement Coordinator at (512)239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BILL CROUCH AND DALE DIXON DBA DIXON DAIRY, Docket No. 1999-0632-AGR-E on November 15, 1999 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Wright, Staff Attorney at (512)239-2269 or David Van Soest, Enforcement Coordinator at (512)239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JOCHEM JONGSMA DBA JOCHEM JONGSMA DAIRY, Docket No. 1998-0826-AGR-E; Permit No. 03431; Enforcement ID No. 12698 on November 15, 1999 assessing $11,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512)239-4482 or , Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BAUKE MULDER DBA B & A DAIRY, Docket No. 1999-0595-AGR-E on November 15, 1999 assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512)239-0572, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding JOHN ROOF DBA JOHN ROOF DAIRY, Docket No. 1998-0248-AGR-E; Enforcement ID No. 12283 on November 15, 1999 assessing $18,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Speaker, Staff Attorney at (512)239-2548 or Merrilee Gerberding, Enforcement Coordinator at (512)239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MARCOS GARCIA DBA MARIO'S GROCERY, Docket No. 1999-0606-PST-E; PST Facility ID No. 0071306 on November 15, 1999 assessing $3,375 in administrative penalties with $675 deferred.

Information concerning any aspect of this order may be obtained by contacting Gloria Stanford, Enforcement Coordinator at (512)239-1871, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding K TRUCK LINES, INC. DBA K-LINE TRUCKING, Docket No. 1999-0281-PST-E; PST ID 71663 on November 15, 1999 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael De La Cruz, Enforcement Coordinator at (817)469-6750 or Julia McMasters, Enforcement Coordinator at (512)239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FISCA OIL COMPANY, INC., Docket No. 1999-0442-PST-E; PST Facility ID No. 38590 on November 15, 1999 assessing $3,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Julia McMasters, Enforcement Coordinator at (512)239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SAJAT, INCORPORATED DBA KL & B FOOD STORE, Docket No. 1998-1403-PST-E; PST Facility ID No. 0065102; Enforcement ID No. 13137 on November 15, 1999 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Thomas Jecha, Enforcement Coordinator at (512)239-2576, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MS. ONA VAN DORN DBA OAKVILLE MERCANTILE, Docket No. 1999-0042-PST-E; PST Facility ID No. 53220 on November 15, 1999 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Julia McMasters, Enforcement Coordinator at (512)239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PROPERTY OWNERS' ASSOCIATION OF TERLINGUA RANCH, INC., Docket No. 1998-1110-PWS-E; PWS No. 022004; Enforcement ID No. 12887 on November 15, 1999 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Julia McMasters, Enforcement Coordinator at (512)239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALI CHRANYA DBA MONAVILLE GROCERY AND GENERAL STORE, Docket No. 1999-0490-PWS-E; PWS No. 2370043 on November 15, 1999 assessing $3,438 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jayme Brown, Enforcement Coordinator at (512)239-1683, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ROMA, Docket No. 1999-0415-PWS- E; PWS No. 2140007 on November 15, 1999 assessing $3,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Stewart, Enforcement Coordinator at (512)239-6684, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LITTLE DINER, INC., Docket No. 1999-0612- PWS-E; PWS No. 0710099 on November 15, 1999 assessing $125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512)239-0789, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BRUCE SOAPE DBA OCEAN MOBILE HOME PARK, Docket No. 1999-0555-PWS-E; PWS No. 0360023 on November 15, 1999 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512)239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF CENTERVILLE, Docket No. 1998- 1385-MWD-E; WQ Permit No. 10147-001; Enforcement ID No. 8548 on November 15, 1999 assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Scottie Aplin, Staff Attorney at (512)239-2941 or Brian Lehmkuhle, Enforcement Coordinator at (512)239-4482, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RELIANT ENERGY, INCORPORATED, Docket No. 1999-0065-AIR-E; Air Account No. FG-0020-V on November 15, 1999 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512)239-1044, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding UNION CARBIDE CORPORATION, Docket No. 1998-1413-AIR-E; Account No. GB-0076-J; Enforcement ID No. 395 on November 15, 1999 assessing $22,500 in administrative penalties with $4,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512)239-1044, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GRIEF BROS. CORPORATION, Docket No. 1998-0919-AIR-E; Air Account No. HG-1221-O; Enforcement ID No. 12496 on November 15, 1999 assessing $111,210 in administrative penalties with $22,242 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512)239-1044, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SOUTHLINE METAL PRODUCTS COMPANY, Docket No. 1999-0393-AIR-E; Air Account No. HG-0675-B on November 15, 1999 assessing $13,590 in administrative penalties with $,2718 deferred.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512)239-1670, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding OGLETREE FOREST PRODUCTS, INC., Docket No. 1998-1240-AIR-E; TNRCC ID No. PF-0007-F on November 15, 1999 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tracy Gross, Staff Attorney at (512)239-1736 or Larry King, Enforcement Coordinator at (512)239- 1405, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NORTHSTAR INTERESTS, L.C., Docket No. 1998-1345-AIR-E; Account No. GB-0044-W; Enforcement ID No. 13087 on November 15, 1999 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512)239-5717, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DONNIE BARNUM, Docket No. 1999-0395- OSS-E; OSS Installer Registration No. 1137 on November 15, 1999 assessing $125 in administrative penalties with $25 deferred.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512)239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JERRY M. COMPTON, Docket No. 1998- 1382-OSS-E; Registered Installer Certificate No. OS4986 on November 15, 1999 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Booker Harrison, Staff Attorney at (512)239-4113 or Craig Carson, Enforcement Coordinator at (512)239-2175, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF BOOKER, Docket No. 1998-1347- MSW-E; MSW Permit No. 1943; Enforcement ID No. 13088 on November 15, 1999 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Scottie Aplin, Staff Attorney at (512)239-2941 or Craig Fleming, Enforcement Coordinator at (512)239-5806, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CALABRIAN CHEMICALS CORPORATION, Docket No. 1998-1469-MLM-E; SWR No. 30446; Air Account No. JE-0081-O; WQ Permit No. 01857; Enforcement ID No. 1119 on November 15, 1999 assessing $13,550 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Susan Johnson, Enforcement Coordinator at (512)239-2555, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BRUCE ALLEN PRIDGEN, Docket No. 1999- 0038-IRR-E; TNRCC Irrigator License No. LI0006560 on November 15, 1999 assessing $563 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Speaker, Staff Attorney at (512)239-2548 or Karen Berryman, Enforcement Coordinator at (512)239-2172, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 127, Docket No. 1998-1458-MWD-E; WQ Permit No. 12209-001 on November 15, 1999 assessing $11,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512)239-4492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-9908038
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 24, 1999

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Notice of Comment and Hearing Period on Draft Municipal Solid Waste Landfill GOP

The Texas Natural Resource Conservation Commission (TNRCC) is providing an opportunity for public comment and a notice and comment hearing (hearing), if one is requested, in order to receive testimony concerning the draft Municipal Solid Waste Landfill (MSWL) General Operating Permit (GOP) under 30 TAC Chapter 122.

The Operating Permit Program under Chapter 122 provides a compliance and enforcement tool by codifying all applicable air regulatory requirements at a specific major source site (site) into an operating permit. A GOP authorizes the operation of multiple sites that are similar in terms of operations, processes, and emissions by codifying applicable requirements that apply to emission units at the sites.

A draft GOP is subject to the procedural requirements of Chapter 122, which includes a 30-day public comment period with an opportunity to request a hearing. Any person who may be affected by the emission of air pollutants from emission units that may be authorized to operate under the GOP is entitled to request, in writing, a hearing on a draft GOP during the 30-day public notice comment period.

After a GOP is issued, the TNRCC receives applications for individual sites and reviews the applications to ensure that the site qualifies for the GOP. After the application review process is complete, the TNRCC is able to approve the authorization to operate under a GOP without further public notice.

In general, an MSWL is a discrete area of land used for the disposal of solid waste (household, commercial, and industrial). The draft MSWL GOP codifies the applicable requirements for the various emission units used by the owners or operators of MSWL sites subject to Chapter 122.

If requested, a public hearing on the draft MSWL GOP will be held January 5, 2000, at 10:00 a.m. in Room 131E of TNRCC Building C, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TNRCC staff member will be available to discuss the draft GOP 30 minutes prior to the hearing and will also answer questions after the hearing.

Copies of the draft MSWL GOP may be obtained from the TNRCC Internet site at http://www.tnrcc.state.tx.us/air/opd or by contacting the TNRCC Office of Permitting, Remediation and Registration, Air Permits Division at (512) 239-1334. Written comments or hearing requests may be mailed to Steve Beard, Office of Permitting, Remediation and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1070. All comments or hearing requests should reference the draft MSWL GOP. Comments must be received by 5:00 p.m., January 10, 2000. To inquire about the submittal of comments, to find if a hearing will be held, or for further information, contact Bruce McFarland with the Office of Permitting, Remediation and Registration, Air Permits Division, at (512) 239-1132.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-9908022
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 23, 1999

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Notice of Municipal Solid Waste Management Application

For The Period of November 17, 1999.

THE CITY OF LITTLEFIELD, P.O. Box 1267, Littlefield, TX 79339-1267, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit (Proposed Permit No. MSW-2274) to authorize a new Type I-AE municipal solid waste landfill facility. The proposed site covers approximately 69.036 acres and is estimated to initially receive 20 tons of waste per day. If the permit is granted, the applicant would be authorized to dispose of: (1) municipal solid waste resulting from or incidental to municipal, community, commercial, institutional, recreational activities, and construction or demolition projects; (2) Class II and III industrial solid waste; (3) and special wastes that are properly identified. The facility would be authorized to operate from 5:00 a.m. to 10:00 p.m, Monday through Sunday. The Executive Director of the TNRCC has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk at the address provided in the information section below within 30 days after newspaper publication of this notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held when there is a significant degree of public interest in the application.

TNRCC may approve the application unless a written hearing request is filed within 30 days after newspaper publication of this notice. To request a hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the applicant's name and the permit number; (3) the statement "I/we

request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) location and distance of your property relative to the proposed facility. You may also submit your proposed adjustments to the application/permit which would satisfy your concerns. Requests for hearing on this application must be submitted in writing during the 30-day notice period to the Office of the Chief Clerk at the address provided in the information section below.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address as above. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040.

TRD-9908039
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 24, 1999

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Notice of Non-Adjudicatory Public Hearing (TMDL)

Notice is hereby given that pursuant to the requirements of the Federal Clean Water Act, Texas Water Code, Chapter 26, and Part 25 of Title 40 of the Code of Federal Regulations, the Texas Natural Resource Conservation Commission (TNRCC or commission) will conduct a non-adjudicatory public hearing to receive public comment regarding the draft Total Maximum Daily Load (TMDL) report and implementation plan concerning dissolved nickel in the Houston Ship Channel System in the Houston metropolitan area of Harris County. This announcement also constitutes notice that a change to the State Water Quality Management Plan will occur upon approval of the TMDL by the United States Environmental Protection Agency (EPA).

Texas is required to develop TMDLs for impaired water bodies under the 1972 Federal Clean Water Act, §303(d). A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water to restore and maintain human uses or aquatic life.

The TNRCC will conduct a non-adjudicatory public hearing to take public comments on the TMDL report and implementation plan concerning dissolved nickel in the Houston Ship Channel, after which the TMDL report will be submitted to the EPA for approval as an update to the State Water Quality Management Plan. The purpose of the public hearing is to provide the public an opportunity to comment on the proposed TMDL report and implementation plan.

A non-adjudicatory public hearing on the proposed TMDL report and implementation plan will be held in Houston on January 13, 2000, at 7:00 p.m., at the City of Houston, Pollution Control Building Auditorium, 7411 Park Place Boulevard. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the matter 30 minutes prior to the hearing and will answer questions before and after the hearing.

In addition, written comments should be submitted to Lisa Martin, TNRCC Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas, 78711- 3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m., January 13, 2000, and should reference Rule Log Number 98061-TML-WT. For further information regarding the proposed TMDL report and implementation plan, please contact Larry Koenig, Office of Environmental Policy, Analysis, and Assessment, (512) 239-4533. Copies of the proposed TMDL report and implementation plan and response to comments can be obtained via the commission's Web Site at www.tnrcc.state.tx.us/oprd/rules/propadop.html, or by calling Lisa Martin at (512) 239-1966.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-9908021
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: November 23, 1999

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC Staff proposes a Default Order when the Staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPR. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to the Texas Water Code (the Code), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 3, 2000**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Default Order if a comment discloses facts or considerations that indicate that the proposed Default Orders is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Default Order is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed Default Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the Default Order should be sent to the attorney designated for the Default Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. January 3, 2000**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Default Orders and/or the comment procedure at the listed phone numbers; however, comments on the Default Orders should be submitted to the TNRCC in **writing**.

(1)COMPANY: Robert Meller dba Allison Volunteer Water System; DOCKET NUMBER: 1998-1484-PWS-E; TNRCC IDENTIFICATION (ID) NUMBER: 2420003; LOCATION: Allison, Wheeler County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.46(e) and (f)(1)(A) by failing to operate

the system under the supervision of a grade "D" operator and by failing to maintain a free chlorine residual of 0.2 milligram liter in the far reaches of the distribution system; 30 TAC §290.106(a) and Texas Health and Safety Code (THSC), §341.033(d) by failing to submit to the commission water samples for bacteriological analysis for the periods of June, July, and August of 1998; 30 TAC §290.103 by allowing an exceedance of the maximum contaminant level for nitrates; and 30 TAC §290.41(c)(3)(K) by failing to properly vent and seal the wellhead; PENALTY: $4,063; STAFF ATTORNEY: Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933 MC R-1, (806) 353-09251.

(2) COMPANY: Charles Shyngle dba Play Palace Day Care Center; DOCKET NUMBER: 1999-0358-PWS-E; TNRCC ID NUMBER: 1012803; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public drinking water system; RULES VIOLATED: 30 TAC §290.106 by failing to submit monthly and repeat water samples following a coliform-positive sample for bacteriological analysis; and 30 TAC §290.51 and THSC, §341.041 by failing to pay public health services fees; PENALTY: $2,000; STAFF ATTORNEY: John Wright, Litigation Division, MC 175, (512) 239-2269; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-9908034

Paul C. Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: November 24, 1999

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Notices of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 3, 2000**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 3, 2000**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1)COMPANY: Amoco Petroleum Products; DOCKET NUMBER: 1999-0068-AIR-E; IDENTIFIER: Air Account Number GB-0004-L; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §101.4, §101.7, and the Act, §382.085(a) and (b), by emitting pollutants in such concentration and duration as to be harmful to human health or the environment; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2)COMPANY: Juan Soto doing business as Bert and Ernies; DOCKET NUMBER: 1999-0926-PWS-E; IDENTIFIER: Public Water Supply Number 2270334; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a) and the Code, §341.033(d), by failing to collect water samples from the facility for bacteriological analysis; 30 TAC §290.103(5), by failing to provide public notice; and 30 TAC §290.51 and the Code, §341.041, by failing to pay public health service fees; PENALTY: $938; ENFORCEMENT COORDINATOR: Kimberly McGuire, (512) 239-4761; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(3)COMPANY: J. Campbell Corporations, Incorporated doing business as Big Tex Auto Mart; DOCKET NUMBER: 1999-1159-AIR-E; IDENTIFIER: Air Account Number DB-5081-J; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: used car lot; RULE VIOLATED: 30 TAC §114.20(c)(1) and the Act, §382.085(b), by offering for sale a vehicle with missing or inoperable emission control devices; PENALTY: $300; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010- 6499, (817) 469-6750.

(4)COMPANY: Keith Broumley doing business as Broumley Dairy; DOCKET NUMBER: 1999-0946-AGR-E; IDENTIFIER: Permit Number 03395; LOCATION: Hico, Hamilton County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §§305.125(1), 321.31(a), 321.39(f)(19)(A), Permit Number 03395, and the Code, §26.121, by allegedly discharging tailwater runoff from an application field and causing a fish kill; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Michael De La Cruz, (512) 239-0259; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5)COMPANY: Campbell Oil Company doing business as Good-O-Country Corner; DOCKET NUMBER: 1999-1067-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 0006124; LOCATION: Silsbee, Hardin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.221 and the Act, §382.085(b), by failing to install an approved Stage I vapor recovery system; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(6)COMPANY: Atlantic Oil & Gas, Incorporated doing business as Fina Mart; DOCKET NUMBER: 1999- 0575-PST-E; IDENTIFIER: PST Identification Number 0055123; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Act, §382.085(b), by failing to conduct an annual pressure decay test; 30 TAC §334.50(a)(1)(A) and the Code, §26.3475, by failing to install the automatic tank gauge and reconcile the inventory control records on a monthly basis; 30 TAC §334.93(a) and (b), by failing

to demonstrate financial responsibility; and 30 TAC §334.21, by failing to pay the required underground storage fees; PENALTY: $14,375; ENFORCEMENT COORDINATOR: Michael De La Cruz, (512) 239-0259; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(7)COMPANY: City of Gilmer; DOCKET NUMBER: 1999-0911-MWD-E; IDENTIFIER: Permit Number 10475-001; LOCATION: Gilmer, Upshur County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 10475-001 and the Code, §26.121, by failing to meet the 30-day and 7-day average limit of three and six milligrams per liter for ammonia- nitrogen; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(8)COMPANY: Hondo Chemical, Inc.; DOCKET NUMBER: 1998-1538-AIR-E; IDENTIFIER: Air Account Number GA-0338-N; LOCATION: Seagraves, Gaines County, Texas; TYPE OF FACILITY: bulk sulfur loading terminal; RULE VIOLATED: 30 TAC §101.4 and the Act, §382.085(a) and (b), by failing to control nuisance odors from the site; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(9)COMPANY: C. J. Nelson; DOCKET NUMBER: 1999-0990-OSS-E; IDENTIFIER: Enforcement Identification Number 13998; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.58(a)(3), §285.5(1), and the THSC, §366.054, by failing to submit planning materials and obtain permitting authority's authorization to install an on-site sewage facility (OSSF); PENALTY: $200; ENFORCEMENT COORDINATOR: Lynda Clayton, (512) 239-5917; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(10)COMPANY: North Star Steel Texas, Incorporated; DOCKET NUMBER: 1999-0836-IWD- E; IDENTIFIER: Permit Number 01971-000; LOCATION: near Rose City, Jefferson County, Texas; TYPE OF FACILITY: steel manufacturing; RULE VIOLATED: Permit Number 01971-001 and the Code, §26.121, by failing to submit discharge monitoring reports; PENALTY: $12,500; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(11)COMPANY: Shaukat Huda doing business as Scotty's Drive In; DOCKET NUMBER: 1999-0641-PST-E; IDENTIFIER: PST Identification Number 0066330; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.93(a) and (b), by failing to demonstrate the required financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage; and 30 TAC §334.21, by failing to pay the required underground storage tank fees; PENALTY: $880; ENFORCEMENT COORDINATOR: Michael De L Cruz, (512) 239-0259; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(12)COMPANY: Texas Water Services, Inc.; DOCKET NUMBER: 1999-0054-MWD-E; IDENTIFIER: Permit Number 12587-001; LOCATION: Magnolia, Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 12587-001 and the Code, §26.121, by failing to prevent the unauthorized discharge of waste and comply with the effluent limits; 30 TAC §317.7(d), by failing to properly mark the yard hydrants and outlets; and 30 TAC §319.11(b), by failing to conduct the analysis of chlorine residual in the effluent; PENALTY: $13,500; ENFORCEMENT COORDINATOR: Merrilee Gerberding, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13)COMPANY: Mr. Ernest L. Thompson; DOCKET NUMBER: 1999-0815-OSI-E; IDENTIFIER: OSSF Installer Number OS5196; LOCATION: Hempstead, Needville, and Manvel; Waller, Fort Bend, and Brazoria Counties; Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.58(a)(3), (5), and (11), and the THSC, §366.054, by failing to obtain necessary permitting authorization before installing an OSSF, install three OSSFs as authorized by the permitting authority, and call for the initial and final inspections for three and nine sites, respectively; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239- 0572; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767- 3500.

(14)COMPANY: Charles Sherrard doing business as Village Motor Cars; DOCKET NUMBER: 1999-1173- AIR-E; IDENTIFIER: Air Account Number DB-5098-P; LOCATION: Grand Prairie, Dallas County, Texas; TYPE OF FACILITY: used car lot; RULE VIOLATED: 30 TAC §114.20(c)(1) and the Act, §382.085(b), by offering for sale vehicles to the general public with missing or inoperable emission control devices; PENALTY: $300; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(15)COMPANY: Gary Wood doing business as Wood Service Plumbing; DOCKET NUMBER: 1999-0981- OSS-E; IDENTIFIER: Enforcement Identification Number 13967; LOCATION: Odell, Wilbarger County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.58(a)(3) and (11), and the THSC, §366.051(c), by failing to obtain the necessary permitting authorization before installing an OSSF and failing to call for the required inspections; 30 TAC §285.30(a), by failing to perform a site evaluation; and 30 TAC §285.50(b) and (c), and the THSC, §366.071, by failing to have the proper certification; PENALTY: $900; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

TRD-9907864

Paul Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: November 19, 1999

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The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to the Texas Water Code (the Code), §7.075. Section 7.075 requires that before the TNRCC may approve the AOs, the TNRCC shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* not later than the 30th day before the date on which the public comment period closes, which in this case is **January 3, 2000**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withdraw or hold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's Orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of

changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 3, 2000**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1)COMPANY: AMPM Enterprises, Incorporated; DOCKET NUMBER: 1998-0936-PST-E; TNRCC IDENTIFICATION (ID) NUMBER: 41181; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: underground storage tanks (UST); RULES VIOLATED: 30 TAC §334.7(d)(3) by failing to include a tank on the UST registration form within 30 days of occurrence of a change; and 30 TAC §334.50(a)(1)(A) and (b)(2)(A) by failing to have a release detection method, failing to conduct annual tank tightness tests, and failing to install line leak detectors for pressurized piping; PENALTY: $5,500; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(2)COMPANY: AMPM Enterprises, Incorporated; DOCKET NUMBER: 1998-0937-PST-E; TNRCC ID NUMBER: 15676; LOCATION: Overton, Rusk County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: 30 TAC §334.7(d)(3) by failing to include a tank on the UST registration form within 30 days of occurrence of a change; and 30 TAC §334.50(a)(1)(A) and (b)(2)(A) by failing to have a release detection method, failing to conduct annual tank tightness tests, and failing to install line leak detectors for pressurized piping; PENALTY: $5,500; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(3)COMPANY: AMPM Enterprises, Incorporated; DOCKET NUMBER: 1998-0938-PST-E; TNRCC ID NUMBER: 20606; LOCATION: New London, Rusk County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: 30 TAC §334.54(d)(l) and §334.51(b)(2) by failing to permanently remove the USTs from service and failing to install spill and overflow prevention and control devices; PENALTY: $5,000; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535- 5100.

(4)COMPANY: AMPM Enterprises, Incorporated; DOCKET NUMBER: 1998-0941-PST-E; TNRCC ID NUMBER: 06965; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: 30 TAC §334.51(b)(2) and §334.54(d)(l) by failing to permanently remove the USTs from service and failing to install spill and overflow prevention and control devices; and 30 TAC §334.7(a)(l) and (d)(1)(B) by failing to provide correct information on the UST registration form within 30 days of occurrence of a change and by failing to update registration with change in operational status of UST systems; PENALTY: $5,500; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(5)COMPANY: Battery Conservation Technologies, Incorporated; DOCKET NUMBER: 1998- 1177-IHW-E; TNRCC ID NUMBER: 52085; LOCATION: Pecos, Reeves County, Texas; TYPE OF FACILITY: treatment, storage, and recycling; RULES VIOLATED: 30 TAC §335.152(a)(6), 40 Code of Federal Regulations (CFR) §264.143(a)(3)(i), and §264.147(a) by failing to make the required trust payment for closure assurance by the due date and in the proper amount for 1998 and 1999 and by failing to provide third party liability insurance coverage for the facility; and 30 TAC §335.232, §335.324, and Texas Health and Safety Code (THSC), §361.134 and §361.135 by failing to pay required hazardous waste generation and facility fees and annual hazardous waste facility fees; PENALTY: $21,875; STAFF ATTORNEY: Scott McDonald, Litigation Division, MC 175, (512) 239-6005; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(6)COMPANY: City of Big Wells; DOCKET NUMBER: 1997-0303-PWS-E; TNRCC ID NUMBER: 13782-001; LOCATION: Big Wells, Dimmit County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.106 and THSC, §341.033(d) by failing to submit water samples from its public water supply system; and the Code, Chapter 26, by exceeding its permitted limits for the daily average biochemical oxygen demand concentration and the daily average total suspended solid concentration; PENALTY: $3,330; STAFF ATTORNEY: Nathan Block, Litigation Division, MC 175, (512) 239-4706; REGIONAL OFFICE: 1403 Seymour, Suite 2, Laredo, Texas 78040-8752, (956) 791-6611.

(7)COMPANY: D.E. Martin dba Consumers Water Company; DOCKET NUMBER: 1999- 1014-PWS-E; TNRCC ID NUMBERS: Public Water Suuply Numbers 1010700 and 1010219; LOCATION: Huffman Heights Subdivision, Spring, Harris County, Texas and Tall Cedars Mobile Home Subdivision, 2 1/2 miles north of Crosby, Harris County, Texas; TYPE OF FACILITY: public water systems; RULES VIOLATED: 30 TAC §290.120(h)(3) by failing to submit a timely corrosion control study; and 30 TAC §290.51 and THSC, §341.041 by failing to pay public health service fees; PENALTY: $160; STAFF ATTORNEY: Tracy Gross, Litigation Division, MC 175, (512) 239-1736; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8)COMPANY: Stanley Haedge dba Kow Kastle Dairy; DOCKET NUMBER: 1999-0682-AGR- E; TNRCC ID NUMBER: 20080; LOCATION: Seldon, Erath County, Texas; TYPE OF FACILITY: dairy; RULES VIOLATED: 30 TAC §321.31 and the Code, §26.121 by failing to prevent an unauthorized discharge of wastewater from the dairy's wastewater storage pond; PENALTY: $6,250; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(9)COMPANY: John Palmer; DOCKET NUMBER: 1997-0103-MLM-E; TNRCC ID NUMBER: 10046; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: barge cleaning; RULES VIOLATED: 30 TAC §335.4, §26.121, and TNRCC Water Quality Permit Number WQ-0002573 by discharging industrial wastes to on-site soils and into the Sabine-Neches Canal; 30 TAC §335.62 and 40 CFR §262.11 by failing to complete a hazardous waste determination for six waste streams; 30 TAC §335.70(a), §335.9(a)(1)(2), and 40 CFR §262.40(c) by failing to maintain proper waste records and by failing to submit annual waste reports to the commission for calendar years 1994 and 1995; 30 TAC §335.6(c) by failing to properly notify the commission regarding use of on-site waste management units; 30 TAC §335.10(a) and 40 CFR §262.20 by failing to manifest off-site shipments of Class I industrial and hazardous wastes; 30 TAC §335.2(b) and 40 CFR §270.1 by failing to ensure that off- site shipments of Class I industrial and

hazardous wastes were transported only to facilities authorized by the commission to accept the wastes and by failing to submit annual waste reports to the commission for calendar years 1994 and 1995; 30 TAC §335.221 and 40 CFR §266.102 by failing to obtain a permit prior to burning hazardous wastes in the facility's on-site boilers and by failing to obtain a permit for the storage of hazardous wastes for greater than 90 days; 30 TAC §335.5 by failing to deed record the on-site disposal of industrial and hazardous wastes; 30 TAC §111.111(a)(4)(A)(ii) and THSC, §382.085(b) by failing to maintain a flare operation log; 30 TAC §115.132(a) and THSC, §382.085(b) by failing to control volatile organic compound (VOC) emissions from the water separator to the atmosphere; 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a) by failing to obtain a permit or satisfy the conditions of a permit exemption before construction of a VOC water separator and boiler number 2, replacement of boiler number 1, and four boiler feed tanks; and 30 TAC §116.115(a), TNRCC Permit Exemption Number X-3346, TNRCC Standard Exemption Number 97, and THSC, §382.085(b) by failing to ensure that the flare be equipped with a continuously burning pilot light and either an automatic re- ignition system or automatic alarm, to ensure that gases burned in the flare contain only carbon, hydrogen, sulfur, oxygen, or compounds derived from those elements, to ensure that all vapors from storage tank Numbers 1 through 12 including: barge emptying operations, vacuum tanks, VOC water separators, storage tanks, and truck loading operations all be routed to the flare, to have the hatches on four storage tanks and three vacuum tanks closed, and to provide written notification to the commission 30 days prior to cleaning barges containing materials other than those listed in its permit exemption application; PENALTY: $250,000; ATTORNEY: Laura Kohansov, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703- 1892, (409) 898-3838.

(10)COMPANY: Hopkins County and Goodwill Industries; DOCKET NUMBER: 1998-0645- MSW-E; TNRCC ID NUMBER: 40088; LOCATION: Sulphur Springs, Hopkins County, Texas; TYPE OF FACILITY: municipal solid waste transfer station; RULES VIOLATED: 30 TAC §330.4(a), (d), and (e) by failing to submit required registration application and obtain approval to operate a municipal solid waste transfer facility; PENALTY: $1,250; STAFF ATTORNEY: Nathan Block, Litigation Division, MC 175, (512) 239-4706; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(11)COMPANY: Petroleum Wholesale, Incorporated; DOCKET NUMBER: 1998-0687-IWD-E; TNRCC ID NUMBER: 48158; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: UST and convenience store; RULES VIOLATED: the Code, §26.121 and §26.039 by failing to prevent and report unauthorized discharges; PENALTY: $7,500; STAFF ATTORNEY: John Peeler, Litigation Division, MC 175, (512) 239-3506; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(12)COMPANY: Louis Bergman dba Pine Meadow Subdivision; DOCKET NUMBER: 1998- 1106-PWS-E; TNRCC ID NUMBER: 1460138; LOCATION: Cleveland, Liberty County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.106(a) and (e) by failing to submit water samples for routine bacteriological analysis and to notify the public of the failure to sample; PENALTY: $1,671; STAFF ATTORNEY: John Wright, Litigation Division, MC 175, (512) 239-2269; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13)COMPANY: Pleasure Point Property Owners Association; DOCKET NUMBER: 1998-1352- PWS-E; TNRCC ID NUMBER: 0030007; LOCATION: Zavalla, Angelina County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC 290.106(a)(l) by failing to collect routine bacteriological samples at active service connections; 30 TAC §290.46(e), (f)(2)(B), (i), (j), (m), (n), (p)(1)(2), (s), and (y) by failing to employ a full-time certified waterworks operator for the day-to-day operations and maintenance of the water system, to properly conduct weekly chlorine residual tests on water collected from the distribution system, to adopt a customer service agreement or plumbing regulations and develop a customer service inspection program and conduct customer service inspections, to maintain interior coatings, to develop and maintain a map of the Pleasure Point 1-A portion of the distribution system, to conduct and record annual tank inspections on the USTs and pressure tanks, to issue a boil water notice for a low distribution pressure event, and to install well number 2 electrical wiring in conduit; 30 TAC 290.43(c)(1), (2), (3), (4), (7), and (8), and (d)(2) and (3), and THSC, §341.036(g) by failing to seal the float switch opening on the 0.0032 million gallons (MG) steel ground storage tank and to equip the 0.003 MG polymer ground storage tank with roof vents that are of goose neck or roof ventilator type, excluding turbine ventilators, with the opening protected by a 16-mesh screen, failing to provide both ground storage tanks with a properly designed and constructed roof hatch, failing to lock the roof hatch on the 0.003 MG polymer ground storage tank, failing to provide the 0.003 MG ground storage tank with an overflow pipe equipped with a gravity hinged flap valve and water level indicator, failing to provide the 0.0032 MG steel ground storage tank with a drain, and failing to equip the pressure tanks with pressure release devices and maintain the air-to-water volume devices for the pressure tanks in an operable condition; 30 TAC §290.42(e)(8) by failing to properly cover hypo chlorination solution containers; 30 TAC §290.41(c)(1)(F) and (3)(K) by failing to secure and record sanitary well easements and properly seal well number 2 wellhead to prevent insects and rain water from entering the well; 30 TAC §290.44(d)(4) and §291.89 by failing to provide each service connection with a metering device and failing to maintain a minimum pressure of 35 pollutant standard index throughout the distribution system; 30 TAC §290.45(b)(l)(C) by failing to provide a well capacity of 0.6 gallons per minute (gpm) per connection, an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection, a total storage capacity of 200 gallons per connection, and a service pump capacity such that each pump station or pressure plane has tow or more pumps with a total capacity of 2.0 gpm per connection; PENALTY: $5,863; STAFF ATTORNEY: William Puplampu, Litigation Division, MC 175, (512) 239-0677; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-9908035
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: November 24, 1999

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Notice of Opportunity to Comment on ShutDown Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Shutdown Orders. Texas Water Code (the Code), §26.3475 authorizes the TNRCC to order the shutdown of any underground storage tank (UST) system found to be noncompliant with

release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The TNRCC staff proposes a shutdown order after the owner or operator of a UST facility fails by to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 3, 1998, cathodic protection violations documented at the facility. Pursuant to the Code, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 3, 2000**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Shutdown Order if a comment discloses facts or consideration that indicate that the consent to the proposed Shutdown Order is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Shutdown Order is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed Shutdown Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the Shutdown Order should be sent to the attorney designated for the Shutdown Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 3, 2000**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Shutdown Orders and/or the comment procedure at the listed phone numbers; however, comments on the Shutdown Orders should be submitted to the TNRCC in **writing**.

(1)COMPANY: Micor Energy, LLC dba Afco; DOCKET NUMBER: 1999-0806-PST-E; TNRCC ID NUMBER: 58511; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) by failing to test a line leak detector at least once per year for performance and operational reliability; and 30 TAC §334.51(b)(2)(C) by failing to provide proper overfill prevention equipment for the UST systems; PENALTY: shutdown order; STAFF ATTORNEY: Robin Houston, Litigation Division, MC 175, (512) 239-0682; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903, (915) 655-9479.

TRD-9908033

Paul C. Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: November 24, 1999

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Notice of Water Quality Applications

The following notices were issued during the period of October 1, 1999 through October 15 , 1999.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

AMERIPOL SYNPOL CORPORATION has applied for a major amendment to TNRCC permit No. 00817 to authorize disposal of cooling tower blowdown, water softener regeneration discharge, and electrodialysis reversal reject water via brine evaporation ponds; to discharge process wastewater to a POTW; and to add a stormwater outfall. The current permit authorizes the discharge of stormwater on an intermittent and flow variable basis via Outfalls 001 and 002, which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TNRCC Permit No. 00817, issued April 15, 1994. The applicant operates the Odessa Plant, a synthetic rubber manufacturing plant. The plant site is located at 2000 East Pool Road, approximately 500 feet south of the intersection of Grandview Avenue and Interstate Highway 20 in the City of Odessa, Ector County, Texas.

ARMCO, INC. has applied for a major amendment to TNRCC Permit No. 00509 to authorize the removal of effluent limitations for total nickel at Outfall 003. The current permit authorizes the discharge of treated domestic sewage effluent at a daily average flow not to exceed 360,000 gallons per day via Outfall 003 which will remain the same and stormwater on an intermittent and flow variable basis via Outfall 009 which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0008524 issued on December 29, 1989 and TNRCC Permit No. 00509, issued on October 31, 1994. The applicant operates the Greens Port Industrial Park. The plant site is located at 13609 Industrial Road, on a tract of land bounded on the north and east by Industrial Road and on the south by the Houston Ship Channel in the City of Houston, Harris County, Texas.

THE BABCOCK & WILCOX COMPANY has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 00300, which authorizes the discharge of decanted cooling water and storm water at a daily maximum flow not to exceed 800,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0000108, issued on March 4, 1988 and TNRCC Permit No. 00300, issued on May 12, 1993. The applicant is authorized to treat and dispose of wastes from an adjoining pipe manufacturer, Turner Piping Systems, Inc. The plant site is located in the northwest quadrant as defined by the intersection of Farm-to-Market Road 137 and the Missouri Pacific Railroad, approximately one mile south of the intersection of Farm-to-Market Road 137 and State Highway 469, on Farm-to-Market Road 137, in the City of Paris, Lamar County, Texas.

BELVIEU ENVIRONMENTAL FUELS has applied for a renewal of TNRCC Permit No. 03499, which authorizes the discharge of process wastewater, neutralized wastewater, cooling tower filter backwash, cooling tower blowdown, treated and untreated stormwater at a daily average dry-weather flow not to exceed 452,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0108812 issued on March 31, 1994 and TNRCC Permit No. 03499, issued on January 28, 1994. The applicant operates a synthetic organic chemical manufacturing (C4 Oleflex) plant which produces methyl tertiary butyl ether (MTBE). The plant site is located in the area enclosed by Hatcherville Road on the west, Southern Pacific Railroad on the east, Enterprise Products Company on the south, and pasture land on the north approximately 2000 feet north of the intersection of Hatcherville Road and Farm-to-Market Road 1942 in the City of Mont Belvieu, Chambers County, Texas.

BFI WASTE SYSTEMS OF NORTH AMERICA, INC. has applied for a renewal of TNRCC Permit No. 03064, which authorizes the discharge of uncontaminated stormwater on an intermittent and flow

variable basis via Outfalls 001, 002, and 003 and discharge of treated sanitary wastewater at a daily average flow not to exceed 3,000 gallons per day via Outfall 004. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TNRCC Permit No. 03064, issued April 5, 1996. The applicant operates the Gulf West Facility, an industrial solid waste landfill. The plant site is located at 2601 South Jenkins Road, approximately 2.4 miles south of Interstate Highway 10, Chambers County, Texas.

BICC GENERAL CABLE INDUSTRIES, INC. has applied for a renewal of TNRCC Permit No. 01270, which authorizes the discharge of treated domestic wastewater and boiler blowdown at a daily average flow not to exceed 15,500 gallons per day via Outfall 001; discharge of cooling tower blowdown at a daily average flow not to exceed 40,000 gallons per day via Outfall 002; discharge of stormwater runoff on an intermittent and flow variable basis via Outfall 003, 004, 005, and 006 Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0000400 issued on May 29, 1987 and TNRCC Permit No. 01270, issued on June 4, 1993. The applicant operates an aluminum wire drawing and insulating plant. The plant site is located one-half mile east of the intersection of U.S. Highway 80 and Farm-to-Market Road 2199, approximately eight miles east of the City of Marshall, Harrison County, Texas.

BRAZOS RIVER AUTHORITY has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 02889, which authorizes the discharge of process wastewater at a daily average flow not to exceed 2.5 million gallons per day via Outfall 001. The applicant operates the Lake Granbury Surface Water Treatment System facilities. The plant site is located southeast of the City of Granbury, approximately 5 miles southeast of the intersection of Farm to Market Road 167 with U.S. Highway 377, and approximately 0.5 miles southeast of the intersection of Farm to Market Road 167 with County Road 308, Hood County, Texas.

CIBOLO CREEK MUNICIPAL AUTHORITY has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0077232 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 11269-001. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,200,000 gallons per day. The current permit authorizes the land application of sewage sludge for beneficial use on 30.4 acres. The sludge treatment works and sludge disposal site are located adjacent to the wastewater treatment facility. The plant site is located approximately 2.25 miles northeast of the center of Randolph Air Force Base on the south bank of Cibolo Creek in Bexar County, Texas.

COGEN LYONDELL, INC. has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 02845, which authorizes the discharge of storm water on an intermittent and flow variable basis via Outfall 001, and cooling tower and boiler blowdown and steam trap condensate at a daily average flow not to exceed 504,000 gallons per day via Outfall 002. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0100919, issued on March 20, 1987 and TNRCC Permit No. 02845, issued on November 14, 1997. The applicant operates a steam and electricity cogeneration facility. The plant site is located adjacent to the intersection of Avenue C and 5th Street in the Lyondell Chemical plant, in the City of Channelview, Harris County, Texas.

CITY OF DONNA has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0024660 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 10504-001. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,300,000 gallons per day. The plant site is located immediately west of Farm-to-Market Road 493 and approximately 1.5 miles south of U.S. Highway 83 (Business Route) in Hildago County, Texas.

DURATHERM, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04086, to authorize the discharge of stormwater on an intermittent and flow variable basis via Outfall 001. The applicant operates a hazardous waste storage facility which produces recyclable fuel. The plant site is located at 2700 Avenue S, near the intersection of 27th Street and Avenue S, approximately 3/4 mile east of State Highway 146 at Dickinson Bayou, approximately two miles southeast of the City of Bacliff, Galveston County, Texas.

EXPLORER PIPELINE COMPANY has applied for a renewal of TNRCC Permit No. 02399, which authorizes the discharge of rainfall runoff, tank water drainage, and washdown water from the launcher/receiver slab on an intermittent and flow variable basis via Outfalls 001 and 002. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TNRCC Permit No. 02399 issued January 31, 1997. The applicant operates the Port Arthur Station, a petroleum products pipeline tank farm. The plant site is located at 6300 Port Arthur Road, one mile north-northwest of the intersection of State Highway 73 and State Highway 823 in the City of Port Arthur, Jefferson County, Texas.

CITY OF FREEPORT has applied for a renewal of TNRCC Permit No. 10882-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 2,250,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,250,000 gallons per day. The plant site is located immediately south of State Highway 288 on the east bank of the Brazos River in Brazoria County, Texas.

CITY OF GEORGETOWN has applied for a renewal of TNRCC Permit No. 10489-003, which authorizes the discharge of treated domestic at a daily average flow not to exceed 2,500,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The plant site is located at 400 Rock Dove Lane, approximately 1000 feet west of County Road 102, approximately 4000 feet south of the intersection of State Highway 29 and County Road 102, and approximately 2.75 miles east of the intersection of State Highway 29 and State Highway Spur 418 in the City of Georgetown in Williamson County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 70 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 11486- 001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,500,000 gallons per day. The applicant has also requested a temporary variance to the existing water quality standards to allow time for the TNRCC to adopt a site specific standard for Bear Creek (in Addicks Reservoir) for incorporation into 30 TAC §307.2(d)(4). The variance would authorize a three year period in which the Commission will consider a recommended site- specific standard for Bear Creek (in Addicks Reservoir) and determine whether to adopt the standard or require the existing water quality standard to remain in effect. The plant site is located on the north bank of Langham Creek at Farm-to-Market Road 529 (Freeman Road) in Harris County, Texas.

CITY OF HOUSTON has applied for a renewal of TNRCC Permit No. 10495-100, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,710,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,710,000 gallons per day. The plant site is located at 303 Benmar Street on the south bank of Greens Bayou approximately 3,000 feet northeast of the intersection of Interstate Highway 45 and North Belt Freeway in Harris County, Texas.

KOHLER CO has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 02995, which authorizes the discharge of washdown waters, hydraulic test water, process wastewater, storm water, recovered ground water and Cull Dump Area seepage via Outfall 001 with a total volume not to exceed 432,000 gallons during any 24-hour period; storm water runoff via Outfall 002 on an intermittent and flow variable basis; and irrigation with effluent from either Outfall 001 or 002 at an application rate not to exceed 5.0 acre-feet per acre per year. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0103268 issued on August 28, 1998 and TNRCC Permit No. 02995 issued on February 11, 1994. The applicant operates a ceramic ware (bathroom fixtures) and fiberglass tubs manufacturing facility. The plant site is located at 4601 U.S. Highway 377 South, on the northeast corner of the intersection of Highway 377 and Farm-to-Market Road 45 in the southwest corner of the City of Brownwood, Brown County, Texas.

LIBERTY WORKS PROPERTY CO., LP has applied for a renewal of TNRCC Permit No. 02017, which authorizes the discharge of storm water, non-contact wastewater, cooling water, and quench water via Outfall 001 at a daily average flow not to exceed 870,000 gallons per day. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0069604, issued on January 7, 1983 and TNRCC Permit No. 02017, issued on January 21, 1994. The applicant operates an inactive steel pipe and tube manufacturing plant. The plant site is located approximately 100 feet south of Farm-to-Market Road 3361 just west of Farm-to-Market Road 2684 in the City of Liberty, Liberty County, Texas.

LUMLOG, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04026, to authorize the discharge of storm water on an intermittent and flow variable basis via Outfall 001, and the discharge of wet decking water and stormwater on an intermittent and flow variable basis via Outfall 002. The applicant operates a wood products manufacturing facility. The plant site is located at 3220 Fritz Swanson Road, 100 yards north of Goforth Road, approximately 0.5 mile east of U.S. Highway 135 in the City of Kilgore, Gregg County, Texas.

MARTIN GAS SALES, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04074, to authorize the discharge of boiler blowdown and storm water via Outfall 001 on an intermittent and flow variable basis. The applicant proposes to operate the Stanolind Cut Terminal, a wholesale and transport facility of sulfur and sulfuric acid. The plant site is located at Number 10 Sulfur Plant Road, 0.7 miles east of the interchange of State Highway 380 and U.S. Route 69 southeast of the City of Beaumont, Jefferson County, Texas.

CITY OF NAVASOTA has applied for a renewal of TNRCC Permit No. 10231-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,800,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,800,000 gallons per day. The plant site is located at the intersection of Chase Street and Peeples Street, on the southern bank of Cedar Creek, one block north of State Highway 105 in the City of Navasota in Grimes County, Texas.

PAPER CHEMICALS, INC. has applied for a renewal of TNRCC Permit No. 02955, which authorizes the discharge of once-through cooling water via Outfall 001 at a daily average flow not to exceed 40,000 gallons per day. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0102822 issued on January 27, 1989 and TNRCC Permit No. 02955 issued on July 7, 1994. The applicant operates a plant which produces antifoaming agents used in the paper industry. The plant site is located at 3901 Terry Street, one third mile east of Loop 151 (U.S. Highway 59) and two-thirds of a mile south of U.S. Highway 67 in the City of Texarkana, Bowie County, Texas.

PD GLYCOL has applied for a major amendment to TNRCC Permit No. 00490 to authorize the discharge of boiler blowdown, steam condensate, and raw water clarifier waste at Outfall 001. The current permit authorizes the discharge of storm water from non-process areas on an intermittent and flow variable basis via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0008931 issued on December 12, 1989 and TNRCC Permit No. 00490 issued on December 21, 1993. The applicant operates the Beaumont Plant, which manufactures ethylene glycol and ethylene oxide. The plant site is located approximately three miles southeast of the Jefferson County Courthouse, just east of the City of Beaumont, Jefferson County, Texas.

RELIANT ENERGY INCORPORATED has applied for a major amendment to TNRCC Permit No. 02596 to authorize the removal of the monitoring and reporting requirement for total zinc at Outfall 001 which will remain the same. The current permit authorizes the discharge of treated domestic wastewater, vehicle wash water, and cooling tower blowdown at a daily average flow not to exceed 20,000 gallons per day via Outfall 001 which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0076155 issued on May 31, 1985 and TNRCC Permit No. 02596 issued on April 26, 1994. The applicant operates the Greenspoint Service Center which provides auxiliary services for the transmission and distribution of electric power. The plant site is located in northern Harris County, approximately 1/2 mile east of the intersection of Veterans Memorial Drive and Gears Road on the southern side of Gears Road, north of the City of Houston, Harris County, Texas.

RESCAR INDUSTRIES, INC. has applied for a renewal of TNRCC Permit No. 01922, which authorizes the discharge of wash water and stormwater not to exceed a daily maximum flow of 100,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0065986 issued on October 21, 1987 and TNRCC Permit No. 01922 issued on May 21, 1993. The applicant operates a railcar cleaning and repair yard. The plant site is located at 407 West Brentwood, southwest of the intersection of West Brentwood Drive and the Union-Pacific Railroad, approximately one (1) east of Beltway 8 in the City of Channelview, Harris County, Texas.

SAMSUNG AUSTIN SEMICONDUCTOR, L.L.C. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04091, to authorize the discharge of reverse osmosis reject water and storm water at a daily average flow not to exceed 265,000 gallons per day via Outfall 001. The applicant operates a plant which manufactures integrated circuits. The plant

site is located at 12100 Samsung Boulevard, on the southwest corner of the intersection of East Parmer Lane and Samsung Boulevard, approximately 1/8-mile southeast of the intersection of Yager Lane and Dessau Road in the City of Austin, Travis County, Texas.

SEA LION TECHNOLOGY, INC. has applied for a National Pollutant Discharge Elimination System (NPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No.03479. The draft permit authorizes the discharge of previously monitored effluents (domestic wastewater, utility wastewater, and stormwater runoff) on an intermittent and flow variable basis via Outfall 001. The applicant operates an organic chemical manufacturing facility. The plant site is located at 5700 Johnny Palmer Road in the City of Texas City, Galveston County, Texas

SHERMAN WIRE COMPANY has applied for a renewal of TNRCC Permit No. 03582, which authorizes the discharge of treated industrial wastewater at a daily average flow not to exceed 35,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TNRCC Permit No. 03582, issued on December 17, 1993. The applicant operates a steel wire products manufacturing facility. The plant site is located on the east side of Gibbons Road, approximately 0.5 miles north of State Highway 56 and approximately 4000 feet west of the intersection of State Highway 56 and State Highway 289 in the City Southmayd, Grayson County, Texas.

SOUTHWEST SHIPYARD, LP has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 02605, which authorizes the discharge of treated wash water from barges and wastewater of similar quality and characteristic, groundwater remediation project wastewater and domestic wastewater at a daily average flow not to exceed 100,000 gallons per day via Outfall 001; steam condensate on an intermittent and flow variable basis via Outfall 002; and dock runoff on an intermittent and flow variable basis via Outfalls 003 and 004. The applicant operates a facility that cleans, repairs and steams barges. The plant site is located at 18310 Market Street Road, Harris County, Texas.

TE PRODUCTS PIPELINE COMPANY, LIMITED PARTNERSHIP has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0082295 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 02302. The draft permit authorizes the discharge of treated wastewater generated from the storage transmix, i.e. prduct, free/entrained water, tank condensate, tank bottoms, and ballast water at a daily average flow not to exceed 50,000 gallons per day via Outfall 001, and discharge of stormwater on an intermittent and flow variable basis via Outfall 002. The applicant operates the Beaumont Marine Terminal, a bulk petroleum liquids storage terminal with marine cargo and pipeline facilities. The plant site is located at the end of a private road adjoining Mansfield Ferry Road on the east bank of the Neches River and approximately three miles southwest of the City of Vidor, Orange County, Texas.

TEXAS PETROCHEMICALS CORPORATION has applied for a major amendment to TNRCC Permit No. 02485 to authorize the removal of effluent limitations from the existing NPDES permit for chemical oxygen demand at Outfall 001. The current permit authorizes the discharge of stormwater via Outfall 001 on an intermittent and flow variable basis which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0087254 issued on March 24, 1989 and TNRCC Permit No. 02485 issued on July 11, 1994. The applicant operates a bulk storage terminal which stores and distributes organic chemicals. The plant site is located at 4604 West Baker Road, approximately 1600 feet west of Decker Drive (Spur 330) in the City of Baytown, Harris County, Texas.

TH AGRICULTURE AND NUTRITION COMPANY, INC. has applied for a renewal of TNRCC Permit No. 03529, which authorizes the discharge of remediated groundwater at a daily average flow not to exceed 2,880 gallons per day via Outfall 001 and Outfall 002. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing TNRCC Permit No. 03529, issued on April 12, 1996. The applicant operates a groundwater treatment system for site remediation of a former agricultural chemical formulation facility. The plant site is located at 201 East Tarrant Street which is bounded on the east by Buttery Creek; on the north by Tarrant Street; on the south by Grayson Street; and on the west by the Austin and Northwestern Railroad Spur in the City of Llano, Llano County, Texas.

TXU ELECTRIC COMPANY, ENERGY PLAZA has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0001198 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 00552. The draft permit authorizes the discharge of once through cooling water and previously monitored effluents at a daily average flow not to exceed 1,280,160,000 gallons per day via Outfall 001. The applicant operates the Handley Steam Electric Station . The plant site is located at 6604 East Rosedale Street on the northwest shore of Lake Arlington immediately southeast of the Interstate Highway 820 and Rosedale Street interchange in the City of Forth Worth, Tarrant County, Texas.

WEDCO, INC. has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 03846, which authorizes the discharge of non- contact cooling water at a daily average flow not to exceed 65,000 gallons per day via Outfall 001. The applicant operates a plastic and rubber processing plant. The plant site is located adjacent to the north side of State Highway 90, approximately 2.5 miles east of the intersection of State Highway 90 and Farm to Market Road 326 near the City of China, Jefferson County, Texas.

ZENECA, INC. has applied for a renewal of TNRCC Permit No. 02654, which authorizes the discharge of stormwater runoff via Outfall 001on an intermittent and flow variable basis. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0094951 issued on July 2, 1990 and TNRCC Permit No. 02654 issued on June 6, 1994. The applicant operates the Zeneca Ag Products, Bayport Site, an agricultural chemicals products facility. The plant site is located at 5757 Underwood Road, one- half mile north of Red Bluff Road on both sides of Underwood Road in the City of Pasadena, Harris County, Texas.

TRD-9908040
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 24, 1999

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Notice of Water Rights Applications

LAKE KIOWA PROPERTY OWNER'S ASSOCIATION, INC., applicant, 905 Kiowa Drive West, Lake Kiowa, Texas, 76240, has

applied to the Texas Natural Resource Conservation Commission (TNRCC) to amend Certificate of Adjudication No. 08-2334, as amended. Certificate of Adjudication No. 08-2334, as amended, authorizes owner to maintain an existing dam and reservoir on Indian Creek, tributary of Isle du Boise Creek, tributary of the Elm Fork Trinity River, tributary of the Trinity River, Trinity River Basin, and to impound therein not to exceed 7000 acre-feet of water for recreation purposes in Cooke County, Texas. Certificate No. 08-2334, as amended, requires the owner to provide for a low-flow outlet in the Lake Kiowa dam to consist of a 24-inch diameter conduit and maintain the water level of the reservoir not less than two feet below the spillway elevation by supplementing the impounded water with groundwater, except during times of maintenance, at which times the owner may lower the reservoir up to six feet below the spillway elevation. The certificate also indicates that if the water level is lowered, owner may not refill the reservoir unless Lake Lewisville and Lake Ray Roberts are in excess of their conservation pool elevation or the owners of these two downstream reservoirs give consent for the certificate owner to impound inflow to refill Lake Kiowa. In addition, the certificate states that during the months of June through October, owner may not lower the reservoir more than two feet below the spillway elevation if Lake Lewisville is above its conservation elevation. The certificate also requires the owner to obtain a record of daily reservoir levels to be reported to the Commission on a monthly basis. Applicant requests authorization, pursuant to § 11.122 and §11.042 of the Texas Water Code to discharge groundwater into Lake Kiowa for subsequent withdrawal for irrigation purposes in Cooke County, Texas. The volume of groundwater discharged into Lake Kiowa will be 107% of the water subsequently withdrawn to account for evaporative loss and will be in addition to the groundwater discharged into Lake Kiowa to comply with special conditions of Certificate No. 08-2334, as amended. The applicant has indicated that a maximum of 202.5 acre-feet of water would be diverted during any year. Applicant indicates that water will be discharged into Lake Kiowa at a maximum rate of 1 cfs (450 gpm) and will be diverted at a maximum rate of 3.9 cfs (1750 gpm). The applicant is currently authorized to store and divert water from Lake Kiowa until December 31, 1999 pursuant to Temporary Water Use Permit No. 8120.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by December 23, 1999. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by December 23, 1999. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by December 23, 1999.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit any proposed conditions to the requested amount which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-9908037
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: November 24, 1999

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificate of Operating Authority

On November 17, 1999, AT&T Communications of the Southwest, Inc. filed an application with the Public Utility Commission of Texas (PUC) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50003. Applicant intends to transfer its certificate to AT&T Communications of Texas, L.P., as part of a reorganization of AT&T's operations.

The Application: Application of AT&T Communications of the Southwest, Inc. for an Amendment to its Certificate of Operating Authority, Docket Number 21619.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than December 8, 1999. You may contact the PUC Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 21619.

TRD-9907866
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 1999

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Notices of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 16, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of iConnect Corp. for a Service Provider Certificate of Operating Authority, Docket Number 21663 before the Public Utility Commission of Texas.

Applicant intends to provide Digital Subscriber Line, Integrated Service Digital Network, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, and Long Distance Services.

Applicant's requested SPCOA geographic area includes the areas currently served by Southwestern Bell Telephone Company and GTE Southwest, Inc. within the state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than December 8, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9907846
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 18, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Rig Telephones, Inc., doing business as DATACOM for a Service Provider Certificate of Operating Authority, Docket Number 21679 before the Public Utility Commission of Texas.

Applicant intends to provide digital subscriber line, integrated services digital network service, T1- Private line, Switch 56 KBPS, frame relay, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than December 8, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9907931
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 22, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 19, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of BroadBand Office Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 21689 before the Public Utility Commission of Texas.

Applicant intends to offer local exchange service on both a facilities-based and resale basis, in addition to purchasing unbundled network elements to fulfill its provision of facilities-based services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than December 8, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9908007
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 23, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 22, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of WorkNet Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 21695 before the Public Utility Commission of Texas.

Applicant intends to provide all types of facilities-based and resold local exchange and interexchange services.

Applicant's requested SPCOA geographic area includes the areas served by all incumbent local exchange companies throughout the state of Texas

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than December 8, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9908008
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 23, 1999

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Notice of Application Pursuant to P.U.C. Substantive Rule §23.94

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 8, 1999, pursuant to P.U.C. Substantive Rule §23.94 for approval of a rate change.

Tariff Title and Number: Application of Cap Rock Cooperative, Inc. to Implement Minor Rate Changes and Offer New Services Pursuant to P.U.C. Substantive Rule §23.94. Tariff Control Number 21625.

The Application: Cap Rock Telephone Cooperative, Inc. (Cap Rock or the cooperative) seeks to restructure and equalize various nonrecurring service order charges, offer new services, remove obsolete service offerings, and make other minor clarification tariff language changes. The cooperative proposes the following changes: 1) one set of service order charges applicable to all exchanges rather than maintain two exchange-specific rate schedules; 2) equalize rates for Nonpublished Telephone Number Service; 3) offer new

Directory Assistance Service and Toll Denial Service; 4) remove as obsolete service offerings Expedited Due Date Charge and Nonlisted Telephone Number Service; and 5) make minor tariff language changes to clarify the applicability of certain nonrecurring service order charges. The cooperative estimates the proposed rate changes will result in a decrease of $3,316 in intrastate gross annual revenue. The cooperative proposes an effective date of March 1, 2000.

Subscribers of Cap Rock have a right to petition the commission for review of this proposed rate change by filing a protest with the commission. The protest must be signed by a minimum of 5.0%, or 246 affected local service customers, and must be received by the commission no later than January 30, 2000.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before January 30, 2000. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Please reference Tariff Control Number 21625.

TRD-9908026
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 23, 1999

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Notices of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on October 7, 1999, to amend a certificate of convenience and necessity pursuant to §§14.001, 14.051, 14.052, 52.002, 52.003, 54.001, 54.005, 54.052 - 54.054, and 54.258 of the Public Utility Regulatory Act, (Vernon 1999) (PURA). A summary of the application follows.

Docket Title and Number: Application of GTE Southwest, Inc. to Amend Certificate of Convenience and Necessity within Atascosa County, Docket Number 21491.

Application: GTE Southwest, Inc. (GTE-SW) seeks expedited approval to amend the boundary of its Jourdanton exchange and Southwestern Bell Telephone Company's (SWBT's) Pleasanton exchange. The proposed revision will transfer a small area from the Pleasanton exchange to the Jourdanton exchange in order to allow GTE-SW to serve all of a new development.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than 10 days following the date this notice is published. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9907844
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 16, 1999, to amend a certificate of convenience and necessity pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Denton Municipal Electric to Amend the certificated service area boundaries with Denton County Electric Cooperative, Inc. doing business as CoServ Electric and Texas Utilities, Inc., Docket Number 21669, before the Public Utility Commission of Texas.

The Application: Denton Municipal Electric's proposed request allows existing customers continued service by their current providers. Denton Municipal Electric states that the proposed project would change the certification on a prospective basis and thus only affect future consumers. Further information regarding the project can be obtained by contacting Kimberly M. Hammer, Law Offices of Jim Boyle at (512) 474-1492.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9908006
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 23, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on November 16, 1999, to amend a certificate of convenience and necessity pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of TXU Electric Company to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line within Collin and Denton Counties, Docket Number 21664, before the Public Utility Commission of Texas.

The Application: TXU Electric Company's (TXU) proposed request involves the design and construction of a double-circuit, 138-kilovolt (kV) loop line between an existing TXU 138-kV transmission line, and the existing Plano Tennyson Substation. The existing 138-kV transmission line is located west of the City of Plano, in Denton County, Texas. TXU states that the proposed project is needed to reliably serve the increasing load in the Plano and Carrollton areas. Further information regarding the project can be obtained by contacting David T. Gill, TXU Business Services Company, Manager, at (214) 812-4812.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9907886
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas

Filed: November 19, 1999

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Notice of Required Filings by Electric and Telecommunications Utilities Regarding Workforce Diversity

During the last session, the Texas Legislature enacted provisions in both Senate Bill 7 (SB 7), Act of May 21, 1999, 76th Legislature, Regular Session, chapter 405, 1999 Texas Session Law Service 2543, 2601 (Vernon) (to be codified as an amendment to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.909(b)) and Senate Bill 560 (SB 560), Act of May 30, 1999, 76th Legislature, Regular Session, chapter 1212, 1999 Texas Session Law Service 4210, 4215 (Vernon) (to be codified as an amendment to PURA, Texas Utilities Code Annotated §52.256(b)) requiring electric and telecommunications utilities to file 5-year plans to enhance workforce diversity and to file annual reports beginning next calendar year on the status of those plans. Specifically, PURA §39.909(b) and §52.256(b), respectively, require electric and telecommunications utilities to file before January 1, 2000, a comprehensive five-year plan to enhance the diversity of their workforces in all occupational categories and to increase their small and historically underutilized businesses contracting. The plan must include: performance with regard to workforce diversity and contracting; initiatives the utility will pursue in these areas over the next five years; programs and activities the utility will undertake to achieve these initiatives; and, a listing of business partnerships the utility will form to facilitate improvement in these areas.

The Public Utility Commission staff has set-up control numbers in Central Records for the utilities to file their plans. Accordingly, staff requests that electric and telecommunications utilities file their 5-year plans no later than January 1, 2000 in the following project numbers: telecommunications utilities in Project Number 21170 and electric utilities in Project Number 21521.

If you have questions regarding this notice, please contact Patricia Zacharie at (512) 936- 7296. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9907845
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 18, 1999

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Public Notices of Amendment to Interconnection Agreement

On November 17, 1999, Southwestern Bell Telephone Company and Optel (Texas) Telecom, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21673. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 10 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21673. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 16, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 21673.

TRD-9907911
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 19, 1999

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On November 10, 1999, Southwestern Bell Telephone Company and KMC Telecom, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21637. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 10 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21637. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 13, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 21637.

TRD-9907949
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 22, 1999

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Public Notice of Interconnection Agreement

On November 10, 1999, Southwestern Bell Telephone Company and Essential.Com, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21638. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 10 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21638. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by December 13, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 21638.

TRD-9907948
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 22, 1999

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Questions for Comments Pertaining to Market Power Mitigation Plans and Generation Capacity Reports

The Public Utility Commission of Texas (commission) has initiated Project Number 21081 to adopt a rule relating to the assessment of market power and the filing of market power mitigation plans. This rulemaking is in response to new legislation that was enacted in Senate Bill 7 (SB 7), Act of May 21, 1999, 76th Legislature,

Regular Session, chapter 405, 1999 Texas Session Law Service 2543 (Vernon) (to be codified as an amendment to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §§39.154, 39.155(a), 39.156, and 39.157(c)). The commission seeks comments and information from interested parties in response to any or all of the following questions.

I. Questions relating to the determination of installed generation capacity pursuant to §39.154.

1. How should the commission determine the installed generation capacity that is capable of delivering electricity to a power region?

2. How should the commission determine the installed generation capacity that is "potentially marketable"? For example,

(a) Should there be a minimum size for reporting purposes, *i.e.*, should distributed generation and small power producers be counted?

(b) How should the capacity of renewable resource plants whose output is likely to be intermittent be counted?

3. What criteria and evidence should be considered to make a determination that a generating facility will be connected to the transmission or distribution system and operating within 12 months?

4. What evidence should be required relating to a "grandfathered facility" to make a determination that a power generation company has commenced complying or made a binding commitment to comply with PURA §39.264?

II. Questions relating to the assessment of market power and the development of a competitive retail market pursuant to §39.155(a).

1. Besides the list of items presented in §39.155(a), what other information or factors should the commission require in order to assess market power or the development of a competitive retail market in the state? For example, should the commission require information on the characteristics of individual generating units?

III. Questions relating to the form and approval of market power mitigation plans pursuant to §39.156.

1. What information should the commission require as part of a market mitigation plan filed under PURA §39.156?

IV. Questions relating to the monitoring of market shares of installed capacity pursuant to §39.157(c).

1. How often should the commission require information to be filed so that it can monitor market shares of installed capacity?

Comments on these questions (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All comments should refer to Project Number 21081. Comments must be received by 3:00 p.m. on Friday, December 17, 1999.

Questions concerning this notice should be referred to Richard Greffe, Senior Economist, Electric Industry Analysis Division, at (512) 936-7404. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9907998
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 22, 1999

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Request for Comments Relating to PURA Chapter 59 Withdrawal of Election and Switched Access Rates

Project Number 21160, *Rulemaking to Address PURA Chapter 59 Withdrawal of Election and Switched Access Rates*, was established to address the changes to the Public Utility Regulatory Act (PURA) made by the 1999 Texas Legislature in Senate Bill 560 (SB 560), Act of May 30, 1999, 76th Legislature, Regular Session, chapter 1212, 1999 Texas Session Law Service 4210, 4233 (Vernon) (to be codified as an amendment to the Public Utility Regulatory Act, Texas Utilities Code §§59.021, 59.024, and 59.025), relating to incumbent local exchange companies (ILECs) electing regulation under PURA Chapter 59. Specifically, the changes involved such an ILEC's withdrawal of election and changes to its rates, including its switched-access rates, as dealt with in the revisions to §§59.021, 59.024, and 59.025. PURA §59.021 was amended to add new Subsection (c), which provides for renewing an ILEC's election of regulation under Chapter 59 for successive two-year periods, and states conditions under which an ILEC's election may end. There are two minor amendments to PURA §59.024: subsection (a) extends the rate cap throughout a company's election period under Chapter 59, and subsection (d) merely adds "Notwithstanding Subsection (a)" to its directive that the commission is to permit rate group reclassifications resulting from access line growth. PURA §59.025 was amended to clarify that although the commission may not on its own motion reduce a Chapter 59-electing ILEC's switched-access rates, the commission may approve a reduction proposed by the company.

The commission's staff believes that only the addition of PURA §59.021(c) requires any conforming change to the commission's Substantive Rules. This minor revision would be to commission Substantive Rule §26.274(e)(1), relating to Imputation, which now states, "the four year price cap under PURA Chapter 58 or the six-year price cap under PURA Chapter 59 has expired." Upon revision, this provision would read, "the price cap under PURA Chapter 58 or the election period under PURA Chapter 59 has expired." The commission staff proposes to make this revision in Project Number 21169, *Review of Substantive Rules to Conform to SB 560.* If the revision is undertaken in Project Number 21169, Project Number 21160 probably will be eliminated.

The commission's staff invites comment from parties on whether the staff's plan is appropriate, and on whether there are any other issues that need to be addressed in Project Number 21160. In particular, the staff invites parties to consider the following matter: The new PURA §59.021(c) is silent on whether the commission should assume that companies currently operating under Chapter 59 regulation must renew their elections now or not until two years after the effective date of the new legislation (meaning September 1, 2001). Is it appropriate for the commission to proceed on the assumption that these companies do not have to renew their elections for two years? Or does the commission need to adopt a rule that clarifies this issue, or any other issue raised by the changes made by the SB 560 amendments to PURA §§59.021, 59.024, or 59.025?

Comments (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days of publication of this notice. All comments should reference Project Number 21160. Any questions regarding this notice should be directed to Rick Akin at (512) 936-7256. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9908013
Rhonda Dempsey

Rules Coordinator
Public Utility Commission of Texas
Filed: November 23, 1999

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Railroad Commission of Texas

Public Notice-Petition to Designate Certain Lands as Unsuitable for Surface Coal Mining Operations

Pursuant to Section 134.017 of the Texas Surface Coal Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. (Vernon Supp. 1999) and Sections 12.73 - 12.85 of the Coal Mining Regulations, Texas R.R. Comm'n., 16 TEX ADMIN. CODE Ch. 12 (1999), the Railroad Commission of Texas hereby gives notice that it has received a petition from Neighbors for Neighbors of Elgin, Texas to designate certain lands in Bastrop and Lee Counties, Texas, as being unsuitable for surface coal mining operations.

The petition received on November 12, 1999 is on file at the Office of the Bastrop County Clerk in Bastrop, Texas, the Office of the Lee County Clerk in Giddings, Texas, and at the Railroad Commission offices in Austin, Texas. Copies are available from the address indicated below. Surface Mining and Reclamation Division Railroad Commission of Texas, P.O. Box 12967 Austin, Texas 78711-2967

For more information, call Melvin B. Hodgkiss, Director, Surface Mining and Reclamation Division, Railroad Commission of Texas, at (512) 463-6901.

Issued this 22nd day of November, 1999.

TRD-9908015
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas
Filed: November 23, 1999

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Southwest Texas State University

Consultant Proposal Request

This request for consulting services is filed under the provisions of Texas Civil Statutes, Article 6252-11c. Southwest Texas State University (SWT) seeks written proposals from qualified consulting firms based in Washington, D.C. to represent and assist the University in developing projects deemed important to the University. Important considerations in the award of the proposed contract will be the years of experience in securing funding assistance for university programs and facilities, a strong bipartisan presence within the firm with considerable experience working with legislative staffs, and a record of substantial success in dealing with the Congress and the Executive Agencies. Extensive understanding of university grant and contract procedures is necessary. Substantial experience in the development of strategies for corporate participation in university-sponsored development projects is required. Interested parties are invited to express their interest and describe their capabilities on or before January 4, 2000. The consulting services desired are a continuation of a service previously performed by a private consultant The contract will be awarded to the previous consultant unless a better offer is received. The term of the contract is to be from date of award for a twelve (12) month period with options to renew. Further technical information can be obtained from Dr. Billy C. Covington at (512) 245-2314. Deadline for receipt of proposals is 4:00 p.m. January 4, 2000. Date and time will be stamped on the proposals by the Office of Research and Sponsored Programs. Proposals received later than this date and time will not be considered. All proposals must be specific and must be responsive to the criteria set forth in this request.

I. GENERAL INSTRUCTIONS

Submit one (1) copy of your proposal in a sealed envelope to Office of Research and Sponsored Programs, 601 University Dr., JCK 489, San Marcos, Texas 78666, before 4:00 p.m., January 4, 2000. Proposals may be modified or withdrawn prior to the established due date.

II. DISCUSSIONS WITH OFFERERS AND AWARD

The University reserves the right to conduct discussions with any or all offerers, or to make an award of a contract without such discussions based only on evaluation of the written proposals. The University also reserves the right to designate a review committee in evaluating the proposals according to the criteria set forth under Section III entitled "Scope of Work." The Associate Vice President for Research and Sponsored programs shall make a written determination showing the basis upon which the award was made and such determination shall be kept on file.

III. SCOPE OF WORK

1. Representation and assistance in developing projects deemed important to the University.

2. Assistance in obtaining funding for University projects.

3. Consulting and representation as directed by Southwest Texas State University

IV. EVALUATION

A. Criteria for Evaluation of Proposals:

Firms will be evaluated on time and quality of experience in representing and assisting universities in developing projects. Equal consideration will be given to past performance, writing skills, and the effectiveness of the firm's strategies.

B. Your proposal should include costs for all related expenses.

V. TERMINATION

This Request for Proposal (RFP) in no manner obligates SWT to the eventual purchase of any services described, implied or which may be proposed until confirmed by a written contract. Progress towards this end is solely at the discretion of SWT and may be terminated without penalty or obligation at any time prior to the signing of a contract. SWT reserves the right to cancel this RFP at any time, for any reason and to reject any or all proposals. SWT requires that the responses to this RFP must state that the proposed terms will remain in effect for at least forty-five (45) days after the scheduled response opening.

TRD-9908017
William A. Nance
Vice President for Finance and Support Services
Southwest Texas State University
Filed: November 23, 1999

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Texas Woman's University

Consultant Contract Award Notification

In compliance with the provisions of Chapter 2254, subchapter B, Texas Government Code, Texas Woman's University furnishes this notice of consultant award. The consultant will provide a detailed assessment of the University's Distance Education including

the business plan, cost benefit analyses, and budgeting processes, including faculty salaries and compensation. Request for proposals was filed in the October 22, 1999, issue of the *Texas Register*.

The contract was awarded to INNOVATIVE INTERACTIONS, INC. 2110 Slaughter LN, STE 115.200, Austin Texas 78748, for $44,160.00 plus travel not to exceed $4,600.00.

The beginning date of the contract is November 22, 1999, and the ending date is February 14, of 2000. The assessment of the University's distance education planing and actives will be conducted during the months of November, December, and January, with a report due by February 14th, 2000.

TRD-9907901
Dr. Brenda Floyd
V.P. Finance and Administration
Texas Woman's University
Filed: November 19, 1999

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Texas Turnpike Authority Division of the Texas Department of Transportation

Notice of Availability of a Draft Environmental Impact Statement (DEIS)

The Texas Turnpike Authority Division (TTA) of the Texas Department of Transportation hereby issues this notice to advise the public that a Draft Environmental Impact Statement (DEIS) has been prepared and approved for the proposed US 183 Alternate (US 183A) in Williamson County. The limits of the proposed project extend from approximately Lakeline Boulevard, north of RM 620 and south of the City of Cedar Park, to north of the City of Leander, south of the South Fork of the San Gabriel River. The project area is generally parallel to and east of existing US 183. Alternatives being considered for proposed US 183A include two route alternatives and a no-build alternative-all three of the alternatives are evaluated in the DEIS.

As currently proposed, the ultimate facility design is anticipated to be a six-lane controlled access freeway constructed within a 400 foot (usual) right-of-way. Frontage roads, overpasses and direct connector ramps would be constructed at varying locations, depending on the final alignment and design. Although the ultimate design is anticipated to be a six-lane freeway, the initial facility may be of smaller scale. The total length of proposed US 183A is approximately ten and one-half miles.

The proposed US 183A project is being developed as a toll road candidate. Accordingly, in conjunction with other project development related activities, TTA is conducting a study to evaluate the feasibility of developing the proposed project as a toll road and financing it, in whole or in part, through the issuance of revenue bonds.

The US 183A DEIS is available for review at the offices of the TTA, 125 East 11th Street, Austin, Texas, 78701. Copies of the DEIS may be purchased from TTA for the actual cost of reproduction ($62).

Copies of the DEIS have also been filed with and are available for public review at the Austin Public Library/Austin History Center (Reading Room, 810 Guadalupe Street, Austin, Texas), the Cedar Park Public Library (550 Discovery Blvd, Cedar Park, Texas) and the Leander Public Library (406 Municipal Drive, Leander, Texas). For additional information contact Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, at the TTA address listed in this notice or by telephone at (512) 936-0983.

TRD-9908041
Phillip Russell
Director
Texas Turnpike Authority Division of the Texas Department of Transportation
Filed: November 24, 1999

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The University of Texas System

Consultant Proposal Request

The University of Texas at Austin requests, pursuant to the provisions of the Government Code, Chapter 2254.029, the submission of proposals leading to the award of a contract for Consulting Services. The University's objective is to conduct an evaluation to determine the nature of utilization and scope of overall demand for use of a hotel and conference center on the U.T. Austin campus.

An award for the services specified herein will be made following a procedure using competitive sealed proposals. Proposals will be opened publicly to identify the names of the RESPONDENTS, but will be afforded security sufficient to preclude disclosure of the contents of the proposal, including prices or other information, prior to award. After opening, an award may be made on the basis of the proposals initially submitted, without discussion, clarification, or modification, or on the basis of negotiation with any of the RESPONDENTS or, at UNIVERSITY'S sole option and discretion, UNIVERSITY may discuss or negotiate all elements of the proposal with selected RESPONDENTS which represent a competitive range of proposals. For purposes of negotiation, a competitive range of acceptable or potentially acceptable proposals may be established comprising the highest rated proposal(s). After the submission of a proposal but before making an award, UNIVERSITY may permit the offeror to revise the proposal in order to obtain the best final offer. The UNIVERSITY may not disclose any information derived from the proposals submitted from competing offers in conducting such discussions. The UNIVERSITY will provide each offeror with an equal opportunity for discussion and revision of proposals. Further action on proposals not included in the competitive range will be deferred pending an award, but UNIVERSITY reserves the right to include additional proposals in the competitive range if deemed in the best interest of UNIVERSITY.

The UNIVERSITY reserves the right to award a Contract for all or any portion of the requirements proposed by reason of this request, award multiple Contracts, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to re-solicit for proposals, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to temporarily or permanently abandon the procurement. If UNIVERSITY awards a contract, it will award the contract to the offeror whose proposal is the most advantageous to UNIVERSITY, considering price and the evaluation factors set forth in this RFP. The contract file must state in writing the basis upon which the award is made.

CONTACT. Interested parties may contact Trina Bickford at The University of Texas at Austin Purchasing Office for a copy of the RFP document by calling (512) 471-4266 or emailing her at bickford@mail.utexas.edu and referencing RFP 99-HCC.

DEADLINE. An original and ten copies of the proposal must be submitted by the Proposal submission deadline of 2 P.M., December 30, 1999.

TRD-9907922
Francie A. Frederick
Executive Secretary to the Board

The University of Texas System
Filed: November 19, 1999

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Texas Workforce Commission

Request for Proposals

A. PROPOSAL DESCRIPTION

The Texas Workforce Commission (TWC) is soliciting proposals to publish a periodic newsletter and other materials in order to fulfill its statutory mission to provide information to employers, policymakers, and the public, on issues relating to family-supportive workplace programs and policies. The contractor for this service will:

write, edit, and produce periodic newsletters, brochures, fact sheets, slide shows and other materials as assigned by the Work and Family Clearinghouse at TWC;

interview employers or other individuals as subjects for articles;

travel to two Texas cities to cover conferences or meetings for writing assignments; and

create the layout and production of camera-ready copy or electronic files compatible with TWC computer programs;

B. AUTHORIZATION TO AWARD CONTRACT

TWC is authorized to award contracts for a child care newsletter under the Human Resources Code, the Labor Code, and as the lead agency for the Work and Family Clearinghouse.

C. AVAILABLE FUNDING

The total amount of available funding through this contract for state fiscal years 2000 and 2001, for planning purposes, is approximately $75,000 to cover both years.

D. ELIGIBLE APPLICANTS

Applicants submitting proposals to publish a periodic newsletter and other materials must complete an Request for Proposal (RFP) Package and provide required documentation as requested in the application in order to be considered eligible.

E. PROJECT SCHEDULE

Application submission deadline is January 3, 2000. The contract is set to begin on February 1, 2000. The contract is scheduled to end August 31, 2001.

F. SCORING CRITERIA

The evaluation criteria for this RFP and the relative weights for scoring are: Demonstrated Effectiveness of the bidder, 80 points; Cost Reasonableness, 20 points; for a maximum of 100 points.

G. SELECTION, NOTIFICATION AND NEGOTIATION PROCESS

The Commission will use competitive negotiation for the procurement. Proposals will be evaluated by TWC and possible outside entities. TWC anticipates completing the selection process and notifying applicants of the application status the week of January 10, 2000. TWC will score proposals received and determine those within the competitive range. If one proposal is clearly superior, then the award will be made to that offeror. If two or more proposals are rated similarly, TWC may use negotiation to obtain amended proposals upon which to base a final award.

H. PAYMENT

The basis of payment for this award shall be reimbursement of actual allowable cost up to budgeted levels and subject to budget limitations.

I. TWC'S CONTACT PERSON

For further information and to order an Application Packet, contact the primary TWC contact person. The primary contact person for this RFP is Elwood Engebretson, Program Specialist, Texas Workforce Commission, Room 342T, 101 East 15th Street, Austin, Texas, 78778-0001, (512) 936-4874, fax (512) 936-3420, E-mail address elwood.engebretson@twc.state.tx.us

TRD-9908042
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Filed: November 24, 1999

♦ ♦ ♦

Request for Qualifications for Selection of Professional Architectural/Engineering Services

The Texas Workforce Commission (TWC), Facilities, Construction and Maintenance Department, 101 E. 15th St., Room 226T, Austin, Texas 78778-0001, hereby issues this request for statement of interest and qualifications (RFQ) for the purpose of selecting a professional architectural/engineering (A/E) firm for a Heating, Ventilation and Air Conditioning equipment replacement project at the TWC facility at 330 Dwyer Street in San Antonio.

The contract will require the A/E firm to develop the scope of the project, prepare construction drawings, specifications and bid documents. The contract will also require the A/E firm to perform project management, coordinate the work, be responsible for compliance with applicable regulations, and perform budgeting/payment activities.

A/E firms that meet the requirements described in this announcement are invited to submit Architect/Engineer Qualifications prior to 5:00 p.m., Wednesday, January 5, 2000, for consideration to the Texas Workforce Commission, Attn: Jim McKaskle, 101 E. 15th St., Room 226T, Austin, Texas 78778-0001. Copies of the entire RFQ are available by calling Jim McKaskle at (512) 305-9693.

The Texas Workforce Commission recognizes the benefits of aiding and stimulating the growth of small disadvantaged and small women-owned business enterprises, and therefore requires that your firm consider in its proposal the participation of qualified, certified Historically Underutilized Businesses (HUBs) as subcontractors. It is TWC's intention that qualified HUBs receive a minimum of twenty percent (20%) of this professional services contract. If your firm is not certified as a HUB, your response to this RFQ should include a plan for utilization of HUBs in providing services to TWC in connection with any contractual agreement awarded to you as a result of this RFQ.

Selection of an A/E firm will be in accordance with state statutes and regulations.

TRD-9907861
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Filed: November 18, 1999

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How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 24 (1999) is cited as follows: 24 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "23 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 23 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), LOIS, Inc. (1-800-364-2512 ext. 152), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 8, April 9, July 9, and October 8, 1999). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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