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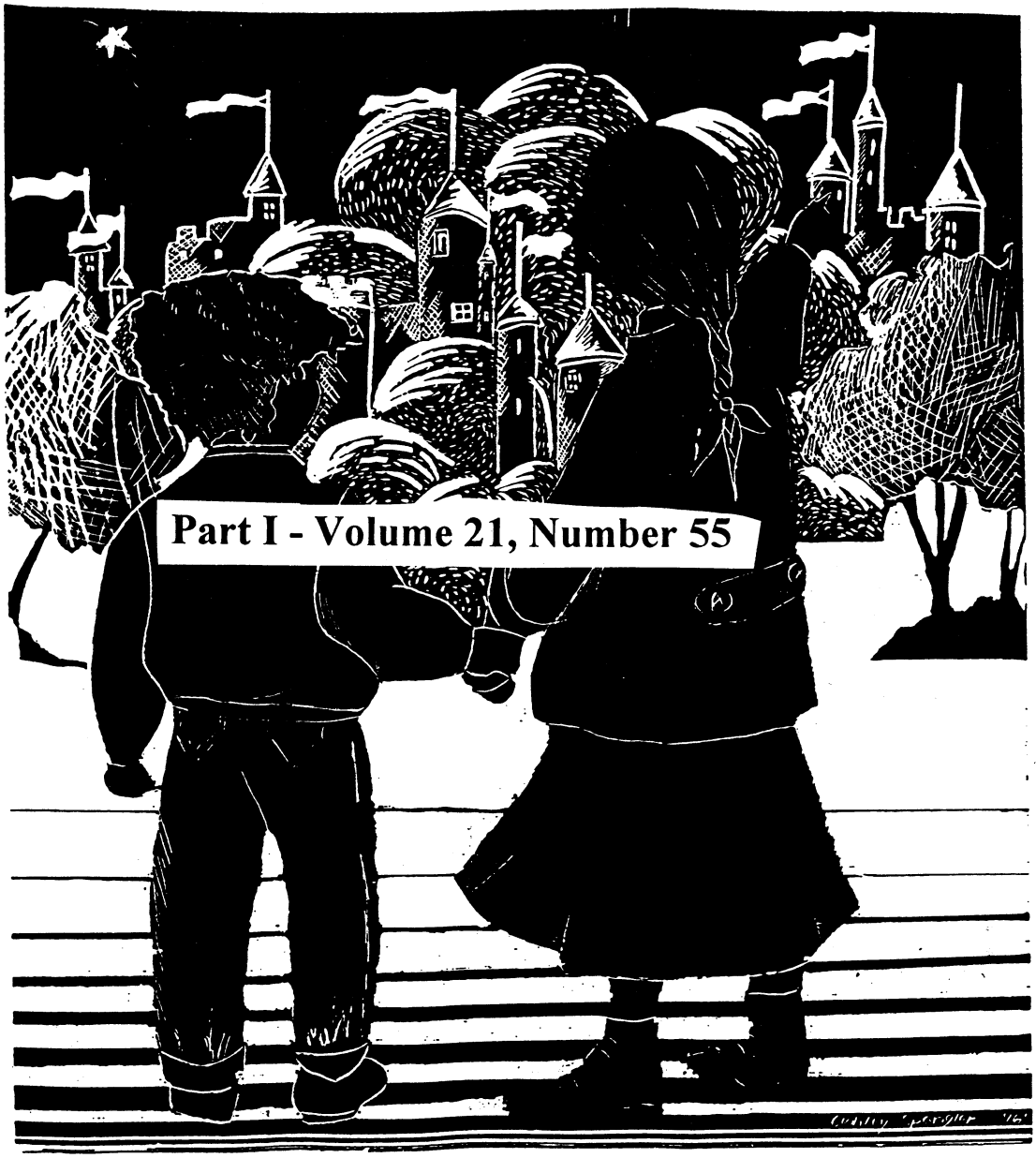

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Artist: *Ashley Spangler*

8th grade

Hendrick Middle School, Plano ISD

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Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569

Secretary of State - Antonio O. Garza, Jr.

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Circulation/Marketing
Tamara Joiner
Jill S. Ledbetter

Texas Administrative Code
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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 use of **bold text**. [Brackets] indicate deletion of existing material within a section.

TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 210. Use of Reclaimed Water

Subchapter D. Alternative and Pre-Existing Reclaimed Water Systems

§§210.41 -210.46

The sections are proposed under the Texas Water Code, (Vernon 1995), §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state and to establish and approve all general policy of the commission.

§§210.41. Applicability of Alternate Reclaimed Water Proposals.

In the event a reclaimed water provider or user proposes to design, construct, or operate a reclaimed water system or to utilize reclaimed water in a manner other than authorized in these rules, the provisions of this subchapter shall apply.

§§210.42. Request to Executive Director.

(a) If a reclaimed water provider or user proposes to design, construct, or operate a reclaimed water system or to utilize reclaimed water in a manner other than authorized in these rules, the provider or user shall file a request with the executive director, in addition to the notification filed pursuant to §210.4 of this title (relating to Notification), identifying the alternative proposal and requesting approval by the executive director.

(b) The request shall be in writing and shall include information necessary or useful in assisting the executive director in acting on the request for approval of the alternate reclaimed water proposal.

§§210.43. Action on Alternative Reclaimed Water Proposals.

The executive director shall review an alternate reclaimed water proposal filed under §210.42 of this title (relating to Request to Executive Director). Within 60 days, the executive director shall identify in writing to the requestor any additional information necessary for the executive director to act on the request, and provide the requestor sufficient time to provide such information. Following the receipt of such information, the executive director shall act on the request, either granting or denying the proposal, in whole or in part. If no additional information is requested, the executive director shall act on the request within 60 days, either granting or denying the proposal, in whole or in part.

§§210.44. Pre-existing Reclaimed Water Systems.

A reclaimed water system not already authorized by a commission permit or other written approval, existing on the effective date of these rules, where construction began prior to June 25, 1990, is authorized under this chapter if the provider or user of such a system provides a detailed description of the system to the executive director pursuant to the notification procedures of §210.4 of this title (relating to Notification) and the system is approved by the executive director. Such notification must occur within 90 days of the effective date of these rules. The system is authorized unless the executive director requests additional information pursuant to §210.45 of this title (relating to Actions on Pre-existing Reclaimed Water Systems) or denies such authorization pursuant to the provisions of §210.46 of this title (relating to Denial of Request).

§§210.45. Action on a Pre-existing Reclaimed Water System.

(a) The executive director may request a reclaimed water user to submit additional information concerning a pre-existing reclaimed water system to be authorized under this subchapter. The additional information may be requested in order to evaluate the potential for significant water quality problems or potential for significant risks to the health or safety of the public, including the need of a project to conform to one or more of the requirements of this chapter. Such request shall be provided in writing to the proposed reclaimed water user within 60 days of the receipt of the notification and shall provide the proposed user not less than 30 days to provide such additional information.

(b) Following the receipt of such information, the executive director shall act on the request, either granting or denying the proposal, in whole or in part. If no additional information is requested, the executive director shall act on the request within 60 days, either granting or denying the proposal, in whole or in part.

§§210.46. Denial of Request.

The executive director shall not grant an alternate reclaimed water proposal or grant authorization to a pre-existing reclaimed water system which could pose a significant threat to water quality or which represents a significant risk to human health or safety.

Issued in Austin, Texas, on July 17, 1996.

TRD-9610276
Kevin McCalla
Director, Legal Division

Texas Natural Resource Conservation Commission
Effective date: July 17, 1996
Expiration date: November 14, 1996

For further information, please call: (512) 239-4640

♦ ♦ ♦

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 use of **bold text**. [Brackets] indicate deletion of existing material within a section.

TITLE 13. CUTLTURAL RESOURCES

Part IV. Records Management Interagency Coordinating Council

Chapter 51. Electronic Documents

13 TAC §51.1, §51.3

The Records Management Interagency Coordinating Council proposes new §51.1 and §51.3, concerning authentication of governmental electronic records. The new rules are proposed under the authority of the Texas Government Code, §441.053 (g) The rules will establish standards for government bodies to authenticate on-line electronic documents obtained from an official source or by means of a digital signature.

Robert S. Martin, Chairman of the Council, has determined that for each of the first five years the rules are in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the rules.

Mr. Martin also has determined that for each year of the first five years the rules as proposed are in effect the public will benefit from government records being made more readily available in electronic form with assurance that the records are identical to the original source. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the rules as proposed.

Comments on the proposal my be submitted to Robert S. Martin, Chairman of the Records Management Interagency Coordinating Council, Texas State Library, P.O. Box 12927 Austin, Texas 78711-2927, within 30 days of publication in the *Texas Register*.

The rules are proposed under the Texas Government Code,§441.053, which provides the Records Management Interagency Coordinating Council with the authority to adopt rules to improve the state's management of records.

The Texas Government Code §441.053(g) is affected by the proposed rules.

§51.1. Definitions.

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

Electronic Format - Information accessible by a computer.

Electronic Public Information - Any public information as defined in the Public Information Act, Government Code, §552.002, that is stored or transmitted in any electronic format.

Governmental Body - As defined in the Public Information Act, Government Code, §552.003.

On-line - Accessible via a computer, a computer network such as the internet, or via a dial-in bulletin board system using a computer or computer terminal.

§51.3. Authentication of On-line Electronic Public Information..

(a) Electronic public information will be considered authentic when:

(1) it is on-line and meets the following requirements:

(A) it is obtained directly from an electronic source that a governmental body has declared to be an official source of on-line electronic public information for that governmental body, and

(B) the public information includes the statement, "This document can only be presumed to be authentic if it is in its original electronic format and only if obtained from an official source of the originating governmental body;" or

(2) it is digitally signed and obtained as follows:

(A) it is in an electronic format with digital signature appended, and

(B) the digital signature meets the requirements of administrative rules of the Department of Resources, and

(C) the digital signature is the official signature of a governmental body as defined by administrative rules of the Department of Information Resources.

(b) Government bodies will notify the Texas State Library and Archives Commission each time they designate an official source of on-line electronic public information.

(c) Subsection (a)(2) of this section will be valid only when the Department of Information Resources has adopted administrative rules to implement this section.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610392
Robert S. Martin

Chairman
Records Management Interagency Coordinating Council
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 463–5460

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 9. Liquefied Petroleum Gas Division

Subchapter A. General Applicability and Requirements

16 TAC §9.34

The Railroad Commission of Texas proposes new §9.34, relating to the LP-gas (welding) advisory committee. The new section establishes a new advisory committee to examine the uses of LP-gas in welding and other similar applications. It also establishes the committee's duration; sets forth the purpose and duties of the committee; prescribes the composition of the committee, the appointment process, and the membership terms of the committee; and sets forth the mechanisms by which the committee will meet, perform its work, and be evaluated.

Thomas D. Petru, assistant director, LP-Gas Section, Gas Services Division, has determined that for each year of the first five years the section is in effect there will be fiscal implications for state and local governments as a result of enforcing or administering the section. The exact impact cannot be determined until the committee appointments are made, but it should be very small, consisting only of travel expense to attend committee meetings for state and local government representatives appointed to the committee.

Mr. Petru 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 a clearly understandable procedure by which the LP-gas (welding) advisory committee is created and operates. There is an anticipated economic cost to small businesses and to individuals, but to only those small business owners and individuals who are members of the advisory committee; due to the nature of the provisions, the amount of that cost cannot be determined, but 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.

Comments on the proposal may be submitted to Kellie Martinec, Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas, 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket Number 1533. For additional information, call Thomas D. Petru at (512) 463-6949.

The new section is proposed under Texas Natural Resources Code, §113.051, which authorizes the commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and Texas Revised Statutes, Article 6252-33, §5 and §8.

Texas Natural Resources Code, §§113.051 and Texas Revised Statutes, Article 6252-33, §5 and §8 are affected by the new section.

§9.34. LP-Gas (Welding) 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) Commission-The Railroad Commission of Texas.

(2) Committee-The LP-Gas (Welding) Advisory Committee of the Railroad Commission of Texas.

(3) Consumer representative-A member of the committee who is not engaged in the business of producing, distributing or retailing LP-gas and who is not engaged in the business of designing, manufacturing, distributing or retailing LP-gas equipment or performing LP-gas-related research or other services, but who is a user of LP-gas in a welding application.

(4) Division-The Gas Services Division of the Railroad Commission of Texas.

(5) Fiscal year-September 1 of a year through August 31 of the following year.

(6) Industry representative-A member of the committee who is engaged in the business of producing, distributing or retailing LP-gas or who is engaged in the business of designing, manufacturing, distributing or retailing LP-gas equipment or performing LP-gas-related research or other services and who sells LP-gas for welding applications.

(7) Local government representative-A member of the committee who is a fire chief, fire marshal, or other similar position for a city or county.

(8) LP-gas-Liquefied petroleum gas (LPG), as that term is defined in Texas Natural Resources Code, Chapter 113.

(9) Member-An industry representative, a consumer representative, or a representative of local government who serves on the LP-Gas (Welding) Advisory Committee of the Railroad Commission of Texas.

(10) Presiding officer-The chairman of the LP-Gas (Welding) Advisory Committee of the Railroad Commission of Texas.

(11) Section-The LP-Gas Section of the Gas Services Division.

(b) Establishment; Duration. The LP-Gas (Welding) Advisory Committee of the Railroad Commission of Texas is hereby established effective October 1, 1996. The committee is abolished on August 31, 1998, 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, environmental, and technical expertise and experience to help the commission regulate the safe use of LP-gas in welding applications. 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 section. All such powers and duties rest solely with the commission.

(d) Composition of Committee; Membership Terms. The committee shall be composed of six members, five of whom shall be voting members. The five voting members shall include two LP-gas consumers, two members of the LP-gas (welding) industry, and one representative from local government, all of whom serve at the pleasure of the commission, for a period of two years. The assistant director of the LP-Gas Section shall serve as an ex officio, non-voting member of the committee.

(e) Nominations for Committee Membership. Any person may nominate a candidate or candidates for membership on the committee. Nominations shall be made in writing and submitted by September 1, 1996, for the initial committee, and by January 1 of each odd-numbered year thereafter. Nominations may be submitted to the commission, a commissioner, or the assistant director of the LP-Gas Section for transmission to the commission.

(f) Appointment of Members. All members of the committee are appointed by and serve at the pleasure of the commission. The commission shall appoint members of the first committee by October 15, 1996, and by August 31 of each odd-numbered year thereafter, such that the composition of the committee meets the requirements of subsection (d) of this section. 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.

(g) Reimbursement of Members' Expenses. The commission shall not reimburse members for travel or other expenses related to service on the committee.

(h) Presiding Officer; Other Officers. The committee shall elect from its members a presiding officer who shall report the committee's advice and attendance in writing to the commission. The committee may elect other officers at its pleasure.

(i) Subcommittees. The committee may organize itself into subcommittees. One member of each subcommittee shall serve as the chair of that subcommittee. The subcommittee chairs shall make written reports regarding their subcommittee's work to the presiding officer.

(j) Meetings. The committee shall meet at the call of the presiding officer or the commission. Committee and subcommittee meetings are open to the public.

(k) Committee Records. The LP-Gas Section staff shall record and maintain the originals of the minutes of each committee and subcommittee meeting. The section shall maintain a record of actions taken by the committee and shall distribute copies of approved minutes and other committee documents to the commission and the committee members.

(l) Evaluation of Committee Costs and Benefits. By October 1 of each year, the assistant director of the Gas Services Division 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.

(m) Report to Legislative Budget Board. The commission shall biennially report to the Legislative Budget Board the information developed under subsection (l) 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 authority to adopt.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610240
Mary Ross McDonald
Assistant Director
Gas Services Section, Office of General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 463-7008

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TITLE 22. EXAMINING BOARDS

Part XVII. Texas State Board of Plumbing Examiners

Chapter 361. Administration

General Provisions

22 TAC §361.1

The State Board of Plumbing Examiners, proposes an amendment to §361.1. This section defines terms commonly used in the profession or in the board's rules. The amendment is being proposed to change the definition for the phrase Maintenance Man or Maintenance Engineer.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing or administering the rule.

Mr. Pereyra, also has determined that each year of the first five years the rule is in effect the public benefit will be a clearer understanding of the phrase Maintenance Man or Maintenance Engineer. The definition also clarifies that their work is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections which safeguard the public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment is proposed and is affected by Texas Civil Statutes, Article 6243-101, §3(c) and §5(a) (Vernon 1996).

§361.1 Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

Maintenance man or maintenance engineer-An employee, as opposed to an independent contractor, who performs [minor] plumbing

maintenance work only in connection with other duties**, including the repair and maintenance of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters and excluding cutting into fuel gas plumbing systems and the installation of gas fueled water heaters.** [This work is of an incidental nature as opposed to plumbing repair work which requires a license. It does not include a] **A** person who erects, builds, or installs plumbing not already in existence **may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections.** Such maintenance persons shall not engage in plumbing work for the general public.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610402
Ernest Pereyra, CPA
Chief Fiscal Officer
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 458-2145

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Petition for Adoption of Rules

22 TAC §361.26

The State Board of Plumbing Examiners, proposes an amendment to §361.26. This section specifies that each written contract for services agreed upon by a licensed plumber and any other person shall contain the name and mailing address and the telephone number of the board. The amendment is being proposed to more broadly define the term contract used in §361.26(b).

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing or administrating the rule.

Mr. Pereyra, also has determined that each year of the first five years the rule is in effect the public benefit will be a clearer understanding of the word contract in §361.26. Additionally, the expansion of the definition of the word contract in §361.26 will require more plumbers to put the name and mailing address and the telephone number of the board on service documents to provide the public with an avenue to complain about the service provided. There should be no impact on small business other than plumbing businesses. There will be a very small financial impact on the individuals required to comply with this rule since they must put additional information on several of their service documents used as contracts with the public. This information initially though can be stamped on the document until the back stock of these documents are depleted.

Comments on the proposal may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment to is proposed and is affected by Texas Civil Statutes, Article 6243-101, §5(a) and §8A(e) (Vernon 1996).

§361.26. Contested Cases: Investigations.

(a) (No change.)

(b) Each written contract for services agreed upon by a licensed plumber and any other person shall contain the name and mailing address and the telephone number of the board. **The term "written contract" includes documents used by a plumber or plumbing company to define the scope and cost of the work to be provided to the public. This may include items such as service invoices, billing invoices or any document which defines the services and cost of the services provided to the public. For the purposes of this section, the public need not sign the document for it to be considered a contract.**

Issued in Austin, Texas, on July 16, 1996.

TRD-9610403
Ernest Pereyra, CPA
Chief Fiscal Officer
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 458-2145

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Chapter 367. Enforcement

22 TAC §367.4

The State Board of Plumbing Examiners proposes an amendment to §367.4. This section specifies when and where a plumber must display his license. The amendment is being proposed to specify that magnetic signs on service vehicles are not sufficient to comply with the permanency requirement of this rule.

Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule is in effect there will be no effect to state or local government as a result of enforcing or administering the rule.

Mr. Pereyra, also has determined that each year of the first five years the rule is in effect the public benefit will be an easier way to determine if a plumber is licensed and a Master Plumber is responsible for the work at issue. There will be no effect on small businesses. There is minimal financial impact on those plumbing companies who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ernest Pereyra, Chief Fiscal Officer, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin 78765-4200.

The amendment is proposed under and is affected by Texas Civil Statutes, Article 6243-101, §5(a) (Vernon 1996).

§367.4. Display of License.

Responsible Master licensees shall display the frameable certificate license in their place of business and all licensees shall carry the pocket card license with them while engaged in work. Each responsible master plumber shall display permanently the master plumber license number and company name on both sides of all service vehicles used in conjunction with plumbing contracting by the responsible master plumber **for the purposes of this rule a magnetic sign on a vehicle is not a permanent sign.** The letters and numbers shall be not less than two inches high and shall be in a color sufficiently different from the body of the vehicle so that the

letters and numbers shall be plainly legible at a distance of not less than 100 feet.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610225
Ernest Pereyra, CPA
Chief Fiscal Officer
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 458-2145

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 29. Purchased Health Services

On behalf of the State Medicaid Director, the Texas Department of Health (department) submits proposed amendments to §29.606 and §29.1125, concerning payment for hospital services and coverage of procurement of nonsolid organs, in its purchased health services rules. Specifically, the amendments allow the department to calculate relative weights for organ transplant diagnosis related groups with less than 10 observations, using Medicaid-specific data. The relative weights include organ procurement for both solid and nonsolid organs.

Joe Moritz, health care financing budget director, has determined that for the first five-year period the sections will be in effect there will be minimal, if any, fiscal implications to state government as a result of enforcing or administering the section as proposed. The minimal costs, if any, may occur from additional administrative costs. There will be no costs to local government.

Mr. Moritz also has determined that for each year of the five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that reimbursement for transplant DRGs may be based on Medicaid-specific data. There is no anticipated economic cost to small or large businesses or individuals who are required to comply with the proposed sections. There is no anticipated effect on local employment.

Comments on the proposal may be submitted to Brenda Salisbery, Program Specialist, Health Care Financing, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3168, (512) 338-6521. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. The department will hold a public hearing on the proposal on August 14, 1996, at 9:00 a.m., in the Board Room of the Texas Department of Health, Moreton Building, Room 736. According to federal requirements, a copy of this proposal is being sent to each Texas Department of Human Services field office where it will be available in each county for public review and comment.

Subchapter G. Hospital Services

25 TAC §29.606

These amendments are proposed under the Human Resources Code, §32.021 and Texas Civil Statutes, Article 4413 (502), §16, 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 and authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

These amendments affect Chapter 32 of the Human Resources Code, §29.606. Reimbursement Methodology for Inpatient Hospital Services.

§§29.606. Reimbursement Methodology for Inpatient Hospital Services.

(a)-(b) (No change.)

(c) Calculating relative weights and standard dollar amounts. The department or its designee uses recent Texas claims data to calculate both the relative weights and standard dollar amounts. A relative weight is calculated for each DRG and applied to all payment divisions. A separate standard dollar amount is calculated for each payment division. Except for border hospitals with a Texas Medicaid provider number beginning with an H and out-of-state children's hospitals, the department or its designee uses the overall arithmetic mean base year payment per case as the standard dollar amount to reimburse out-of-state hospitals. The overall arithmetic mean base year payment per case is also used as the standard dollar amount to reimburse military hospitals providing inpatient emergency services for admissions on or after October 1, 1993. The calculation of the standard dollar amount for out-of-state children's hospitals is described in subsection (r) of this section. Except for new hospitals, the overall arithmetic mean base year payment per case is also used as the standard dollar amount to reimburse hospitals that initially enroll as a Title XIX provider after the current base year. The standard dollar amount for new hospitals is the lesser of the overall arithmetic mean base year payment per case plus three percentile points or the hospital's average Medicaid cost per Medicaid discharge based on the tentative or final settlement, if applicable, of the hospital's first 12-month cost reporting period occurring after the hospital's enrollment as a Title XIX provider. The use of the hospital's average Medicaid cost per Medicaid discharge as its standard dollar amount is applied prospectively to the beginning of the next prospective year and is applicable only if the tentative or final settlement is completed and available at least 60 days before the beginning of the prospective year. The hospital's Medicaid costs are determined using similar methods and procedures used in Title XVIII of the Social Security Act, as amended, effective October 1, 1982, by Public Law 97-248. If a specific DRG has less than 10 observations for Medicaid data, the department or its designee uses the corresponding Medicare relative weight**, except for DRGs relating to organ transplants. Relative weights for organ transplant DRGs with less than 10 observations may be developed using Medicaid-specific data. The relative weights include organ procurement costs for both solid and nonsolid organs**. The department or its designee makes no distinction between urban and rural hospitals and there is no federal/national portion within the payment.

(d)-(r) (No change.)

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610179
Susan K. Steeg
General Counsel
Texas Department of Health
Proposed date of adoption: September 9, 1996
For further information, please call: (512) 458-7236

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Subchapter L. General Administration

25 TAC §29.1125

The amendment is proposed under the Human Resources Code, §32.021 and Texas Civil Statutes, Article 4413 (502), §16, 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 and authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

These amendments affect Chapter 32 of the Human Resources Code.

§§29.1125. Organ Transplants.

(a) Subject to the specifications, conditions, and limitations established by the department, organ transplant services are covered as follows:

(1) (No change.)

(2) Coverage includes solid **and nonsolid** organ procurement (including acquiring/harvesting, processing, preserving, storing, distributing, and tissue typing). If a hospital obtains **an** [a solid] organ outside of the hospital, the hospital must obtain it from an organ procurement organization designated by the secretary of the Department of Health and Human Services. Coverage does not include donor expenses [or services or nonsolid organ procurement, such as a cornea or bone marrow].

(3) (No change.)

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

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610178
Susan K. Steeg
General Counsel
Texas Department of Health
Proposed date of adoption: September 9, 1996
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 5. Property and Casualty Insurance

Subchapter R. Temporary Rate Reduction for Certain Lines of Insurance

28 TAC §5.14011

The Texas Department of Insurance proposes new §5.14011 which continues in effect current §§5.14000-5.14010, concerning temporary rate reductions for certain lines of insurance. New §5.14011 is necessary to effect the continuation of provisions of the preceding sections of Subchapter R (Temporary Rate Reduction for Certain Lines of Insurance). Subchapter R was enacted to implement amendments to the Insurance Code, Article 5.131, occasioned by passage of House Bill 1988, 74th Legislature, Regular Session. Sections 5.14000-5.14010 concern the temporary rate reductions for certain lines of insurance which are required by Article 5.131. The sections set forth the calculation and application of the amount of the rate reduction for certain lines of insurance for insurers to pass through to policyholders, on a prospective basis, the reduction in loss and allocated loss adjustment expense anticipated from recent tort reform legislation. The commissioner proposes to continue §§5.14000-5.14010 in effect without changes. As instructed by the legislature, he will make a final determination whether §§5.14000-5.14010, and particularly the rate reduction factors set forth in §5.14004, should be amended or remain in effect unchanged based on evidence adduced at the hearing. The commissioner specifically wishes to hear evidence regarding whether different rate reduction percentages should be imposed on personal and commercial automobile minimum liability limits policies as opposed to policies carrying increased liability limits.

C. H. Mah, associate commissioner for the technical analysis division, has calculated the fiscal impact for the first five years that the rule will be in effect. Mr. Mah has determined that any impact will occur in the first four years because Article 5.131 provides that the rates reduction percentages established by the commissioner remain effective only until January 1, 2001. Mr. Mah has determined that for each year of the remaining four years that the proposed rate reductions are in effect, any fiscal implications to state government are the result of the legislative enactment of Article 5.131 of the Insurance Code, and are not as a result of the adoption and implementation of these sections. Mr. Mah has also determined that for each year of the remaining four years the proposed rate reductions will be in effect, there will be no fiscal implications to local government nor to small business as a result of enforcing or administering the sections. There will be no effect on local employment or the local economy as a result of the proposal.

Mr. Mah has also calculated the public benefit and cost anticipated for the first five years that the rule is in effect. Any such effect will be felt only for the first four years that the rule is in effect because Article 5.131 provides that the rates reduction percentages established by the commissioner remain effective only until January 1, 2001. Mr. Mah has determined that the public benefit as a result of the sections will be the reduction in rates charged by insurers for certain lines of insurance affected by tort reform legislation. Consumers will experience savings

in insurance as a result of implementation of the proposal. The amount of savings to the consumer will vary depending on the type of coverage the person has, the amount of the deductible, the type of company the person is insured by and similar factors. The estimated economic cost to insurers that write the lines of insurance affected by these sections will vary depending on various factors including size of company, type of company, whether the company is a regulated or non rate regulated insurer, the type of risk written by the insurer, the volume of premium dollars the insurer writes for the lines of insurance affected, and the type of data collection the insurer maintains. It is estimated that the most measurable cost of compliance will have occurred in the past year when insurers reprogrammed their systems to account for the rate reduction factor. Neither the proposed new rule nor the continuation in effect of the existing rate reduction rules is expected to result in substantial costs. Costs of compliance for the remaining four years are expected to range from $1,000-$100,000, consisting primarily of computer costs and filing of tort reform forms. The assumptions on which these costs are based may change substantially as the department receives data during the comment period.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the *Texas Register,* to Caroline Scott, Chief Clerk, Texas Department of Insurance, P. O. Box 149104, Mail Code 113-2A, Austin, Texas 78714-9104. An additional copy of the comment must be submitted to Rose Ann Reeser, Deputy Commissioner, Legal and Compliance Division, Texas Department of Insurance, P. O. Box 149104, MC 110-1A, Austin, Texas 78714-9104. The text of current §§5.14000-5.14010 will not be republished in the *Texas Register* as part of this proposed rule because the commissioner proposes no changes to those sections unless changes are required based on evidence adduced at the hearing. The full text of Subchapter R appears in the October 6, 1995, *Texas Register* (20 TexReg 8197). Interested parties may also view the current sections via the Internet at www.sos.state.tx.us/tac/index.html, or obtain a copy from the Office of the Chief Clerk, Texas Department of Insurance. A public hearing on the proposal will be conducted on August 27, 1996. A separate notice of hearing will be published.

The new section is proposed under the Insurance Code, Articles 5.131 and 1.03A. Article 5.131 enacted by the 74th Legislature requires the commissioner to issue rules mandating appropriate rate reductions for certain lines of insurance to pass through, on a prospective basis, the savings that accrue from tort reform legislation enacted in the regular sessions of the 73rd and 74th legislatures, and to hold a hearing on such rules on or before September 1 of each of the years that the rates are to remain in effect. Article 5.131 also provides for the granting of administrative relief and the collection of data to monitor compliance with the statute. Article 1.03A authorizes the commissioner of insurance to promulgate and adopt rules and regulations for the conduct and execution of the duties and functions of the department.

Insurance Code, Article 5.131 is affected by this new section.

§5.14011. Continuation of Loss and ALAE Reduction Percentages.

The loss and ALAE reduction percentages by line as set forth in §5.14004 of this title (relating to Loss and ALAE Reduction Percentages by Line) shall be applied to the rate or charge for each policy effective on and after January 1, 1997, and shall remain in effect until further order of the commissioner.

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

Issued in Austin, Texas, on July 17, 1996.

TRD-9610264
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 463-6327

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Part II. Texas Workers' Compensation Commission

Chapter 134. Guidelines for Medical Services, Charges, and Payments

The Texas Workers' Compensation Commission (the commission) proposes new §134.302, concerning the dental fee guideline and simultaneous repeal of current §134.301, concerning the same subject. The new rule is proposed to update and revise the guideline which addresses the types of services subject to the Workers' Compensation Act and reimbursement and billing for dental services rendered to relieve the effects of and promote recovery from an injury compensable under the Texas Workers' Compensation Act. The rule does not list specific dollar values but provides that services subject to the Workers' Compensation Act shall be reimbursed at a fair and reasonable rate. The proposed rule will be effective for dental services rendered after the effective date of the rule. Dental services rendered prior to the effective date of the rule will be subject to the provisions of the 1992 Dental Guideline.

This revision of the Dental Fee Guideline does not include a listing of billing codes as current §134.301 does, but instead refers to the Current Dental Terminology (CDT) codes of the American Dental Association. In addition, the wording of the guideline has been simplified. Reimbursements for dental services continue to be fair and reasonable rates rather than specific fees.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. Chamness has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be compliance with the statutory mandate that the Commission periodically review and revise its medical policies and fee guidelines,

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed. There will be no effect on small businesses.

Comments on the proposal or requests for public hearing must be submitted to Elaine Crease by 5:00 p.m. on Monday, August 26, 1996 at Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. Please contact the commission to determine whether the comment period has been extended beyond this date.

Subchapter C. Medical Fee Guidelines

28 TAC §134.301

(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 Workers' Compensation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines, and the Texas Labor Code, §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years.

The proposed new rule and repeal affects the following statutes: the Texas Labor Code, §413.002, which requires that the Commission's Medical Review Division monitor health care providers, insurance carriers and claimants to ensure compliance with Commission rules; the Texas Labor Code, §413.007, which sets out information to be maintained by the Commission's Medical Review Division; the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines; the Texas Labor Code, §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years; the Texas Labor Code, §413.013, which requires the Commission by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review; the Texas Labor Code, §413.015, which requires insurance carriers to pay charges for medical services as provided in the statute and requires that the Commission ensure compliance with the medical policies and fee guidelines through audit and review; the Texas Labor Code, §413.016, which provides for refund of payments made in violation of the medical policies and fee guidelines; the Texas Labor Code, §413.017, which provides a presumption of reasonableness for medical services fees which are consistent with the medical policies and fee guidelines; the Texas Labor Code, §413.019, which provides for payment of interest on delayed payments refunds or overpayments; and the Texas Labor Code, §413.031, which provides a procedure for medical dispute resolution.

§134.301. Dental Fee Guideline.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610236
Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 440-3700

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28 TAC §134.302

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines, and the Texas Labor Code, §413.012, which requires review and revision of the medical policies and fee guidelines at least every two years.

§134.302. Dental Fee Guideline.

(a) Dental services rendered under the Texas Workers' Compensation Act shall include the repair or replacement of those teeth and oral structures injured or directly affected by an occupational injury or disease. This guideline is effective for dental services provided after the effective date of this rule. Dental services provided prior to the effective date of this rule shall be subject to the 1992 Dental Guideline. Preauthorization of any treatments or services shall be as required in the Commission's preauthorization rule.

(b) The coding for dental services shall be the most recent Current Dental Terminology (CDT) of the American Dental Association with the modifier "DS" listed before each CDT code.

(c) Reimbursement for services rendered shall be a fair and reasonable rate. Reimbursement is allowed only when a licensed dentist is performing compensable services within the dentist's scope of practice or when a nonlicensed individual is rendering care under the direct supervision of a licensed dentist.

(d) Examples of services which are not covered by workers' compensation insurance include:

(1) all preventative services;

(2) multiple units of fixed prosthetics exceeding the number of teeth involved in the original injury;

(3) hair and tissue analysis;

(4) treatments based on mercury toxicity;

(5) silent period durations;

(6) jaw tracking not induced by trauma; and

(7) mandibular kinesiography not induced by trauma.

(e) If multiple procedures are performed during the same operative session, then the following rule for reimbursement applies:

(1) reimbursement for the primary procedure is 100% of the fair and reasonable value for the major procedure; and

(2) reimbursement for the secondary procedure(s) is 50% of the fair and reasonable value for the secondary procedure(s).

(f) Reimbursement for laboratory procedures performed in dental laboratories are included in the reimbursement for the dental procedure code(s).

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610235
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 440-3700

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Subchapter E. Health Facility Guidelines

The Texas Workers' Compensation Commission (the Commission or TWCC) proposes new §134.401, concerning guidelines for acute care inpatient hospital fees and the simultaneous repeal of existing §134.400, concerning the same subject. The new rule establishes presumptively fair and reasonable payments for inpatient hospital services provided after the effective date of the rule to workers' compensation claimants who were injured on or after January 1, 1991. The new rule is proposed to meet the requirements of the Texas Labor Code, §413.012 that the Commission periodically review and revise its fee guidelines. The proposed new rule revises the current guideline by: increasing the per diem reimbursement for hospital services related to a medical admission from $600 to $857; decreasing the per diem reimbursement for services related to a surgical admission from $1,100 to $1,026; decreasing the per diem reimbursement for intensive or cardiac care units services from $1,600 to $1,547; redefining the exemption for "small/rural" hospitals as an exemption for "hospitals with 100 or less licensed beds"; and revising the basic reimbursement method to require the payment of the lesser of billed charges, contract rates or the per diem in the guideline.

The Commission considered all relevant statutory and policy mandates and objectives and designed this rule to achieve those mandates and objectives, including the following:

(1) establish guidelines relating to fees charged or paid for medical services for employees who suffer compensable injuries, including guidelines relating to payment of fees for specific medical treatments or services;

(2) ensure that injured workers receive the health care reasonably required by the nature of their injury, as and when needed;

(3) ensure guidelines for medical services fees are fair and reasonable;

(4) ensure quality health care to the injured workers of Texas;

(5) achieve effective medical cost control;

(6) ensure guidelines for medical services fees do not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or someone acting on that individual's behalf;

(7) consider the increased security of payment afforded by the Act in establishing the fee guidelines;

(8) maintain a statewide database of medical charges, actual payments, and treatment protocols that may be used by the Commission in adopting medical fee guidelines;

(9) ensure the Commission's database contains information necessary to detect practices and patterns in medical charges and actual payments; and

(10) ensure the Commission's database can be used in a meaningful way to allow the Commission to control medical costs as provided by the Act.

This proposed new rule achieves these objectives by its provisions, including the following:

(1) specifying the fees to be paid for acute care inpatient hospital services provided under the Texas Workers' Compensation Act;

(2) utilizing per diem reimbursement rates that take into account average amounts currently accepted by hospitals as payment in full for acute care inpatient services to avoid any adverse effect on the access to or quality of medical care, to ensure the per diem rates are fair and reasonable, and to achieve effective medical cost control;

(3) requiring that payment to a hospital be the lesser of the amount specified in the fee guideline, the amount specified in a prenegotiated contract with the carrier, or billed charges to ensure that hospitals are not reimbursed for workers' compensation patients in excess of the amount that would be paid for similar treatment of non-workers' compensation patients; and

(4) including non-workers' compensation data in the Commission's data to allow the Commission to detect practices and patterns in medical charges and actual payments, to ensure that hospitals are not reimbursed for workers' compensation patients in excess of the amount that would be paid for similar treatment of non-workers' compensation patients, and to achieve meaningful cost control.

To gather additional data which could be used to determine fair and reasonable hospital reimbursement, the Commission ordered and obtained copies of contracts or summaries of contracts reflecting rates accepted by Texas hospitals as payment in full from third party payers and managed care organizations for hospital services, both workers' compensation and non-workers' compensation.

To determine which hospitals would be required to provide contract information, hospitals were ranked by the dollar amount of reimbursement received for workers' compensation cases for calendar year 1994. After ranking the hospitals, it was determined that the top 80 hospitals received 80% of the total workers' compensation reimbursement paid to hospitals. None of the hospitals which received the remaining 20% of the total reimbursement were reimbursed a significant portion of the total workers' compensation reimbursement. As a result, the Commission determined that obtaining contracts from the top 80 hospitals would provide relevant information on which to base fair and reasonable rates for the inpatient hospital care in the workers' compensation system.

The Commission sent letters to these 80 hospitals requesting copies of all contracts or other agreements reflecting rates accepted as payment in full by each hospital that were in effect for any dates of services on or after January 1, 1994 through October 1, 1995. Almost all of the hospitals refused to voluntarily produce the contracts and, as a result, the Commission issued orders on January 26, 1996 requiring the

production of the contracts. The Texas Hospital Association, as well as almost all of the hospitals from whom contracts were sought filed suit in Travis County District Court attempting to prevent the Commission from obtaining the contracts, or, in the alternative, to obtain a protective order to maintain the confidentiality of the contracts. On February 9, 1996, the parties agreed to a protective order to keep the documents confidential for six months and the remainder of the contracts or detailed summaries, verified under oath, of the contract provisions, were produced by the hospitals.

Because of mergers, acquisitions, corporate buyouts and other similar ownership changes, all of the 80 hospitals originally identified did not individually respond to the Commission orders. However, none of the hospitals ordered to produce contracts reported that they had no such contracts. The hospitals producing contracts were located throughout the state. With the exception of one, all of the following hospitals producing contracts were 100 or more licensed beds in size.

TOP 80 HOSPITALS (Calendar Year 1994, Sorted Alphabetically):

All Saints Episcopal Hospital, Fort Worth

AMI Twelve Oaks Hospital, Houston

AMI Park Plaza Hospital, Houston

Arlington Memorial Hospital, Arlington

Baptist Memorial Hospital System, San Antonio

Baptist Hospital of Southeast Texas, Beaumont

Baylor University Medical Center, Dallas

Bethania Regional Health Care Center, Wichita Falls

Bexar County Hospital District, San Antonio

Brackenridge Hospital, Austin

Brownsville Medical Center, Brownsville

Citizens Medical Center, Victoria

Cypress Fairbanks Medical Center Hospital, Houston

Doctors Hospital East Loop, Houston

Garland Community Hospital, Garland

Good Shepard Medical Center, Longview

Harris Methodist-Fort Worth, Fort Worth

Harris Methodist H E B, Bedford

HCA Medical Center Hospital, Houston

HCA Medical Plaza Hospital, Ft Worth

HCA North Hills Medical Center, North Richland Hills

HCA West Houston Medical Center, Houston

HCA Medical Center-Plano, Plano

HCX South Arlington Medical Center, Arlington

Hendrick Medical Center, Abilene

Hermann Hospital, Houston

High Plains Baptist Hospital, Amarillo

Hillcrest Baptist Medical Center, Waco

Houston NW Medical Center, Houston

Humana Hospital-Clear Lake, Webster

Humana Hospital Metro, San Antonio

Humana Hospital-San Antonio, San Antonio

Humana Hospital Medical City-Dallas, Dallas

McAllen Medical Center, Mc Allen

Medical Arts Hospital, Dallas

Medical Center Hospital, Tyler

Medical Center Hospital, Odessa

Memorial City Medical Center, Houston

Memorial Medical Center, Corpus Christi

Memorial Hospital System, Houston

Methodist Hospital Lubbock, Lubbock

Methodist Medical Center, Dallas

Midland Memorial Hospital, Midland

Mother Frances Hospital Regional Healthcare Center, Tyler

Nix Medical Center, San Antonio

Northeast Medical Center Hospital, Humble

Northwest Texas Hospital, Amarillo

Osteopathic Medical Center of Texas, Fort Worth

Park Place Hospital, Port Arthur

Parkland Memorial Hospital, Dallas - Presbyterian Hospital, Dallas

Providence Memorial Hospital, El Paso

RHD Memorial Medical Center, Dallas

Rio Grande Regional Hospital, Mc Allen

Rosewood Medical Center, Houston

Santa Rosa Hospital, San Antonio

Scott and White Memorial Hospital, Temple

Seton Medical Center, Austin

Shannon West Texas Memorial Hospital, San Angelo

Sierra Medical Center, El Paso

Southwest Texas Methodist Hospital, San Antonio

Spohn Hospital, Corpus Christi

St. Joseph Hospital of Houston, Houston

St. Lukes Episcopal Hospital, Houston

St. Davids Community Hospital, Austin

St. Joseph Hospital, Fort Worth

St. Elizabeth Hospital, Beaumont

St. Anthonys Hospital, Amarillo

St. Mary of the Plains Hospital, Lubbock

St. Paul Medical Center, Dallas

St. Lukes Lutheran Hospital, San Antonio

Sun Belt Regional Medical Center, Houston

Sun Towers Hospital, El Paso

The Methodist Hospital, Houston

University Medical Center, Lubbock

University of Texas-Medical Center, Galveston

Valley Baptist Medical Center, Harlingen

Vista Hills Medical Center, El Paso

Westbury Hospital, Houston

Zale Lipshy University Hospital, Dallas

The contracts or contract summaries were analyzed by comparing the rates for medical services, surgical services, intensive care unit services, and combined medical/surgical services in each contract. Data on approximately 2,000 contracts was received and analyzed. Of these 2,000 contracts, approximately 11.2% based fees on diagnostic related groups (DRGs); approximately 30.7% based fees on a discount from charge; approximately 52.7% based fees on a per diem rate; and approximately 5.5% based fees on some other method (such as capitation; case by case; or some combination of methods). Some contracts contained hospital rates for workers' compensation cases.

The Commission elected to analyze contract data because it provided a current source of determining what hospitals are accepting as payment in full for services to both patients with workers' compensation injuries and other patients.

Because the per diem method of reimbursement was the most commonly used method for hospital reimbursement, and because this is the method used currently in §134.400 of this title for workers' compensation hospital reimbursement, this reimbursement method was chosen for proposed new §134.401. To arrive at the per diem reimbursement rates proposed, the per diem contract amounts for non-workers' compensation cases were averaged on a state-wide basis. These averages revealed that the Commission's current per diem reimbursement for acute care inpatient medical services is low ($600) when compared to the current state-wide average per diem amount hospitals are contracting for to provide these services ($857). The contract data also revealed that the Commission's current per diem reimbursement for acute care inpatient surgical services ($1,100) is high when compared to the state-wide average per diem amount hospitals are willing to contract for to provide these services ($1,026). Data analysis showed that current reimbursement for intensive care unit services contained currently in §134.400 of this title (relating to Acute Care Inpatient Hospital Fee Guideline) ($1,600) is high when compared to the state-wide average reimbursement hospitals are contracting for to provide those services ($1547).

The proposed new rule exempts from its provisions hospitals with less than 100 licensed beds. These hospitals are to reimbursed at a fair and reasonable rate. Current §134.400 of this title exempts "small/rural" hospitals from the reimbursement provisions of the guideline. The "small/rural" designation is vague and difficult to apply. The exemption in proposed new §134.401 is specific and definite and excludes small/rural hospitals from the per diem rates proposed because pricing data was not requested from these hospitals due to the small number of workers' compensation cases handled by such hospitals Therefore, reimbursement for these small/rural hospitals will be at a fair and reasonable rate.

Concurrent with this rulemaking notice, the Commission is proposing to repeal §134.400 of this title, the rule adopting the current Acute Care Inpatient Hospital Fee Guideline (ACIHFG). However, the text of this proposed rule continues the current guideline in effect for services rendered from September 1, 1992 to the effective date of the new guideline.

The Texas Hospital Association (THA) has offered additional data to the Commission for analysis as part of its review of the current guideline. The Commission, the Medical Advisory Committee, and THA are currently engaged in discussions to determine what data can be provided without a breach of confidentiality. The Commission has begun a review of certain data already provided. The Commission is interested in reviewing verifiable data on hospital costs to confirm that, as the hospital contract data already obtained strongly suggests, reimbursements set out in the proposed ACIHFG adequately reimburse costs. Because the Commission has a substantial amount of information in its own database including charge and payment data and has hospital contract data for close to 80% of the workers' compensation hospital reimbursement, it will not delay proposing the ACIHFG until additional verifiable data can be obtained and analyzed. Instead, the Commission believes it is important to revise the ACIHFG: to comply with the statutory mandate to periodically review and revise its fee guidelines; and to revise hospital reimbursements in accordance with the Commission's most current data which reflects that hospital reimbursements, particularly medical reimbursements, should be changed. In addition, the decision of the Texas Court of Appeals, Third District in *Texas Hospital Association; Dallas/Fort Worth Hospital Council; Memorial Healthcare; and Hendrick Medical Center v. Texas Workers' Compensation Commission*, currently on appeal to the Texas Supreme Court, presents a risk that if current §134.400 of this title is ruled void, the state will be without a fee guideline for acute care inpatient hospital services. Such a guideline is essential to ensure that statutory mandates, including medical cost containment, are followed.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be fiscal implications to some units of state and local governments as a result of enforcing or administering the rule.

There will be no addition or reduction in cost to the state or to units of local government expected as a result of enforcing or administering the rule. Any increased or decreased cost to the state as the employer/carrier for state employees will be the same as that described for insurance carriers later in this preamble.

State-owned hospitals and units of local government that are hospital districts will experience the same increased/reduced revenue as that described for hospitals later in this preamble.

Ms. Chamness has also determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be as follows.

(a) The public benefit expected as a result of adoption of the proposed rule is as follows.

(1) The Commission will comply with the statute requiring the adoption of fair and reasonable rates.

(2) Persons required to pay for inpatient hospital services, including employers, insurance carriers, the State of Texas and local governments, will pay fair and reasonable amounts for workers' compensation claimants which are similar to that paid for other patients.

(3) Hospitals will receive a fair and reasonable amount in compliance with the statute.

(4) Claimants will have access to quality health care services.

(5) The guideline will be updated to provide for reimbursement amounts implementing medical cost containment measures designed to assure quality of medical care as required by the Workers' Compensation Act.

(6) It is anticipated that clear, fair guidelines will minimize disputes and encourage prompt payments to hospitals.

(b) The probable economic costs to persons required to comply with the rule are as follows.

(1) Compared with current §134.400 of this title, there is no additional bill processing cost attributable to this proposed new rule, with the exception of minimal costs to reprogram computer payment systems.

(2) It is anticipated that there will be a minimal charge for copies of the fee guideline. This charge will be consistent with the requirements of state law for charging for copies of documents.

(3) It is estimated that the proposed new §134.401 will result in an approximate 2% increase in reimbursement to hospitals, which equates to a less than 1% increase in costs to the workers' compensation system as a whole. This increase in system costs may be less than the estimated 1% because of changes in the reimbursement system. The proposed new rule establishes reimbursement as the lesser of: a pre-negotiated workers' compensation contract rate between the hospital and the insurance carrier, the hospital's usual and customary charges, or the reimbursement set out in the guideline. This provision changes the current practice of paying the guideline's per diem reimbursement amount even when it is more than a hospital's billed charges. This change from the current guideline will result in a savings to the system. In addition, the ability of hospitals to negotiate rates which are less than the per diem set in the guideline may also result in savings to the system.

(4) Insurance carriers will experience an approximated 2% increase in hospital reimbursements as a result of the proposed guideline and may experience minimal costs to reprogram computer payment systems. However, the 2% increase may be reduced based on the factors discussed in the preceding paragraph.

There will be no difference in costs of compliance for small businesses as compared to large businesses. Hospitals with 100 beds or less are exempted from the guideline and will be reimbursed at a fair and reasonable rate as provided by statute.

Comments on the proposal must be submitted to Elaine Crease by 5:00 p.m. on Monday, August 26, 1996 at Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. Please contact the Commission to determine whether the comment period has been extended beyond this date.

Based upon comments received and the staff's or Commissioners' review of those comments, or based upon action by the Commissioners at the public meeting, the rule as adopted may differ from the rule as proposed, including, but not limited to, the following: fee amounts in this proposed new guideline may change, the Commission may establish regional variations in fees, and/or the Commission may establish a tiered per diem for surgery. Persons in support of the fee amounts proposed or opposed to regional fee variations and/or a tiered surgical per diem may wish to comment to that effect. Persons submitting comments in favor of regional variation of hospital reimbursements or alternative methodology such as tiered per diems for surgery should include the proposed methodology, how the methodology would vary the reimbursement proposed and provide data to support the alternative methodology.

The Commission encourages submission of verified contracts or contract data not already submitted to TWCC relating to the period January 1, 1994 through October 1, 1995 with comments. Verification should include the signature under oath of an authorized person who can assure the authenticity and the accuracy of the contract data. Persons submitting comments regarding financial considerations of the rule are requested to provide data to support their positions which can be substantiated by the Commission. Commenters are encouraged to provide to the Commission with their comments the source of the data, the entity issuing the data and its address, the date the data was issued, and any information indicating how the data was determined to be valid or could be substantiated by the Commission.

A public hearing regarding this rule will be scheduled at a later date, and will be held in Room 910A of the Commission's central office in the Southfield Building, 4000 South IH-35, Austin, Texas. The date for this hearing will be published in the *Texas Register* if time permits. Interested persons can also contact the Commission to determine when the public hearing will be held. Commenters at the public hearing are encouraged to provide to the Commission with their comments the source of any data used, the entity issuing the data and its address, the date the data was issued and any information indicating how the data was determined to be valid or could be substantiated by the Commission. Please also see the previous two paragraphs in this preamble.

28 TAC §134.400

(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 Workers' Compensation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Labor Code, §402.061 which requires the Commission to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act; the Texas Labor Code, §408.021, which entitles injured employees to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code, §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines; and the Texas Labor Code, §413.012, which requires periodic review of the medical policies and fee guidelines .

The proposed new rule and repeal of existing rule §134.400 affect the following statutes: the Texas Labor Code, §408.021, which entitles injured employees to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code, §413.002, which requires that the Commission's Medical Review Division monitor health care providers, insurance carriers and claimants to ensure compliance with Commission rules; the Texas Labor Code, §413.007, which sets out information to be maintained by the Commission's Medical Review Division; the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines; the Texas Labor Code, §413.012, which requires periodic review of the medical policies and fee guidelines; the Texas Labor Code, §413.013, which requires the Commission by rule to establish programs related to health care treatments and services for dispute resolution, monitoring, and review; the Texas Labor Code, §413.015, which requires insurance carriers to pay charges for medical services as provided in the statute and requires that the Commission ensure compliance with the medical policies and fee guidelines through audit and review; the Texas Labor Code, §413.016, which provides for refund of payments made in violation of the medical policies and fee guidelines; the Texas Labor Code, §413.017, which provides a presumption of reasonableness for medical services fees which are consistent with the medical policies and fee guidelines; the Texas Labor Code, §413.019, which provides for payment of interest on delayed payments, refunds or overpayments; and the Texas Labor Code, §413.031, which provides a procedure for medical dispute resolution.

§134.400. Acute Care Inpatient Hospital Fee Guideline.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610237
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 440-3700

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28 TAC §134.401

The new rule is proposed under the Texas Labor Code, §402.061, which requires the Commission to adopt rules necessary for the implementation and enforcement of the Texas Workers' Compensation Act; the Texas Labor Code, §408.021, which entitles injured employees to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code, §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; the Texas Labor Code, §413.011, which mandates that the Commission by rule establish medical policies and guidelines; and the Texas Labor Code, §413.012, which requires periodic review of the medical policies and fee guidelines .

§134.401. Acute Care Inpatient Hospital Fee Guideline.

(a) Applicability.

(1) This guideline shall become effective October 1, 1996. The Acute Care Inpatient Hospital Fee Guideline (ACIHFG) is applicable for all reasonable and medically necessary medical and/or surgical inpatient services rendered after the effective date of this rule in an acute care hospital to injured workers under the Texas Workers' Compensation Act. Medical and/or surgical inpatient services rendered prior to the effective date of this rule shall be subject to the ACIHFG in effect at the time the services were rendered. These rules shall not apply to acute care hospitals with 100 or less licensed beds which shall be reimbursed at a fair and reasonable rate.

(2) Psychiatric and/or rehabilitative inpatient admissions are not covered by this guideline and shall be reimbursed at a fair and reasonable rate until the issuance of a fee guideline on these specific types of admissions. For these type of admissions, insurance carriers shall put one of the appropriate following codes on each bill to indicate the type of services performed:
Type of Service - Code
Rehabilitation - Inpatient - IR
Psychiatric - Inpatient - IP

(3) Services such as outpatient physical therapy, radiological studies, and laboratory studies are not covered by this guideline and shall be reimbursed in accordance with the Texas Workers' Compensation Commission (TWCC) Medical Fee Guideline in effect at the time the services are rendered. For these type of admissions, insurance carriers shall put one of the appropriate following codes on each bill to indicate the type of services performed:
Type of Service - Code
Hospital Surgical - Outpatient - HS
Hospital Other - Outpatient - HO
Ambulatory Surgical - Outpatient - AS
Ambulatory Other - Outpatient - AO

(4) Ambulatory/outpatient surgical care is not covered by this guideline and shall be reimbursed at a fair and reasonable rate until the issuance of a fee guideline addressing these specific types of reimbursements. For these type of admissions, Insurance carriers shall put one of the appropriate following codes on each bill to indicate the type of services performed:
Type of Service - Code
Ambulatory Surgical - Outpatient - AS
Ambulatory Other - Outpatient - AO

(5) Emergency services are not covered by this guideline and shall be reimbursed at a fair and reasonable rate until the issuance of a fee guideline addressing these specific services. Emergency transportation shall be reimbursed in accordance with the Texas Workers' Compensation Commission Medical Fee Guideline in effect at the time the services are rendered.

(b) General Ground Rules.

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

(A) Acute Care Hospital - A health care facility that provides inpatient or outpatient services delivered to patients experiencing acute illness or trauma as licensed by the Texas Department of Health (TDH) as a General or Special Hospital Type.

(B) Inpatient Services - Services rendered to a person who is formally admitted to an acute care hospital and whose length of stay exceeds 23 hours.

(C) Institutional Services - All non-physician services rendered within the hospital by an employee or agent of the hospital.

(D) Length of Stay (LOS) - Number of calendar days from admission to discharge. In computing a patient's length of stay, the day of admission is counted, but the day of discharge is not.

(E) Medical Admission - Any hospital admission where the primary services rendered are medical in nature.

(F) Stop-Loss Payment - An independent method of payment for an unusually costly or lengthy stay.

(G) Stop-Loss Reimbursement Factor (SLRF) - A factor established by the Commission to be used as a multiplier to establish a reimbursement amount when total hospital charges have exceeded specific stop-loss thresholds.

(H) Stop-Loss Threshold (SLT) - Threshold of total charges established by the Commission, beyond which reimbursement is calculated by multiplying the applicable Stop-Loss Reimbursement Factor by the total charges identifying that particular threshold.

(I) Surgical Admission - Any hospital admission where the primary services rendered are surgical in nature.

(J) Standard Per Diem Amount (SPDA) - A standardized per diem amount established by the Commission as the maximum reimbursement for hospital services covered by this guideline.

(2) General Information.

(A) All hospitals shall bill their usual and customary charges. The basic reimbursement for acute care hospital inpatient services rendered shall be the lesser of:

(i) a rate for worker's compensation cases prenegotiated between the carrier and hospital;

(ii) the hospital's usual and customary charges; or

(iii) reimbursement as set out in subsection (c) of this section for that admission.

(B) Additional reimbursements as outlined in subsection (c)(4) of this section are determined on a case-by-case basis within the guidelines established for the specific services rendered.

(C) All charges submitted are subject to audit as described in Commission rules.

(D) All bills for professional services rendered by a health care provider shall be submitted on form TWCC-67, the standard HCFA 1500 form.

(E) All bills for acute care hospital inpatient services shall be submitted on form TWCC-68a, the standard UB-92 (HCFA 1450) form. Depending upon the type of service(s) rendered, the appropriate code shall be included on each UB-92 (HCFA 1450) submitted. One of the following codes shall be put on the bill by the insurance carrier:
Type of Service - Code
Acute Care - Inpatient (Medical) - IM
Acute Care - Inpatient (Surgical) - IS

(F) When a medical admission takes place, and surgery is subsequently performed during this stay, the entire stay is considered to be a surgical admission.

(c) Reimbursement.

(1) Standard Per Diem Amount . The workers' compensation standard per diem amounts to be used in calculating the reimbursement for acute care inpatient services are as follows:
Medical - $ 857
Surgical - $ 1,026
Intensive Care Unit (ICU)/Cardiac Care Unit (CCU) - $ 1,547

(2) Method. All inpatient services provided by an acute care hospital for medical and/or surgical admissions will be reimbursed using a service related standard per diem amount.

(A) The complete treatment of an injured worker is categorized into two admission types: medical or surgical. A per diem amount shall be determined by the admission category.

(B) A per diem amount is also established for reimbursement of each specific ICU/CCU day independently. This special per diem rate is used for each ICU/CCU day in lieu of the specific (medical/surgical) per diem rate being used for normal services rendered during this admission.

(C) Independent reimbursement is allowed on a case-by-case basis if the particular case exceeds the stop-loss threshold as described in paragraphs (5) of this subsection.

(3) Reimbursement Calculation.

(A) Explanation.

(i) Each admission is assigned an admission category indicating the primary service(s) rendered (medical or surgical).

(ii) The applicable Workers' Compensation Standard Per Diem Amount (SPDA) is multiplied by the length of stay (LOS) for admission.

(iii) If applicable, ICU/CCU days are subtracted from the total LOS and reimbursed the ICU/CCU per diem rate for those specific days of treatment in lieu of the assigned medical/surgical per diem rate.

(iv) The Workers' Compensation Reimbursement Amount (WCRA) is the total amount of reimbursement to be made for that particular admission.

(B) Formula. LOS x SPDA = WCRA

(C) Examples.

(i) Without ICU/CCU days: admission category - medical; length of stay - eight days; per diem (medical) - $857; eight days at $857 equals $6,856.

(ii) With ICU/CCU days: admission category, surgical; length of stay, 15 days; ICU/CCU days - three days; per diem (surgical) - $1,026; per diem (ICU/CCU) - $1,547. Fifteen TOTAL DAYS MINUS THREE ICU/CCU days equals 12 surgical days. Twelve days at $1,026 plus three days at $1,547 equals $16,953.

(4) Additional Reimbursements. All items listed in this paragraph shall be reimbursed in addition to the normal per diem based reimbursement system in accordance with the guidelines established by this section.

(A) Implantables (e.g. rods, pins, joints, pacemakers) which are medically necessary, shall be reimbursed at cost to the hospital plus 10%. A copy of an invoice for the device or a comparable device shall accompany the UB-92 (HCFA 1450) submitted to the carrier in order to receive reimbursement.

(B) MRIs and CAT Scans performed during the admission shall be reimbursed in accordance with the Texas Workers' Compensation Commission Medical Fee Guideline currently in effect.

(5) Stop-Loss Method. Stop-loss is an independent reimbursement methodology established to ensure fair and reasonable compensation to the hospital for unusually costly services rendered during treatment to an injured worker. This methodology shall be used in place of and not in addition to the per diem based reimbursement system.

(A) Explanation.

(i) To be eligible for stop-loss payment the total audited charges for a hospital admission must exceed $50,000, the minimum stop-loss threshold.

(ii) This stop-loss threshold is established to ensure compensation for unusually extensive services required during an admission.

(iii) If audited charges exceed the stop-loss threshold, reimbursement for the entire admission shall be paid using a Stop-Loss Reimbursement Factor (SLRF) of 80%.

(iv) The Stop-Loss Reimbursement Factor is multiplied by the total audited charges to determine the Workers' Compensation Reimbursement Amount (WCRA) for the admission.

(v) Audited charges are those charges which remain after a bill review by the insurance carrier has been performed. Those charges which may be deducted are personal items (e.g., telephone, television). If an on-site audit is performed, charges for services which are not documented as rendered during the admission may be deducted. The formula to obtain audited charges is as follows: Total Charges - Deducted Charges = Audited Charges

(B) Formula. Audited Charges x SLRF = WCRA

(C) Example.

Total Charges: -$108,000
Deducted Charges: -$8,001
Audited Charges: -$99,999
$99,999 x .80 equals $79,999.20 (WCRA)

(6) Reimbursement for Other Services.

(A) Professional Services. All professional services performed by a health care provider shall be reimbursed in accordance with the Texas Workers' Compensation Commission Medical Fee Guideline currently in effect.

(B) Pharmacy Services. Pharmaceutical services rendered as part of inpatient institutional services are included in the basic reimbursement established by subsection (c) of this section for such services and shall not be reimbursed separately.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610234
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 440-3700

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resources Conservation Commission

Chapter 37. Financial Assurance

The commission proposes new §§37.1, 37.11, 37.21, 37.31, 37.41, 37.51, 37.61, 37.71, 37.81, 37.100, 37.101, 37.111, 37.121, 37.131, 37.141, 37.151, 37.161, 37.201, 37.211, 37.221, 37.231, 37.241, 37.251, 37.261, 37.301, 37.311, 37.321, 37.331, 37.341, 37.351, 37.361, 37.400, 37.401, 37.411, 37.501, 37.511, 37.521, 37.531, 37.541, 37.551, 37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661, 37.901, 37.911, 37.921, 37.931, 37.1001, 37.1011, and 37.1021, concerning financial assurance requirements.

New Chapter 37 proposes standard financial assurance wording of the mechanisms and requirements for financial responsibility and places them in one rule chapter. Initially, this chapter will provide financial assurance requirements for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities.

Owners or operators seeking permits for compost facilities must provide evidence of financial responsibility for closure. This requirement is authorized by Texas Health and Safety Code, §361.085 and promulgated as 30 TAC §332.47(9).

Owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities must provide evidence of financial responsibility for closure and sudden liability coverage per 30 TAC Chapter 334, Subchapter K.

Proposed Chapter 37, Subchapter A sets forth the applicability of the proposed rules, definitions, and basic requirements for demonstrating financial assurance. This subchapter would re-

quire all mechanisms relied upon to show evidence of financial responsibility to be worded as set forth in Subchapter D or G, require approval of all mechanisms by the executive director, require substitution of financial assurance mechanisms in the event of failure or cancellation, and allow the use of multiple financial assurance mechanisms for a single facility, or use of a single mechanism for multiple facilities of the same type. Mechanisms used to show financial responsibility for closure must be at least equal in amount to the most recent closure cost estimates. Mechanisms used to show evidence of sudden liability coverage must be at least equal to the annual aggregate limit as specified. To receive approval for financial responsibility, mechanisms for permitted facilities must be submitted at least 60 days prior to the acceptance of waste for processing or at least 60 days prior to operations, while registrants must submit mechanisms prior to issuance of a registration.

Proposed Chapter 37, Subchapter B sets forth the general criteria for approval of financial assurance for closure. This subchapter would allow the executive director to draw on the mechanism when required to do so, require continuous coverage until terminated, require annual adjustments for inflation, require necessary adjustments in the closure cost estimate, and require establishment of a standby trust for surety bonds or letters of credit.

Proposed Chapter 37, Subchapter C sets forth the criteria for approval of financial assurance mechanisms for closure, including trust funds, surety bonds guaranteeing payment, surety bonds guaranteeing performance, irrevocable standby letters of credit, insurances, financial tests, and corporate guarantees.

Proposed Chapter 37, Subchapter D sets forth the required wording of financial assurance mechanisms for closure referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter E sets forth the criteria for approval of financial assurance for liability. This subchapter would address the liability requirements for sudden accidental occurrences.

Proposed Chapter 37, Subchapter F sets forth the criteria for approval of financial assurance mechanisms for liability, including trust funds, surety bonds guaranteeing payment, irrevocable standby letters of credit, insurances, financial tests, and corporate guarantees.

Proposed Chapter 37, Subchapter G sets forth the required wording of financial assurance mechanisms for liability referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter J makes the requirements of Chapter 37 applicable to owners and operators seeking permits for compost facilities under §332.47.

Proposed Chapter 37, Subchapter K makes the requirements of Chapter 37 applicable to owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities under Chapter 334, Subchapter K. Amendment of §332.47 and §334.484(c)(16) reflects the requirement upon owners and operators of compost facilities and owners and operators of Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities to use the documents and language from Chapter 37.

Amendment of Chapter 332 would make the new Chapter 37 applicable to owners and operators of permitted compost facilities. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 332 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Amendment of Chapter 334 would make the new Chapter 37 applicable to owners and operators of Class A and B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 334 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Minick 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 increased efficiency in the review of financial assurance documents and additional safeguards for the resources of the state. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

The commission has prepared a Takings Impact Assessment for the amendment to Chapter 37 pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of the new rules is to begin the consolidation of financial assurance requirements into one rule chapter. The new rules substantially advances this purpose by setting up a new Chapter 37 and making it initially applicable to financial assurance for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities. Promulgation and enforcement of these rules will not affect private real property because they add no new financial assurance requirements and they do not adversely affect property values.

A public hearing on this proposal will be held August 29, 1996, at 10:00 a.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, 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, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Comments may be mailed to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96127-037-AD. Comments must be received by 5:00 p.m., August 29, 1996.

For further information, please contact Randall Terrell, Office of Policy and Regulatory Development, (512) 239-0577.

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.

Subchapter A. General Financial Assurance Requirements

30 TAC §§37.1, 37.11, 37.21, 37.31, 37.41, 37.51, 37.61, 37.71, 37.81

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.1. Applicability.

This chapter applies to an owner or operator required by this chapter to provide evidence of financial responsibility. However, this chapter does not apply to owners and operators which are state or federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States.

§37.11. Definitions.

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

Assets - All existing and all probable future economic benefits obtained or controlled by a particular entity.

Current assets -Cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

Current closure cost estimate -The most recent of the estimates prepared for closure and approved by the executive director.

Current liabilities -Obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

Current plugging and abandonment cost estimate -The most recent of the estimates prepared in accordance with Chapter 331 of this title (relating to Underground Injection Control).

Face amount -The total amount the insurer is obligated to pay under an insurance policy.

Financial responsibility -This term shall mean the same as financial assurance.

Independent audit -An audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

Liabilities -Probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

Net working capital -Current assets minus current liabilities.

Net worth -Total assets minus total liabilities and equivalent to owner's equity.

Standby trust -An unfunded trust established to meet the requirements of this chapter.

Tangible net worth -The tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

§37.21. Wording and Approval of Mechanisms.

The mechanisms submitted for compliance with this chapter must be worded as they appear in Subchapter D or G of this chapter (relating to Wording of the Mechanisms for Closure or Wording of the Mechanisms for Liability). The executive director shall determine the acceptability of the mechanisms submitted.

§37.31. Submission of Documents.

(a) To receive approval as a permitted facility, an owner or operator required by this chapter to provide evidence of financial responsibility must submit an originally signed financial assurance mechanism 60 days prior to acceptance of waste or 60 days prior to beginning operations, whichever occurs first.

(b) To receive approval as a registered facility, an owner or operator required by this chapter to provide evidence of financial responsibility must submit originally signed financial assurance mechanisms prior to issuance of registration.

§37.41. Use of Multiple Financial Assurance Mechanisms.

An owner or operator may satisfy the requirements of this chapter by establishing more than one financial assurance mechanism per facility. The executive director may use any or all of the mechanisms to satisfy the requirements for which financial assurance was provided. These mechanisms are limited to those specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) or Subchapter F of this chapter (relating to Financial Assurance Mechanisms for Liability), except that the financial test or corporate guarantee may not be combined with other mechanisms, provided the mechanisms are for the same facility.

(1) It shall be the combination of mechanisms, rather than the single mechanism, which shall provide financial assurance for an amount that must be at least equal to the minimum financial assurance requirements of this chapter.

(2) If an owner or operator uses a trust fund in combination with a surety bond or irrevocable standby letter of credit, the owner or operator may use that trust fund as the standby trust fund for the other mechanisms.

(3) A single standby trust may be established for two or more mechanisms.

(4) If an owner or operator demonstrates the required liability coverage through the use of a combination of financial assurance mechanisms, the owner or operator shall specify at least one such assurance as "primary" coverage and shall specify other assurance as "excess."

§37.51. Use of a Financial Assurance Mechanism for Multiple Facilities.

An owner or operator may use a financial assurance mechanism as specified in this chapter to meet the requirements of this chapter for more than one facility, provided that the facilities are of the same type. Evidence of financial assurance submitted to the executive director shall include a list showing, for each facility, the commission registration or permit number, name, address, and the amount of funds assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure of any of the facilities covered by the mechanism, the executive director may direct only the amount of funds designated for that facility.

§37.61. Termination of Mechanisms.

The executive director shall provide written consent to termination of a financial assurance mechanism when:

(1) an owner or operator substitutes and receives approval from the executive director for alternate financial assurance as specified in this chapter; or

(2) the executive director releases the owner or operator from the requirements of this chapter.

§37.71. Incapacity of Owners or Operators, Guarantors, or Financial Institutions.

(a) An owner or operator must notify the executive director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming the owner or operator as debtor, within ten business days after the commencement of the proceeding. As required under the terms of the guarantee, a guarantor of a corporate guarantee as specified in §37.261 of this title (relating to Corporate Guarantee for Closure) and a corporate guarantee as specified in §37.551 of this title (relating to Corporate Guarantee for Liability) shall make such a notification if he is named as debtor.

(b) An owner or operator who fulfills the requirements of this chapter shall be deemed to be without the required financial assurance coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act as trustee or of the institution issuing the surety bond, irrevocable standby letter of credit, or insurance policy to issue such mechanisms. The owner or operator must establish other acceptable financial assurance within 60 days after such an event.

§37.81. Transfer of Ownership or Operational Control.

When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of this chapter, until the executive director determines that the new owner or operator has demonstrated compliance with the requirements of this chapter. Upon determination by the executive director that the new owner or operator is in compliance with this chapter, the executive director shall provide written consent to termination of the financial assurance mechanism to the old owner or operator in accordance with §37.61 of this title (relating to Termination of Mechanisms)

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610212
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239-1966

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Subchapter B. Financial Assurance Requirements for Closure

30 TAC §§37.100, 37.101, 37.111, 37.121, 37.131, 37.141, 37.151, 37.161

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.100. Applicability.

An owner or operator required by this chapter to establish financial assurance for the closure of a facility must, at a minimum, meet the requirements of this subchapter.

§37.101. Drawing on the Financial Assurance Mechanisms.

The executive director may draw on the financial assurance mechanism(s) when an owner or operator who is required to comply with this chapter has:

(1) failed to perform closure when required to do so; or

(2) failed to provide an alternate financial assurance mechanism; or

(3) failed to provide continuous financial assurance coverage.

§37.111. Continuous Coverage Required.

The owner or operator of a facility required by this chapter to provide evidence of financial responsibility for closure shall provide continuous financial assurance coverage until the executive director provides written consent to termination in accordance with §37.61 of this title (relating to Termination of Mechanisms).

§37.121. Closure Cost Estimate.

The owner or operator of each facility required by this chapter to provide evidence of financial responsibility for closure must establish financial assurance in an amount no less than the approved closure cost estimate.

§37.131. Annual Inflation Adjustments to Closure Cost Estimates.

The owner or operator must adjust the current closure cost estimate for inflation within 60 days prior to the anniversary date of the first establishment of the financial assurance mechanism. For owners or operators using the financial test or corporate guarantee, the current

closure cost estimate must be updated for inflation within 30 days after the close of the firm's fiscal year and before submission of updated information to the executive director as specified in this chapter. The adjustment must be made as specified in paragraphs (1) and (2) of this section, using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the United States Department of Commerce in its Survey of Current Business. The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the current closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted cost estimate by the latest inflation factor.

§37.141. Increase in Closure Cost Estimate.

Whenever the closure cost estimate increases to an amount greater than the amount being provided in the financial assurance mechanism(s) as a result of changes in closure activities, the owner or operator, within 30 days after the increase, must either cause the amount of the mechanism to be increased and submit evidence of such increase to the executive director, or obtain additional financial assurance in accordance with Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) to cover the increase and receive approval by the executive director.

§37.151. Decrease in Closure Cost Estimate.

Whenever the closure cost estimate decreases to an amount less than the amount being provided in the financial assurance mechanism(s) as a result of changes in closure activities, the owner or operator may request a reduction in the amount of the financial assurance mechanism in writing to the executive director. Following written approval by the executive director, the amount of the mechanism may be reduced to the amount of the current closure cost estimate.

§37.161. Establishment of a Standby Trust.

An owner or operator who uses a surety bond or an irrevocable standby letter of credit to satisfy the requirements of this chapter must establish a standby trust fund. Under the terms of the bond or letter of credit, all payments made under the bond or all amounts paid pursuant to a draft by the executive director shall be deposited by the surety or issuing institution directly into the standby trust fund in accordance with instructions from the executive director. This standby trust fund must meet the requirements of the trust fund specified in §37.201 of this title (relating Trust Fund for Closure), except that:

(1) an originally signed duplicate of the trust agreement must be submitted to the executive director with the surety bond or irrevocable standby letter of credit; and

(2) until the standby trust fund is funded pursuant to the requirements of this chapter, the following are not required by this section:

(A) payments into the trust fund as specified in §37.201 of this title;

(B) updating of Schedule A of the trust agreement to show current closure cost estimates;

(C) annual valuations as required by the trust agreement; and

(D) notices of nonpayment as required by the trust agreement.

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

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Texas Natural Resource Conservation Commission
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Subchapter C. Financial Assurance Mechanisms for Closure

30 TAC §§37.201, 37.211, 37.221, 37.231, 37.241, 37.251, 37.261

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.201. Trust Fund for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by establishing either a fully funded trust or a pay-in trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.301(a) of this title (relating to Trust Agreement for Closure) including a formal certification of acknowledgment as specified in §37.301(b) of this title.

(d) Schedule A of the trust agreement as specified in §37.301(a) of this title must be updated within 30 days after an approved change in the amount of the current closure cost estimate covered by the agreement, or annual inflation adjustments.

(e) A fully funded trust requires that the initial payment into the trust fund be at least equal to the current closure cost estimate, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the initial payment plus the amount of the combined

mechanism(s) must be at least equal to the current closure cost estimate. A receipt from the trustee for the initial payment must be submitted by the owner or operator to the executive director with the originally signed duplicate of the trust agreement.

(f) A pay-in trust requires annual payments by the owner or operator over the term of the initial registration or permit, the remaining term of the initial registration or permit, or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund must be made in accordance with this subsection.

(1) For a new facility, a receipt from the trustee for the first payment must be submitted by the owner or operator to the executive director in accordance with §37.31 of this title (relating to Submission of Documents). The first payment must be at least equal to the current closure cost estimate divided by the number of years in the pay-in period; or when a combination of mechanisms are used in accordance with §37.41 of this title, the first payment must be at least equal to the current closure cost estimate less the amount of the combined mechanism(s) divided by the number of years in the pay-in period. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula.
Figure: 30 TAC §37.201(f)(1)

(2) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (1) of this subsection.

(3) If the owner or operator establishes a trust fund after having used another financial assurance mechanism, the first payment must be at least equal to the amount that the fund would contain if the trust fund was established when the registration or permit was initially issued, and subsequent payments must be made as specified in paragraph (1) of this subsection.

(g) After the initial payment for a fully-funded trust or after the pay-in period is completed for a pay-in trust, whenever the current closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain an additional financial assurance mechanism as specified in this subchapter to cover the difference.

(h) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current closure cost estimate.

(i) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (h) of this section, the executive director, if he approves the request, shall instruct the trustee to release to the owner or operator such funds in writing.

(j) After beginning closure, an owner or operator or any other person authorized by the executive director to perform closure may request reimbursement for closure expenditures by submitting itemized bills to the executive director. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. After receiving bills for closure activities, the executive director shall instruct the trustee to make reimbursement in such amounts as the executive director specifies in writing, if the executive director determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the executive director has reason to believe that the cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, the executive director may withhold reimbursement of such amounts as deemed prudent until it is determined, in accordance with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility.

§37.211. Surety Bond Guaranteeing Payment for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed surety bond to the executive director.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.311 of this title (relating to Payment Bond).

(d) The bond must guarantee that the owner or operator shall:

(1) fund the standby trust fund as specified in §37.161 of this title (relating to Establishment of a Standby Trust) in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(2) fund the standby trust fund as specified in §37.161 of this title in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the executive director becomes final, or within 15 days after an order to begin final closure is issued by the United States district court or other court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(f) The penal sum of the bond must be in an amount sufficient to satisfy the requirements for which financial assurance for closure is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple

Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(g) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

§37.221. Surety Bond Guaranteeing Performance for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed surety bond to the executive director.

(b) The bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the United States Department of Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.321 of this title (relating to Performance Bond).

(d) A surety bond guaranteeing performance of closure must guarantee that the owner or operator shall perform closure in accordance with the closure plan or the closure requirements of the registration or permit for the facility whenever required to do so.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a determination by the executive director that the owner or operator has failed to perform closure in accordance with registration or permit requirements when required to do so, under terms of the bond the surety shall perform closure as guaranteed by the bond or shall deposit the amount of the penal sum of the bond into a standby trust, as specified in §37.161 of this title (relating to Establishment of a Standby Trust), as directed by the executive director to satisfy the financial assurance requirements.

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation of the bond may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts. If the owner or operator fails to provide an alternate financial assurance mechanism as specified in this subchapter within 90 days of the receipt of notice of cancellation from the surety to the executive director and to the owner or operator, and obtain written approval of the alternate assurance from the executive director, the surety shall be required to perform under the terms of the bond.

(g) The penal sum of the bond must be in an amount sufficient to satisfy the requirements for which financial assurance was required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(h) The surety shall not be liable for deficiencies in the performance of closure by the owner or operator after the executive director releases the owner or operator from the requirements of this section, in accordance with Subchapter A of this chapter.

§37.231. Irrevocable Standby Letter of Credit for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submit an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.331 of this title (relating to Irrevocable Standby Letter of Credit).

(d) The originally signed irrevocable standby letter of credit must be accompanied by a letter from the owner or operator referring to the irrevocable standby letter of credit by number, issuing institution, and date, and providing the following information: the commission registration or permit number, name and address of the facility, and the amount of funds assured by the irrevocable standby letter of credit by facility.

(e) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(f) The irrevocable standby letter of credit must be issued in an amount sufficient to satisfy the requirements for which financial assurance is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the amount of the letter of credit plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(g) Following a determination that the owner or operator has failed to satisfy the requirements for which financial assurance is required or with the registration or permit requirements when required to do so, the executive director may draw on the irrevocable standby letter of credit and deposit such funds into a standby trust for the closure of the facility.

(h) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the

irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this chapter and obtain written approval of such assurance from the executive director.

§37.241. Insurance for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed certificate to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.341 of this title (relating to Certificate of Insurance).

(d) The insurance policy must be issued for a face amount at least sufficient to satisfy the requirements for which financial assurance for closure is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the face amount plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate. Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(e) For a claims-made insurance policy, the owner or operator shall place in escrow, as instructed by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy. When the owner or operator fails to provide an alternate financial assurance mechanism, the executive director may use these funds to renew the policy.

(f) The insurance policy must guarantee that funds shall be available whenever needed to fulfill obligations of the insured under this chapter. The policy shall also guarantee that once closure of a facility for which closure insurance was provided begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(g) After beginning closure of a facility, an owner or operator or any other person authorized to perform closure may request reimbursement for closure expenditures by submitting itemized bills to the executive director. Within 60 days after receiving bills for closure activities, the executive director shall determine whether the closure expenditures are in accordance with the closure plan or the closure requirements, and if so, he shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the cost of closure will be significantly greater than the face amount of the policy, he may withhold reimbursement of such amounts as he deems prudent until he determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain general financial assurance requirements for the facility. If the executive director does not instruct the insurer to make such reimbursements, he shall provide the owner or operator with a detailed written statement of reasons.

(h) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy by the owner or operator as specified in Subchapter A of this chapter. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(i) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the mechanism of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(j) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(1) the executive director deems the facility abandoned; or

(2) the registration or permit expires, is terminated, or revoked, or a new or renewal registration or permit is denied; or

(3) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction; or

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(5) the premium due is paid.

§37.251. Financial Test for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a financial test or a financial test and corporate guarantee which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) net working capital and tangible net worth each at least six times the sum of the current closure cost estimate, liability coverage requirements, and any other financial assurance obligations under the Texas Natural Resource Conservation Commission (TNRCC) or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least $10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current closure cost estimate, liability coverage requirements, and any other financial assurance obligations under the TNRCC or other federal or state environmental regulations assured by a financial test;

(2) the owner or operator must have:

(A) a current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth at least six times the sum of the current closure cost estimate and liability coverage requirements and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least $10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current closure cost estimates, liability coverage requirements, and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identical to the wording specified in §37.351 of this title (relating to Financial Test). If an owner or operator is using the financial test to demonstrate both assurance for closure, as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure) and liability coverage, he must submit the letter specified the Financial Test for Liability, Part B in §37.651 of this title (relating to Financial Test for Liability) to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title is not required; and

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) he has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure, he found such amounts to be in agreement.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator must send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, he shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

§37.261. Corporate Guarantee for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test for Closure). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee for Closure). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure of the facility covered by the corporate guarantee in accordance with the closure plan or the closure requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund for Closure) in the name of the owner or operator;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts;

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

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

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Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
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Subchapter D. Wording of the Mechanisms for Closure

30 TAC §§37.301, 37.311, 37. 321, 37.331, 37.341, 37.351, 37.361

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.301. Trust Agreement for Closure.

(a) A trust agreement for a closure trust fund, as specified in §37.201 of this title (relating to Trust Fund for Closure), must be worded as specified in Figure 1: Trust Agreement, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure 1: 30 TAC §37.301(a)

(b) Certification of Acknowledgment is the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in §37.201 of this title.
Figure 2: 30 TAC §37.301(b)

§37.311. Payment Bond.

A surety bond guaranteeing payment for closure, as specified in §37.211 of this title (relating to Surety Bond Guaranteeing Payment for Closure), must be worded as in the Payment Bond for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.311

§37.321. Performance Bond.

A surety bond guaranteeing performance for closure, as specified in §37.221 of this title (relating to Surety Bond Guaranteeing Performance for Closure), must be worded as in the Performance Bond for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.321

§37.331. Irrevocable Standby Letter of Credit.

An irrevocable standby letter of credit for closure, as specified in §37.231 of this title (relating to Irrevocable Standby Letter of Credit for Closure), must be worded as in the Irrevocable Standby Letter of Credit for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.331

§37.341. Certificate of Insurance.

A certificate of insurance for closure, as specified in §37.241 of this title (relating to Insurance for Closure), must be worded as in the Certificate of Insurance for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.341

§37.351. Financial Test.

A letter from the chief financial officer for closure, as specified in §37.251 of this title (relating to Financial Test for Closure) must be worded as in the Financial Test for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.351

§37.361. Corporate Guarantee for Closure.

A corporate guarantee for closure as specified in §37.261 of this title (relating to Corporate Guarantee for Closure) must be worded as in the Corporate Guarantee for Closure, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis material deleted.
Figure: 30 TAC §37.361

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

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Texas Natural Resource Conservation Commission
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Subchapter E. Financial Assurance Requirements for Liability Coverage

30 TAC §§37.400, 37.401, 37.411

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.400. Applicability.

An owner or operator required by this chapter to establish financial assurance for sudden liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility must, at a minimum, meet the requirements of this subchapter.

§37.401. Liability Requirements for Sudden Accidental Occurrences.

(a) An owner or operator shall establish liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator shall have and maintain liability coverage for sudden accidental occurrences in the amount specified in this chapter, exclusive of legal defense costs. The owner or operator shall choose from one or more mechanisms as specified in Subchapter F of this chapter (relating to Financial Assurance Mechanisms for Liability) to meet the liability requirements for sudden accidental occurrences.

(b) An owner or operator shall notify the executive director in writing within 30 days:

(1) whenever a claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial assurance mechanism authorized in Subchapter F of this chapter; or

(2) whenever a Certification of Valid Claim for bodily injury or property damages caused by a sudden accidental occurrence arising from the operation of a facility is entered between the owner or operator and third-party claimant for liability coverage under Subchapter F of this chapter; or

(3) whenever a final court order establishing a judgment for bodily injury or property damage caused by a sudden accidental occurrence arising from the operation of a facility is issued against the owner, operator, or a financial assurance mechanism that is providing financial assurance for liability coverage under Subchapter F of this chapter.

§37.411. Adjustments to the Level of Liability Coverage.

If the executive director determines that the level of financial responsibility required by §37.401 of this title (relating to Liability Requirements for Sudden Accidental Occurrences) are not consistent with the degree and duration of risk associated with the facility or group of facilities, the executive director may adjust the level of financial responsibility required under §37.401 of this title as may be necessary to protect human health and the environment. An owner or operator must furnish to the executive director, within 30 days, any information which the executive director requests to determine whether cause exists for such adjustments of level of coverage. Any adjustment to financial assurance of the level for a facility that has a permit or registration will be treated as a permit or registration modification, unless the rule changes the amount required.

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

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Subchapter F. Financial Assurance Mechanisms for Liability

30 TAC §§37.501, 37.511, 37.521, 37.531, 37.541, 37.551

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.501. Trust Fund for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing a fully-funded trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed duplicate of the trust agreement to the executive director.

(b) The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.601(a) of this title (relating to Trust Agreement for Liability), including a formal certification of acknowledgment as specified in §37.601(b) of this title.

(d) The trust fund for liability shall be funded for the full amount of the liability coverage to be provided by the trust before it may be relied upon to satisfy the requirements of financial assurance for liability. If at any time after the trust is created the amount of funds in the trust is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the trust, shall either add sufficient funds to the trust to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance mechanism as specified in this subchapter to cover the difference. For purposes of this section, "the full amount of liability coverage to

be provided" means the amount of coverage for sudden accidental occurrences required to be provided less the amount of liability coverage being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(e) If the value of the trust fund is greater than the total amount of the required liability coverage, the owner or operator may submit a written request to the executive director for release of the amount in excess of the required liability coverage.

(f) If an owner or operator substitutes other financial assurance as specified in this subchapter for all or part of the trust fund, he may submit a written request to the executive director for release of the amount in excess of the required liability coverage as covered by the trust fund.

(g) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (e) or (f) of this section, the executive director, if he approves the request, shall instruct the trustee in writing to release to the owner or operator such funds.

§37.511. Surety Bond Guaranteeing Payment for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the bond to the executive director.

(b) The surety company issuing the bond shall be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.611 of this title (relating to Payment Bond for Liability).

(d) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to satisfy a third party liability claim as guaranteed by the bond.

(e) The penal sum of the bond must be in an amount, sufficient to satisfy the requirements for which financial assurance for liability is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidence by the return receipts.

§37.521. Irrevocable Standby Letter of Credit for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by establishing an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose letter of credit operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.621 of this title (relating to Irrevocable Letter of Credit for Liability).

(d) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(e) The irrevocable standby letter of credit must be issued in an amount sufficient to satisfy the requirements for which financial assurance is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the amount of the letter of credit plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this subchapter and obtain written approval of such assurance from the executive director.

§37.531. Insurance for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements), and submitting a signed duplicate original of the endorsement or certificate of insurance to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.631 of this title (relating to Certificate of Insurance for Liability); or the wording of the

endorsement must be identical to the wording specified in §37.641 of this title (relating to Endorsement for Liability).

(d) The insurance policy shall be amended by attachment of the Liability Endorsement or evidenced by a Certificate of Liability Insurance. If requested by the executive director, the owner or operator shall provide a signed duplicate original of the insurance policy.

(e) The insurance policy must be issued for a face amount at least sufficient to satisfy the requirements for which financial assurance for liability is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the face amount plus the amount of the combined mechanism(s) must be at least equal to the required liability coverage.

(f) The insurance policy must guarantee that funds shall be available whenever needed to fulfill obligations of the insured under this chapter. Under the terms of the policy, the insurer shall become liable on the insurance obligation when the owner or operator fails to satisfy a third party liability claim as guaranteed by the policy. The policy shall also guarantee that when the third party claimant provides a valid certificate of claim for payment, the insurer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(g) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy by the owner or operator as specified in Subchapter A of this chapter. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the mechanism of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return of receipts.

(i) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(1) the executive director deems the facility abandoned; or

(2) the registration or permit expires, is terminated, or revoked or a new or renewal registration or permit is denied; or

(3) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction; or

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(5) the premium due is paid.

§37.541. Financial Test for Liability.

(a) An owner or operator may satisfy the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by demonstrating that he passes a financial test which conforms to the requirements of this section, in addition to the requirements specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) tangible net worth of at least $10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(2) the owner or operator must have:

(A) a current rating for the owner's or operator's most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth of at least $10 million; and

(C) assets in the United States amounting to either:

(i) at least 90% of his total assets; or

(ii) at least six times the amount of liability coverage to be demonstrated by this test.

(c) To demonstrate that the owner or operator meets this test, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer and worded as specified in the Financial Test for Liability, Part A, §37.651 of this title (relating to Financial Test for Liability). If an owner or operator is using the financial test to demonstrate both assurance for closure, as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure), and liability coverage, he must submit the letter specified in the Financial Test for Liability, Part B, §37.651 of this title to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title (relating to Financial Test) is not required; and

(2) a copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) he has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure, he found such amounts to be in agreement.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator shall send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, he shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice shall be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall provide alternate financial assurance as specified in this section within 30 days after notification of the disallowance.

§37.551. Corporate Guarantee for Liability.

(a) An owner or operator may meet the requirements of financial assurance for liability as specified in Subchapter E of this chapter (relating to Financial Assurance Requirements for Liability Coverage) by obtaining a written guarantee for liability coverage, hereinafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapter A of this chapter (relating to General Financial Assurance Requirements).

(b) The guarantor must be the direct or higher-tier parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.541 of this title (relating to Financial Test for Liability). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.661 of this title (relating to Corporate Guarantee). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.541(c) of this title.

(d) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to satisfy a judgement based on a determination of liability for bodily injury or property damage to third parties caused by sudden accidental occurrences, arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor shall do so up to the limits of coverage;

(2) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

(e) In the case of corporation incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(1) the state in which the guarantor is incorporated; and

(2) each state in which a facility covered by the guarantee is located have submitted a written statement to the Unites States Environmental Protection Agency (EPA) that a guarantee executed as described in this section and §37.661 of this title (relating to Corporate Guarantee) is a legally valid and enforceable obligation in that state.

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

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Subchapter G. Wording of the Mechanisms for Liability

30 TAC §§37.601, 37.611, 37.621, 37.631, 37.641, 37.651, 37.661

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.601. Trust Agreement for Liability.

(a) A trust agreement for a liability trust fund, as specified in §37.501 of this title (relating to Trust Fund for Liability), must be worded as specified in Figure 1: Trust Agreement, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted and wherever closure information appears within braces that information shall be deleted.
Figure 1: 30 TAC §37.601(a)

(b) Certification of Acknowledgment is the certification of acknowledgment which must accompany the trust agreement for a trust fund as specified in this section.
Figure 2: 30 TAC §37.601(b)

§37.611. Payment Bond for Liability.

A surety bond guaranteeing payment for liability, as specified in §37.511 of this title (relating to Surety Bond Guaranteeing Payment for Liability), must be worded as in the Payment Bond for Liability, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.611

§37.621. Irrevocable Letter of Credit for Liability.

An irrevocable standby letter of credit for liability, as specified in §37.521 of this title (relating to Irrevocable Standby Letter of Credit for Liability), must be worded as in the Irrevocable Standby Letter of Credit for Liability, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.621

§37.631. Certificate of Insurance for Liability.

A certificate of liability insurance, as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as in the Certificate of Insurance for Liability, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.631

§37.641. Endorsement for Liability.

A liability endorsement as specified in §37.531 of this title (relating to Insurance for Liability), must be worded as in the Endorsement for Liability, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.641

§37.651. Financial Test for Liability.

A letter from the chief financial officer for liability, as specified in §37.541 of this title (relating to Financial Test for Liability) must be worded as in the Financial Test for Liability, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.651

§37.661. Corporate Guarantee.

A corporate guarantee for liability as specified in §37.551 of this title (relating to Corporate Guarantee for Liability) must be worded as in the Corporate Guarantee for Liability, except that instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.
Figure: 30 TAC §37.661

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

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Subchapter J. Financial Assurance for Permitted Compost Facilities

30 TAC §§37.901, 37.911, 37.921, 37.931

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.901. Applicability.

This subchapter applies to permitted compost facilities required to provide evidence of financial assurance under §332.47 of this title (relating to Permit Application Preparation).

§37.911. Definitions.

For definitions of compost facilities and other definitions not found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), see Chapter 332, Subchapters A and D of this title (relating to General Information and Operations Requiring a Permit), §332.2 of this title (relating to Definitions), and §332.41 of this title (relating to Definition, Requirements, and Application Processing for a Permit Facility).

§37.921. Financial Assurance Requirements for Closure of a Compost Facility.

An owner or operator of a permitted compost facility subject to this subchapter shall establish financial assurance for the closure of the facility that meets the requirements of this section, in addition to Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure; Financial Assurance Mechanisms for Closure; and Wording of the Mechanisms for Closure).

§37.931. Financial Assurance Mechanisms Available for Permitted Compost Facility.

An owner or operator subject to this subchapter may utilize a(n):

(1) trust fund (fully-funded or pay-in trust);

(2) surety bond guaranteeing payment;

(3) surety bond guaranteeing performance;

(4) irrevocable letter of credit;

(5) insurance;

(6) financial test; or

(7) corporate guarantee, as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) to demonstrate financial assurance for closure.

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610219
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239-1966

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Subchapter K. Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, and Reuse Facilities

30 TAC §§37.1001, 37.1011, 37.1021

The new sections are proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed new sections implement Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§37.1001. Applicability.

This subchapter applies to Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K of this title (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil).

§37.1011. Financial Assurance Requirements for Closure of Class A and B Facilities.

An owner or operator of a Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facility subject to this subchapter shall establish financial assurance for the closure the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, B, C, and D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure; Financial Assurance Mechanisms for Closure; and Wording of the Mechanisms for Closure).

(1) The financial assurance shall be in the amount specified in the cost estimate for closure pursuant to §334.508 of this title (relating to Closure Requirements Applicable to Class A and Class B Facilities).

(2) An owner or operator subject to this subchapter may utilize a(n):

(A) fully-funded trust;

(B) surety bond guaranteeing payment;

(C) surety bond guaranteeing performance;

(D) irrevocable standby letter of credit;

(E) insurance;

(F) financial test; or

(G) corporate guarantee, as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure) to demonstrate financial assurance for closure.

(3) Within 60 days after receiving certifications from the owner or operator and an independent qualified hydro geologist, geologist, or independent registered professional engineer that closure has been completed in accordance with the approved closure plan, the executive director shall notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for closure, as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure) for that facility, unless the executive director has reason to believe that closure has not been in accordance with the approved closure plan.

§37.1021. Liability requirements for Class A and B Facilities.

An owner or operator of a Class A or B petroleum-substance contaminated soil storage, treatment, or reuse facility subject to this subchapter shall establish financial assurance for sudden liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility that meets the requirements of this section, in addition to the requirements specified under Subchapters A, E, F, and G of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Liability Coverage; Financial Assurance Mechanisms for Liability; and Wording of the Mechanisms for Liability).

(1) An owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs.

(2) An owner or operator subject to this subchapter may utilize a(n):

(A) fully-funded trust;

(B) surety bond guaranteeing payment;

(C) irrevocable standby letter of credit;

(D) insurance;

(E) financial test; or

(F) corporate guarantee, as specified in Subchapter F of this chapter (relating to Financial Assurance Mechanisms for Liability) to demonstrate financial assurance for sudden liability.

(3) Within 60 days after receiving certifications from the owner or operator and an independent qualified hydro geologist, geologist, or independent registered professional engineer, that closure has been accomplished in accordance with the approved closure plan, the executive director shall notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for sudden liability coverage, as specified in §37.401 of this title (relating to Liability Requirements for Sudden Accidental Oc-

currences), and by this section for that facility, unless the executive director has reason to believe that closure has not been in accordance with the approved closure plan.

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

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Kevin McCalla
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Chapter 210. Use of Reclaimed Water

The Texas Natural Resource Conservation Commission (commission) proposes new §§210.1-210.9, 210.21-210.25, 210.31-210.36, and 210.41-210.46, concerning the use of reclaimed water (i.e., treated wastewater); general requirements for producers, providers, and users of reclaimed water; quality criteria; specific uses and reporting requirements for reclaimed water; and alternative and pre-existing reclaimed water systems.

The purpose of the proposed new sections is to clarify, strengthen, and update requirements relating to quality criteria and design and operational requirements. The proposed new chapter will achieve consistency in the renumbering system for all water related rules to be contained in the 200 series under Title 30 of the Texas Administrative Code. The proposed new requirements will also continue to encourage and facilitate the reuse of treated domestic wastewater effluent from municipal wastewater treatment facilities for beneficial purposes to assist in the conservation of surface and groundwater; ensure the protection of public health; to protect the quality of surface and ground water; and to help ensure an adequate supply of water for present and future needs.

The proposed new sections establish criteria for authorization of reclaimed water activities which adequately protect the health of persons who might normally come into contact with reclaimed water, will protect against adverse effects from reclaimed water should crops be irrigated with reclaimed water, and will ensure that the conveyance, storage, and use of reclaimed water will not pose adverse effects upon surface water, ground water, and soil resources. These sections will not modify in any way the requirement for the producer, provider and/or user to hold the appropriate water rights allowing the use of state water. These sections do not affect any current requirements necessitating the need for a water right or amendment, if applicable to a particular reclaimed water use or activity.

The proposed new §§210.1-210.9 establish general provisions applicable to reclaimed water producers, providers, and users. These sections are contained together in Subchapter A (relating to General Provisions).

Proposed new §210.1, relating to Applicability, delineates which entities are subject to the requirements of Chapter 210.

Proposed new §210.2, relating to Purpose and Scope, specifies the purpose of Chapter 210 and delineates the relationship of the chapter to water rights and wastewater discharge permits issued by the commission.

Proposed new §210.3, relating to Definitions, defines terms that are used throughout Chapter 210.

Proposed new §210.4, relating to Notification, provides that the executive director must receive notification and must approve proposed reclaimed water uses, establishes who must submit the notifications, what information must be included in the notifications, and also specifies when additional notification to the executive director is necessary.

Proposed new §210.5, relating to Permits and Authorizations Required, describes how reclaimed water and sewage sludge management are authorized by either the approval of the executive director or by permit issued under Chapter 305 of this title (relating to Consolidated Permits).

Proposed new §210.6, relating to Responsibilities, establishes the responsibilities under this chapter for producers, providers, and users of reclaimed water.

Proposed new §210.7, relating to Transfer of Reclaimed Water, clarifies that reclaimed water may only be provided to a user upon demand to ensure its proper application and use.

Proposed new §210.8, relating to Restrictions, specifies that Chapter 210 does not convey any property right or grant any exclusive privilege.

Proposed new §210.9, relating to Enforcement, specifies that a person or entity involved in a reclaimed water activity which is the subject of this chapter is subject to enforcement action including remedial measures and the assessment of administrative penalties. Civil penalties and injunctive relief may also be sought by the commission.

The proposed new §§210.21-210.25 will establish general requirements, storage requirements, irrigation requirements, and design criteria for reclaimed water systems. These sections are contained together in Subchapter B (relating to General Requirements for Producers, Providers, and Users of Reclaimed Water).

Proposed new §210.21, relating to Applicability, establishes which entities or persons are subject to the requirements of Subchapter B.

Proposed new §210.22, relating to General Requirements, specifies particular prohibitions and requirements which are applicable to providers, users, or producers of reclaimed water.

Proposed new §210.23, relating to Storage Requirements for Reclaimed Water, specifies particular lining requirements and other criteria applicable to holding ponds utilized for the storage of reclaimed water. These requirements are established primarily for the protection of ground water quality.

Proposed new §210.24, relating to Irrigation Using Reclaimed Water, specifies particular requirements and guidelines which must be met by persons or entities when reclaimed water is used for irrigation.

Proposed new §210.25, relating to Special Design Criteria for Reclaimed Water Systems, establishes design criteria and labeling requirements for piping systems used in the distribution of reclaimed water.

The proposed new §§210.31-210.36 will establish beneficial uses for reclaimed water with corresponding quality criteria, monitoring, reporting, and record keeping requirements for the protection of human health and water in the state. Such uses may include, but are not limited to, irrigation, fire protection, toilet flushing, aesthetic enjoyment, and industrial and utility operations. These sections are contained together in Subchapter C (relating to Quality Criteria and Specific Uses for Reclaimed Water).

Proposed new §210.31, relating to Applicability, specifies which entities or persons must comply with Subchapter C.

Proposed new §210.32, relating to Specific Uses of Reclaimed Water, establishes two categories of use for reclaimed water based upon the potential for human contact with either the reclaimed water or with food crops irrigated with reclaimed water.

Proposed new §210.33, relating to Quality Standards for Using Reclaimed Water, specifies the levels of pollutants and the bacteriological quality that must be attained before use of reclaimed water. Two levels of quality are specified which correspond to the specific uses of reclaimed water.

Proposed new §210.34, relating to Sampling and Analysis, describes required reclaimed water sampling and analysis which will assure the quality of the reclaimed water after its treatment.

Proposed new §210.35, relating to Guidelines for Certain Distribution Systems, includes guidelines for the proper operation of certain distribution systems for reclaimed water conveyance and the maintenance of bacteriological quality.

Proposed new §210.36, relating to Record Keeping and Reporting, establishes the responsibility of record keeping and reporting required of providers, users, and producers of reclaimed water.

The proposed new §§210.41-210.46 will establish notification and approval protocols for authorization of certain alternative reclaimed water activities not specifically authorized under the rules and certain pre-existing reclaimed water systems. These sections are contained together in Subchapter D (relating to Alternative and Pre-existing Reclaimed Water Systems).

Proposed new §210.41, relating to Applicability of Reclaimed Water Proposals, specifies the conditions under which that a provider or user may operate an alternative reclaimed water system.

Proposed new §210.42, relating to Request to Executive Director, specifies that alternative reclaimed water systems may be approved by the executive director upon the written application of the provider or user.

Proposed new §210.43, relating to Action on Alternative Reclaimed Water Proposals, provides the criteria to be used by the executive director in the review and action on a request to use an alternative reclaimed water systems.

Proposed new §210.44, relating to Pre-existing Reclaimed Water Systems, specifies how certain reclaimed water systems which have not yet received commission authorization may be approved by the executive director.

Proposed new §210.45, relating to Action on Pre-existing Reclaimed Water Proposals, provides the criteria to be used by the executive director in the review and action on a request to continue to use a pre-existing reclaimed water system.

Proposed new §210.46, relating to Denial of Request, specifies the criteria under which the executive director may deny a request for approval of an alternative or pre-existing reclaimed water system.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years these sections as proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the sections. There are no significant implications anticipated for state government. Local governments affected by the provisions will realize potential cost savings as a result of adoption of the sections. The cost savings for local governments will result from the opportunity to avoid certain permit amendment requirements as a condition of the use of reclaimed water. In addition, the options for the use of reclaimed water afforded by this rule will reduce the demand for and the treatment cost of water provided through public drinking water supply systems. These potential cost savings will vary for individual permit holders and will depend on the extent to which wastewaters are reclaimed under these sections and the current costs of treating and supplying water within each jurisdiction.

Mr. Minick has also determined that for the first five years these sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be more cost-effective regulation of the use of reclaimed wastewaters, the more efficient use of public water supplies, and enhanced conservation of surface and ground water resources. There are no significant fiscal implications anticipated for small businesses. Holders of municipal or domestic wastewater permits will potentially realize the cost savings attributed to local governments. There are no economic costs anticipated for any person required to comply with the sections as proposed.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the proposed rule is to ease the burden on the commission and those regulated by the rule in authorizing the use of reclaimed water. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules.

A public hearing on the proposal will be held August 13, 1996, at 10:00 a.m. in Room 2210 of commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion within the audience will not occur during the hearing; 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.

Written comments on the proposal should refer to Rule Log Number 95121-210-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Written comments must be received by 5:00 p.m. 30 days from the date of publication of this proposal in the *Texas Register*. Such comments will not receive individual responses but, rather, will be addressed in the preamble of the adopted rules and published in the *Texas Register* . For further information concerning this proposal, please contact Louis C. Herrin, III, Wastewater Permits Section, Agriculture and Watershed Management Division at (512) 239-5552.

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.

Subchapter A. General Provisions

30 TAC §§210.1-210.9

The sections are proposed under the Texas Water Code, §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state.

There are no other rules, codes or statutes that will be affected by this proposal.

§§210.1. Applicability.

This chapter applies to the reclaimed water producer, provider, and user. If the entity which is the producer of the reclaimed water is the same as the user, then the use of reclaimed water is permissible only if the use occurs after the wastewater has been treated in accordance with the producer's wastewater permit and the permit provides for an alternative means of disposal during times when there is no demand for the use of the reclaimed water. This chapter does not apply to treatment or disposal of wastewater permitted by the commission in accordance with the requirements of Chapter 305 of this title (relating to Consolidated Permits). This chapter does not apply to those systems authorized under Chapter 285 of this title (relating to On-Site Wastewater Treatment) which utilizes surface irrigation as an approved disposal method.

§§210.2. Purpose and Scope.

(a) The purpose of this chapter is to establish general requirements, quality criteria, design, and operational requirements for the beneficial use of reclaimed water which may be substituted for potable water and/or raw water. As defined and specified in this chapter, the requirements must be met by producers, providers, or users of reclaimed water. Specific use categories are defined with corresponding reclaimed water quality requirements. These criteria are intended to allow the safe utilization of reclaimed water for conservation of surface and ground water; to ensure the protection of public health; to protect ground and surface waters; and to help ensure an adequate supply of water resources for present and future needs.

(b) The commission has defined other types of reclaimed water activity in separate regulations, including §309.20 of this title (relating to Land Disposal of Sewage Effluent) and §297.1 of this title (relating to Definitions). These regulations do not modify those definitions. The term reclaimed water is limited in scope for the purpose of this rule as defined in §210.3 of this title (relating to Definitions).

(c) Approval by the executive director of a reclaimed water use project under this chapter does not affect any existing water rights. If applicable, a reclaimed water use authorization in no way affects the need of a producer, provider and /or user to obtain a separate water right authorization from the commission.

(d) Reclaimed water projects approved under this chapter do not require a new or amended waste discharge permit from the commission except as provided in §210.5 of this title (relating to Permits Required). Persons who desire to develop projects not specifically authorized by this chapter may seek authorization pursuant to provisions of Subchapter D or apply for a new or amended waste discharge permit under Chapter 305 of this title (relating to Consolidated Permits).

§§210.3. Definitions.

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

Beneficial use-The use of the amount of water which is economically necessary for the purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.

BOD_5-Five day biochemical oxygen demand.

$CBOD_5$-Five day carbonaceous biochemical oxygen demand.

CFU-Colony forming units.

Domestic wastewater-Waste and wastewater from humans or household operations that are discharged to a wastewater collection system or otherwise enters a treatment works. Also, this includes waterborne human waste and waste from domestic activities such as washing, bathing, and food preparation, including greywater and blackwater, that is disposed in an on-site wastewater system as defined in Chapter 285 of this title (relating to On-Site Wastewater Treatment).

DRASTIC-A classification system for comparing land units on the basis of their vulnerability to ground-water pollution, a detailed description of which is found in Appendix 1 of this chapter.

Figure 1: 30 TAC §210.3

Edwards Aquifer -That portion of an arcuate belt of porous, water bearing, predominantly carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Comal, Hays, Travis, and Williamson counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devil's River Limestone, Person Formation, Kainer Formation, Edwards Formation, and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally. (See Chapter 313 of this title (relating to Edwards Aquifer))

Edwards Aquifer Recharge zone-Generally, that area where the stratigraphic units constituting the Edwards Aquifer crop out, and including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures,

or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area designated as such on official maps located in the offices of the commission and the Edwards Underground Water District. (See Chapter 313 of this title (related to Edwards Aquifer))

Food crop -Any crops intended for direct human consumption.

Initial holding pond-An impoundment which first receives reclaimed water from a producer at the quality levels established by this chapter, not including subsequent holding ponds.

Geometric mean -The nth root of the product of all measurements made in a particular period of time, for example in a month's time, where n equals the number of measurements made. In the alternative, the geometric mean can also be computed as the antilogarithm of the sum of the logarithm of each measurement made. Where any measurement using either computation method equals zero, it must be substituted with the value of one.

l-Liter.

Landscape impoundment-Body of reclaimed water which is used for aesthetic enjoyment or which otherwise serves a function not intended to include contact recreation.

Leak detection system -A system or device designed, constructed, maintained, and operated with a pond that is capable of immediately detecting a release of leachate or reclaimed water that migrates through a liner. The system may typically include a leachate collection system along with either leak detection sensors or view ports.

Municipal wastewater -Waste or wastewater discharged into a publicly owned or a privately owned sewerage treatment works primarily consisting of domestic waste.

mg/l-Milligram per liter.

NTU-Nephelometric turbidity units.

Nuisance-Any distribution, storage, or use of reclaimed water that is or may tend to be injurious to or which adversely affects human health or welfare, animal life, vegetation, or property, or which interferes with the normal use and enjoyment of animal life, vegetation, or property.

On-channel pond-An impoundment wholly or partially within a definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. The water may flow continuously or intermittently, and if intermittently, with some degree of regularity, dependent on the characteristics of the source or sources.

Permit or permitted-A written document issued by the commission or executive director in accordance with Chapter 305 of this title (relating to Consolidated Permits) which, by its conditions, may authorize the permittee to construct, install, modify, or operate, in accordance with stated limitations, a specified facility for waste discharge, including a wastewater discharge permit.

Pond system-Wastewater facility in which primary treatment followed by stabilization ponds are used for secondary treatment and in which the ponds have been designed and constructed in accordance with applicable design criteria. (See Chapter 317 of this title (relating to the Design Criteria for Sewerage Systems))

Producer-A person or entity that produces reclaimed water by treating domestic wastewater, in accordance with a permit or other authorization of the Agency , to meet the quality criteria established in this chapter.

Provider -A person or entity that distributes reclaimed water to a user(s) of reclaimed water. For purposes of this chapter, the reclaimed water provider may also be a reclaimed water producer.

Reclaimed water-Domestic or municipal wastewater which has been treated to a quality suitable for a beneficial use, pursuant to the provisions of this chapter and other applicable rules and permits.

Restricted landscaped area -Land which has vegetative cover to which public access is controlled in some manner. Access may be controlled by either legal means (e.g. state or city ordinance) or controlled by some type of physical barrier (e.g., fence or wall). Example of such areas are: golf courses; cemeteries; roadway rights-of-way; median dividers.

Restricted recreational impoundment-Body of reclaimed water in which recreation is limited to fishing, boating and other non-contract recreational activities.

Single grab sample-An individual sample collected in less than 15 minutes.

Spray irrigation -Application of finely divided water droplets using artificial means.

Subsequent holding pond-A pond or impoundment which receives reclaimed water from an initial holding pond where the quality of the water changes after management in the initial holding pond, due to factors which may include:

(A) the addition of water occurs such as contributions from surface water or ground water sources, but not including contributions of reclaimed water, domestic wastewater, or municipal wastewater;

(B) some type of utilization of the reclaimed water for a beneficial use occurs; or

(C) commingling of reclaimed water with surface water runoff where it occurs between storage in an initial holding pond and the subsequent holding pond.

Surface irrigation-Application of water by means other than spraying so that contact between the edible portion of any food crop and the irrigation water is prevented.

Type I reclaimed water use-Use of reclaimed water where contact between humans and the reclaimed water is likely.

Type II reclaimed water use-Use of reclaimed water where contact between humans and the reclaimed water is unlikely.

Unrestricted landscaped area-Land which has had its plant cover modified and access to which is uncontrolled. Examples of such areas are: parks; school yards; greenbelts; residences.

User-Person or entity utilizing reclaimed water for a beneficial use, in accordance with the requirements of this chapter. A reclaimed water user may also be a producer or a provider.

§§210.4. Notification.

(a) Before providing reclaimed water to another for a use allowable under this chapter, the reclaimed water provider shall notify

the executive director and obtain written approval to provide the reclaimed water. The notification shall include:

(1) a description of the intended use of the reclaimed water, including quantity, quality, origin, and location and purpose of intended use;

(2) a clear indication of the means for compliance with this chapter, including documentation that a user will be apprised of their responsibilities under this chapter as a part of the water supply contract or other binding agreement;

(3) evidence in a water supply contract or other binding agreement of the provider's authority to terminate reclaimed water use that is noncompliant with this chapter; and

(4) an operation and maintenance plan that is required under ordinance or is to be a part of the water supply contract or other binding agreement, where applicable, and which shall contain, as a minimum, the following:

(A) a labeling and separation plan for the prevention of cross connections between reclaimed water distribution lines and potable water lines;

(B) the measures that will prevent unauthorized access to reclaimed water facilities (eg., secured valves);

(C) procedures for monitoring reclaimed water transfers and use;

(D) steps the user must utilize to minimize the risk of inadvertent human exposure;

(E) schedules for routine maintenance;

(F) a plan for carrying out provider employee training and safety relating to reclaimed water treatment, distribution, and management; and

(G) contingency plan for remedy of system failures, unauthorized discharges, or upsets.

(b) If the provider is not the producer, a description of the origin of the reclaimed water, its quality based upon the parameters contained in the underlying waste discharge permit(s), and a signed agreement from the producer authorizing the transfer of the reclaimed water to the provider. If applicable, a reclaimed water provider or user may need to obtain a separate water right authorization from the commission.

(c) A producer who chooses to use reclaimed water for a beneficial use only within the boundaries of a wastewater treatment facility permitted by the commission, may do so without notification otherwise required by this section. In such instances, the producer is still required to comply with all applicable requirements of this chapter pertaining to the reclaimed water use.

(d) If effluent is to be used for irrigation within the Edwards Aquifer recharge zone, plans and specifications for the disposal system must be submitted to the executive director for review and approval prior to construction of the facility in accordance with Chapter 313 of this title (relating to Edwards Aquifer).

(e) Major changes from a prior notification for use of reclaimed water must be approved by the executive director. A major change includes:

(1) a change in the boundary of the approved service area:

(2) the addition of a new producer;

(3) major changes in the intended use, such as conversion from irrigation of a golf course to residential irrigation; or

(4) changes from either Type I or Type II uses to the other

§§210.5. Authorization For The Use of Reclaimed Water.

(a) Prior to discharging any reclaimed water to the waters in the state, the provider or user shall obtain a permit from the commission in accordance with the requirements of Chapter 305 of this title (relating to Consolidated Permits) except as provided for by §210.22(e) of this title (relating to General Requirements).

(b) The executive director may require a reclaimed water user to apply for and obtain a permit to utilize reclaimed water in order to take into account any potential adverse impacts upon human health, soil and ground water resources, or aquatic life that these rules do not adequately address.

(c) For purposes of this chapter, no permit issued pursuant to Chapter 305 of this title (relating to Consolidated Permits) will be required for additional treatment required to meet the quality standards of §210.33 of this title (relating to Quality Standards for Using Reclaimed Water), unless such additional treatment results in a discharge of wastewater into waters in the state.

(d) A reclaimed water provider or user who accepts effluent meeting the Type II quality criteria and that must also meet the Type I quality criteria for a proposed use must provide additional treatment for the proposed new use. The additional manner of treatment must be authorized by the executive director. The provider or user must notify and be granted an authorization from the executive director prior to engaging in such activity. Examples of such additional treatment may include processes for disinfection or filtration of the reclaimed water. Such authorization may be granted by the executive director after review of the proposed plans and specifications submitted to the executive director for the additional treatment. This request for authorization may be submitted to the executive director along with the notification required by §210.4 of this title (relating to Notification).

(e) If a provider or user elects to treat reclaimed water supplied by the provider or producer, respectively, to a quality better than the minimum standards of this chapter for the same use, such treatment does not require a permit or other additional authorization by the executive director.

(f) Any sewage sludge generated as a result of reclaimed water treatment undertaken pursuant to this section shall be managed in accordance with the requirements of Chapter 312 of this title (relating to Sludge Use, Disposal and Transportation).

§§210.6. Responsibilities.

The producer of reclaimed water will not be liable to the state or subject to enforcement for misapplication of reclaimed water by users, except as provided in this section. Both the reclaimed water provider and user have, but are not limited to, the following responsibilities:

(1) The reclaimed water provider, and producer if appropriate, shall:

(A) assure construction of reclaimed water distribution lines or systems in accordance with this chapter and in accor-

dance with §210.25 of this title (relating to Special Design Criteria for Reclaimed Water Systems);

(B) transfer reclaimed water of at least the minimum quality required by this chapter at the point of delivery to the user for the specified use;

(C) sample and analyze the reclaimed water and report such analyses in accordance with §§210.34 and 210.36(b) of this title (relating to Sampling and Analysis and Recordkeeping and Reporting, respectively);

(D) notify the executive director in writing within five (5) days of obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval; and

(E) not be found in violation of this chapter for the misuse of the reclaimed water by the user if transfer of such water is shut off promptly upon knowledge of misuse regardless of contract provisions.

(2) The reclaimed water user shall:

(A) use the reclaimed water in accordance with this chapter; and

(B) maintain and provide records as required by §210.36(a) of this title (relating to Recordkeeping and Reporting).

§§210.7. Transfer and Conveyance of Reclaimed Water.

Reclaimed water transferred from a provider to a user shall be done on a demand only basis in order that the water is not provided during times it cannot be beneficially used in accordance with this chapter. The reclaimed water user may refuse delivery of such water at any time. However, this section is not intended to change any obligation the user may have by contract or ordinance. All reclaimed water transferred to a user must be of at least the treatment quality for the use specified in §210.32 of this title (relating to Specific Uses of Reclaimed Water).

§§210.8. Restrictions.

This chapter does not convey or alter any property right and does not grant any exclusive privilege.

§§210.9. Enforcement.

If a person or entity fails to comply with the terms of this chapter, the executive director may require the entity to apply for and obtain a permit or permit amendment. The commission may also issue an enforcement order requiring remedial measures and the assessment of administrative penalties pursuant to §§26.019 and 26.136 of the Texas Water Code. The commission may also seek civil penalties and injunctive relief in a court of competent jurisdiction as provided by §26.123 of the Texas Water Code.

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

Issued in Austin, Texas, on July 15, 1996.

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Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4640

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Subchapter B. General Requirements for the Productions, Conveyance, and Use of Reclaimed Water

30 TAC §§210.21-210.25

The sections are proposed under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state and to establish and approve all general policy of the commission.

§§210.21. Applicability.

This subchapter establishes general requirements applicable to producers, providers, and users of reclaimed water. This subchapter also establishes requirements and specifications for transfer, storage, and irrigation using reclaimed water and design criteria of reclaimed water systems. Additionally, this subchapter establishes requirements and specifications necessary to minimize discharges of waste into or adjacent to waters in the state.

§§210.22. General Requirements.

(a) Reuse of untreated wastewater is prohibited.

(b) Food crops that may be consumed raw by humans shall not be spray irrigated. Food crops including orchard crops that will be substantially processed prior to human consumption may be spray irrigated. Other types of irrigation that avoid contact of reclaimed water with edible portions of food crops are acceptable.

(c) There shall be no nuisance conditions resulting from the distribution, the use, and/or storage of reclaimed water.

(d) Reclaimed water shall not be utilized in a way that degrades ground water quality to a degree adversely affecting its actual or potential uses.

(e) Reclaimed water managed in ponds for storage must be prevented from discharge into waters in the state, except for discharges directly resulting from rainfall events or in accordance with a permit issued by the commission. All other discharges are unauthorized. If any unauthorized overflow of a holding pond occurs causing discharge into or adjacent to waters in the state, the user or provider, as appropriate, shall report any noncompliance. A written submission of such information shall also be provided to the TNRCC regional office and to the Austin Office, Water Enforcement Section (MC-149), within five working days of becoming aware of the overflow. The written submission shall contain a description of the noncompliance and its cause; the potential danger to human health or safety, or the environment; the period of noncompliance, including exact dates and times; if the noncompliance has not been corrected, the anticipated time it is expected to continue; and, steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

§§210.23. Storage Requirements for Reclaimed Water.

(a) Except for authorized on-channel ponds, storage facilities for retaining reclaimed water prior to use shall not be located within the 5-year floodplain.

(b) Except as provided by subsection (e) of this section, all initial holding ponds must be lined in accordance with either subsection (c) or (d) of this section, as appropriate.

(c) All initial and subsequent holding ponds containing Type I and Type II effluent, located within the recharge zone of the Edwards Aquifer, as defined in Chapter 313 of this title (relating to Edwards Aquifer), and all initial holding ponds containing Type II effluent, located in a vulnerable area as defined by a rating of 110 or greater on the statewide *"Ground-Water Pollution Potential - General, Municipal, and Industrial Sources"* (DRASTIC) map (as shown Figure 1 of this chapter), shall conform to the following requirements:
Figure 1: 30 TAC §210.23(c)

(1) The ponds, whether constructed of earthen or other impervious material, shall be designed and constructed so as to prevent groundwater contamination;

(2) Soils used for pond lining shall be free from foreign material such as paper, brush, trees, and large rocks;

(3) All soil liners must be of compacted material, at least 24 inches thick, compacted in lifts no greater than 6 inches thick and compacted to 95 percent of Standard Proctor Density;

(4) Soil liners must meet the following particle size gradation and Atterberg limits:

(A) 30 percent or more passing a number 200 mesh sieve; and

(B) a liquid limit of 30 percent or greater; and a plasticity index of 15 or greater and have a permeability less than or equal to 1×10^{-7} cm/sec;

(5) Synthetic membrane linings shall have a minimum thickness of 40 mils with a leak detection system. In situ liners at least 24 inches thick meeting a permeability less than or equal to 1×10^{-7} cm/sec are acceptable alternatives;

(6) Certification shall be furnished by a Texas Registered Professional Engineer that the pond lining meets the appropriate criteria prior to utilization of the facilities; and

(7) Soil embankment walls shall have a top width of at least five feet. The interior and exterior slopes of soil embankment walls shall be no steeper than one foot vertical to three feet horizontal unless alternate methods of slope stabilization are utilized. All soil embankment walls shall be protected by a vegetative cover or other stabilizing material to prevent erosion. Erosion stops and water seals shall be installed on all piping penetrating the embankments.

(d) All initial holding ponds designed to contain Type I effluent, located outside of the recharge zone of the Edwards Aquifer, and Type II effluent, located in areas in the state not identified in subsection (c) of this section shall conform to the following requirements:

(1) The ponds, whether constructed of earthen or other impervious materials, shall be designed and constructed so as to prevent groundwater contamination;

(2) Soils used for pond lining shall be free from foreign material such as paper, brush, trees, and large rocks;

(3) All soil liners must be of compacted material, at least 24 inches thick, compacted in lifts no greater than 6 inches and material has a permeability less than or equal to 1×10^{-4} cm/sec;

(4) Synthetic membrane linings shall have a minimum thickness of 40 mils. In situ liners at least 24 inches thick meeting a permeability less than or equal to 1×10^{-4} cm/sec are are acceptable alternatives;

(5) Certification shall be furnished by a Texas Registered Professional Engineer that the pond lining meets the appropriate criteria prior to utilization of the facilities; and

(6) Soil embankment walls shall have a top width of at least five feet. The interior and exterior slopes of soil embankment walls shall be no steeper than one foot vertical to three feet horizontal unless alternate methods of slope stabilization are utilized. All soil embankment walls shall be protected by a vegetative cover or other stabilizing material to prevent erosion. Erosion stops and water seals shall be installed on all piping penetrating the embankments.

(7) An alternative method of pond lining which provides equivalent or better water quality protection than provided under this section may be utilized with the prior approval of the executive director.

(8) A specific exemption may be obtained from the executive director if, after the review of data submitted by the reclaimed water provider or user, as appropriate, the executive director determines containment of the reclaimed water is not necessary, considering:

(A) soil and geologic data, and ground water data, including its quality, uses, quantity and yield; and

(B) adequate demonstration that impairment of ground water for its actual or potential use will be prevented.

(e) Reclaimed water may be stored in leak-resistant, fabricated tanks.

(f) Subsequent holding ponds utilized for the receipt and storage of reclaimed water of a quality that could cause or causes a violation of a surface water quality standard or impairment of ground water for its actual or intended use will also be subject to the storage requirements of this section.

§§210.24. Irrigation Using Reclaimed Water.

(a) The reclaimed water user shall provide reasonable control of the application rates for reclaimed water applied to irrigation areas. These controls shall encourage the efficient use of reclaimed water and avoid excessive application of reclaimed water that results in surface runoff or excessive percolation below the root zone.

(b) The reclaimed water provider or user, as applicable shall determine and document typical irrigation demands for the proposed use based on type of vegetation and land area to be irrigated. As one alternative, a typical method for determining irrigation needs is shown in Table 1 of this section. However, other alternative methods may be used.
Figure 1: 30 TAC §210.24(b)

(c) The reclaimed water provider shall be responsible for conducting periodic audits of appropriate controls implemented by reclaimed water users. Other typical irrigation operational considerations that must be addressed include the following:

(1) Irrigation of Food Crops.

(A) Irrigation of edible crops that will be peeled, skinned, cooked, or thermally processed before consumption is allowed. Direct contact of the reclaimed water with such crops is allowed.

(B) Irrigation of citrus fruit is allowed. Direct contact of the reclaimed water with citrus is allowed.

(C) Irrigation of edible crops that will not be peeled, skinned, cooked, or thermally processed before consumption is allowed if an indirect application method is used which will preclude the direct contact with the reclaimed water. For instance, a ridge and furrow, drip irrigation, or a subsurface distribution system may be used to irrigate such above ground crops. However, these methods would not be suitable for crops such as carrots or radishes.

(D) Irrigation of edible crops that will not be peeled, skinned, cooked, or thermally processed before consumption that allows for direct contact of the reclaimed water on the crop is prohibited.

(2) Irrigation of pastures used by animals milked for human consumption shall be conducted in a manner to avoid contact of reclaimed water with such animals.

(3) Irrigation of landscaped areas:

(A) Application of reclaimed water on public access facilities shall be controlled by agreement with the reclaimed water provider or by local ordinance.

(B) Reclaimed water may not be used to fill swimming pools, hot tubs, wading pools, or other structures designed for contact recreation.

(d) General irrigation requirements.

(1) A provider or user designing or operating an irrigation system using reclaimed water is responsible for ensuring that reclaimed water overflow, crop stress, and undesirable soil contamination by a salt does not occur. To prevent such occurrences, the provider or user is required to consider, evaluate, and respond appropriately to the following factors as the need arises:

(A) Precipitation inputs to the water balance should utilize the average monthly precipitation based on past rainfall records.

(B) The consumptive use requirements (evapotranspiration losses) of the crop system should be developed on a monthly basis. The method of determining the consumptive use requirement shall be documented by the provider or user as a part of the water balance study and the records of the study maintained for possible commission review.

(C) A leaching requirement, calculated as shown in Table 1 of this section, shall be included in the water balance study when the total dissolved solids concentration of the reclaimed water presents the potential for developing excessive soil salinity buildup due to the long term operation of the irrigation system.

(2) The irrigation site must be maintained with a vegetative cover or be under cultivation during times when reclaimed water is being applied.

(3) The irrigation practices shall be designed so as to prevent incidental ponding or standing water except where local farming conditions and the accepted irrigation delivery systems and cropping patterns are such that, as an unavoidable consequence of such conditions, systems, and patterns, there will be standing water.

(4) Irrigation application rates and application times shall be developed so as to minimize "wet grass" conditions in unrestricted landscaped areas during the periods the area could be in use.

(5) Irrigation systems shall be designed so that the irrigation spray does not reach any privately-owned premises outside the designated irrigation area or reach public drinking fountains.

(6) There shall be no application of effluent when the ground is water saturated or frozen.

(7) Distribution systems must be designed to prevent operation by unauthorized personnel.

(8) Irrigation operations shall be managed in a manner to minimize the inadvertent contact of reclaimed water with humans.

(9) Operational or tailwater controls shall be provided to preclude discharge of reclaimed water from irrigation sites.

§§210.25. Special Design Criteria for Reclaimed Water Systems.

(a) All hose bibs and faucets shall be painted purple and designed to prevent connection to a standard water hose. Hose bibs shall be located in locked, below grade vaults which shall be clearly labeled as being of non-potable quality. As an alternative to the use of locked, below grade vaults with standard hose bibs services, hose bibs may be placed in a non-lockable service box which can only be operated by a special tool so long as the hose bib is clearly labeled as non-potable water, in accordance with subsection (b) of this section.

(b) One of the following labeling requirements must be met by the user or provider, for any area where reclaimed water is stored or where there exist hose bibs or faucets:

(1) Signs in both English and Spanish shall be posted at all storage areas and on all hose bibs and faucets reading "Reclaimed Water, Do Not Drink" or similar warnings;

(2) The area should be secured to prevent access by the public; or

(3) A sign may be utilized at all storage areas and on all hose bibs and faucets, as shown in Figure 1, having a minimum size of eight inches by eight inches.
Figure 1: 30 TAC §210.25(b)(3)

(c) Reclaimed water piping shall be separated from potable water piping when trenched by a horizontal distance of at least nine feet. Where the nine foot separation distance cannot be achieved, the reclaimed water piping must meet the line separation requirements of Chapter 290 of this title (relating to Water Hygiene).

(d) Where a reclaimed water line parallels a sewer line, the reclaimed water line shall be constructed in accordance with subsection (e) or (f) of this section. The horizontal separation distance shall be three feet (outside to outside) with the reclaimed water line at the level of or above the sewer line. Reclaimed water lines which parallel sewer lines may be placed in the same benched trench. Where a reclaimed water line crosses a sewer line, the requirements of §290.44(e)(5)(B) of this title (relating to Location of Water Lines) shall be followed, with "reclaimed water

line" substituted in §290.44(e) of this title (relating to Location of Water Lines) for "water line."

(e) Reclaimed water lines which transport reclaimed water under pressure shall be sized according to acceptable engineering practices for the needs of the reclaimed water users. The designer shall consider methods to prevent or maintain lines to mitigate the effect of the deposition of solids in such lines. Pipe specified for reclaimed water force mains shall be of a type having an expected life at least as long as that of the lift station and shall be suitable for the reclaimed water being pumped and operating pressure to which it will be subjected. All pipe shall be identified in the technical specifications with appropriate ASTM, ANSI, or AWWA standard numbers for both quality control (dimensions, tolerance, and installation such as bedding or backfill). All pipes and fittings shall have a minimum working pressure rating of 150 pounds per square inch. Final plans and specifications shall describe required pressure testing for all installed reclaimed water force mains. Minimum test pressure shall be 1.5 times the maximum design pressure. Allowable leakage rates shall be determined as described in §317.2(d)(4) of this title (relating to Pressure Sewer Systems).

(f) Gravity flow reclaimed water lines shall meet the requirements of §317.2 (a) of this title (relating to General Requirements) and §317.2(c) of this title (relating to High Velocity Protection). The designer shall consider methods to prevent high velocity scour or maintain line fluid velocity to mitigate the effects of the deposition of solids in the gravity conveyance.

(g) All exposed piping and piping within a building shall be either purple pipe or painted purple. All buried piping installed after the effective date of these rules shall be either: purple, the pipe taped with purple metallic tape, purple bagged, or painted purple. All exposed piping should be stenciled in white with a warning reading "NON-POTABLE WATER". All exposed or buried reclaimed water piping constructed at a wastewater treatment facility is exempt from the color coding requirements of this section.

(h) When applicable, in accordance with §317.1(a)(3)-(4) of this title, (relating to General Provisions), the design of distribution systems which will convey reclaimed water to a user shall be submitted to the executive director and must receive an approval. The design of the distribution systems must meet the requirements of Chapter 317 of this title (relating to Design Criteria for Sewerage Systems). Where a municipality is the plan review authority for certain sewer systems which transport primarily domestic waste, in accordance with §317.1(a)(5) of this title,in lieu of the commission, design submittals will not be subject to submittal to the commission and instead must be approved by the municipality. Materials shall be submitted for approval by the executive director in accordance with the Texas Engineering Practice Act (Texas Statutes Article 3271a, Vernon's Annotated).

(i) All ground level and elevated storage tanks shall be designed, installed, and constructed in accordance with current American Water Works Association (AWWA) standards with reference to materials to be used and construction materials to be followed.

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

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Subchapter C. Quality Criteria and Specific Users For Reclaimed Water

30 TAC §§210.31-210.36

The sections are proposed under the Texas Water Code, §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state and to establish and approve all general policy of the commission.

§§210.31. Applicability.

This subchapter applies to the reclaimed water producer, the reclaimed water provider and the reclaimed water user. This subchapter sets the specific uses, the quality standards, as well as the monitoring, record keeping, and reporting standards for reclaimed water.

§§210.32. Specific Uses of Reclaimed Water.

Numerical parameter limits pertaining to specific reclaimed water use categories are contained in §210.33 of this title (relating to Quality Standards for Using Reclaimed Water). These limits apply to reclaimed water before discharge to initial holding ponds or a reclaimed water distribution system. It shall be the responsibility of the reclaimed water producer to establish that the reclaimed water meets the quality limits at the sample point for the intended use in accordance with the monitoring requirements identified in §210.34 of this title (relating to Sampling and Analysis).

(1) Type I Reclaimed Water Use. This type of use includes irrigation or other uses in areas where the public may be present during the time when irrigation takes place or other uses where the public may come in contact with the reclaimed water. The following types of uses would be considered Type I uses:

(A) Residential irrigation, including landscape irrigation at individual homes.

(B) Urban uses, including irrigation of public parks, golf courses with unrestricted public access, school yards, or athletic fields.

(C) Use of reclaimed water for fire protection, either in internal sprinkler systems or external fire hydrants.

(D) Irrigation of food crops where the applied reclaimed water may have direct contact with the edible part of the crop, unless the food crop undergoes a pasteurization process.

(E) Irrigation of pastures for milking animals.

(F) Maintenance of impoundments or natural water bodies where recreational activities, such as wading or fishing, are anticipated even though the water body was not specifically designed for such a use.

(G) Toilet or urinal flush water.

(H) Other similar activities where the potential for unintentional human exposure may occur.

(2) Type II Reclaimed Water Use. This type of use includes irrigation or other uses in areas where the public is not present during the time when irrigation activities occur or other uses where the public would not come in contact with the reclaimed water. The following are examples of uses that would be considered Type II uses.

(A) Irrigation of sod farms, silviculture, limited access highway rights of way, and other areas where human access is restricted or unlikely to occur. The restriction of access to areas under irrigation with reclaimed water could include the following:

(i) The irrigation site is considered to be remote.

(ii) The irrigation site is bordered by walls or fences and access to the site is controlled by the owner/operator of the irrigation site.

(iii) The irrigation site is not used by the public during the times when irrigation operations are in progress. Such sites may include golf courses, cemeteries, and landscaped areas surrounding commercial or industrial complexes. The "syringing" or "wetting" of greens and tees on golf courses shall be allowable under Type II so long as the "syringing" is done with hand-held hoses as opposed to automatic irrigation equipment. The public need not be excluded from areas where irrigation is not taking place. For example, irrigation of golf course fairways at night would not prohibit the use of club house or other facilities located a sufficient distance from the irrigation.

(iv) The irrigation site is restricted from public access by local ordinance or law with specific standards to achieve such a purpose.

(B) Irrigation of food crops where the reclaimed water is not likely to have direct contact with the edible part of the crop, or where the food crop undergoes pasteurization prior to distribution for consumption.

(C) Irrigation of animal feed crops other than pasture for milking animals.

(D) Maintenance of impoundments or natural water bodies where direct human contact is not likely.

(E) Soil compaction or dust control in construction areas where application procedures minimize aerosol drift to public areas.

(F) Cooling tower makeup water. Use for cooling towers which produce significant aerosols adjacent to public access areas may have special requirements.

(G) Irrigation or other non-potable uses of reclaimed water at a wastewater treatment facility.

(3) Any Type I reclaimed water may also be utilized for any of the Type II uses identified in subsection (b) of this section.

§§210.33. Quality Standards for Using Reclaimed Water.

The following conditions apply to the types of uses of reclaimed water. At a minimum, the reclaimed water producer shall only transfer reclaimed water of the following quality as described for each type of specific use:

(1) for Type I reclaimed water uses, reclaimed water on a 30-day average shall have a quality of:
Figure 1: 30 TAC §210.33(1)

(2) for Type II reclaimed water use, reclaimed water on a 30-day average shall have a quality of:

(A) for a system other than pond system:
Figure 2: 30 TAC §210.33(2)(A)

(B) for a pond system:
Figure 3: 30 TAC §210.33(2)(B)

§§210.34. Sampling and Analysis.

The reclaimed water producer shall sample the reclaimed water prior to distribution to a user to assure that the water quality is in accord with the intended contracted use. Analytical methods shall be in accord with those specified in Chapter 319 of this title (relating to Monitoring and Reporting). The minimum sampling and analysis frequency for reclaimed water for the applicable parameters identified in §210.33 of this title (relating to Quality Standards for the Use of Reclaimed Water) is as follows:

(1) Type I Reclaimed Water Uses twice per week.

(2) Type II Reclaimed Water Uses once per week.

§§210.35. Guidelines for Certain Distribution Systems.

The commission recommends that a provider or user maintain a plan to carry out periodic fecal coliform sampling within certain reclaimed water distribution piping systems. Such a plan does not need the approval or review of the commission. This periodic sampling should occur in instances where residential irrigation, including landscape irrigation at individual homes occurs, or where specific urban uses such as irrigation of public parks, school yards, or athletic fields occurs. The plan should specify activities by the provider or user to respond to human health threats if undesirable fecal coliform test results or trends are detected.

§§210.36. Record Keeping and Reporting.

(a) The reclaimed water provider and user shall maintain records on site for a period of five years.

(1) Records to be maintained by the provider include:

(A) copies of notifications made to the commission concerning reclaimed water projects.

(B) as applicable, copies of contracts made with each reclaimed water user (this requirement does not include reclaimed water users at residences that have separate distribution lines for potable water).

(C) records of volume of water delivered to each reclaimed water user per delivery (this requirement does not apply to reclaimed water users at residences that have separate distribution lines for potable water).

(D) reclaimed water quality analyses.

(b) The reclaimed water provider or producer shall report to the commission on a monthly basis the following information on forms furnished by the executive director. Such reports are due to the commission by the 20th day of the month following the reporting period.

(1) volume of reclaimed water delivered to a user or provider.

(2) quality of reclaimed water delivered to a user or provider reported as a monthly average for each quality criteria except those listed as "not to exceed" which shall be reported as individual analyses.

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

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Subchapter D. Alternative and Pre-Existing Reclaimed Water System

30 TAC §§21.41–210.46

(Editor's note: The Texas Natural Resource Conservation Commission proposes for permanent adoption the new §§21.41–210.46, it adopts on an emergency basis in this issue. The text of the new §§21.41–210.46 are in the Emergency Rules section of this issue.)

The sections are adopted under the Texas Water Code, (Vernon 1995), §5.103, which provides the Texas Natural Resource Conservation Commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code and other laws of this state and to establish and approve all general policy of the commission.

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

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Chapter 310. Use of Reclaimed Water

Subchapter A. General Provisions

30 TAC §§310.1-310.18

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of existing §§310.1-310.18, concerning the use of reclaimed water (i.e., treated wastewater); general requirements for producers, providers, and users of reclaimed water; quality criteria; specific uses and reporting requirements for reclaimed water; and alternative and pre-existing reclaimed water systems.

The proposed repeal of Chapter 310 imposes a numbering change that implements a reorganization of commission rules, by moving this chapter to the area of Title 30 of the Texas Administrative Code that is being reserved for rules related to water programs in Chapters 200-299.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five years the repeals are proposed are in effect, there will be fiscal implications as a result of enforcement and administration of the repeals. There are no significant implications anticipated for state government. Local governments affected by the provisions will realize potential cost savings as a result of adoption of the repeals. The cost savings for local governments will result from the opportunity to avoid certain permit amendment requirements as a condition of the use of reclaimed water. In addition, the options for the use of reclaimed water afforded by this rule will reduce the demand for and the treatment cost of water provided through public drinking water supply systems. These potential cost savings will vary for individual permit holders and will depend on the extent to which wastewaters are reclaimed under these repeals and the current costs of treating and supplying water within each jurisdiction.

Mr. Minick has also determined that for the first five years these repeals are proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the repeals will be more cost-effective regulation of the use of reclaimed wastewaters, the more efficient use of public water supplies, and enhanced conservation of surface and ground water resources. There are no significant fiscal implications anticipated for small businesses. Holders of municipal or domestic wastewater permits will potentially realize the cost savings attributed to local governments. There are no economic costs anticipated for any person required to comply with the repeals as proposed.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, Section 2007.043. The following is a summary of that Assessment. The specific purpose of the proposed rule is to ease the burden on the commission and those regulated by the rule in authorizing the use of reclaimed water. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules.

A public hearing on the proposal will be held August 13, 1996 at 10:00 a.m. in Room 2210 of commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured to receive oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion within the audience will not occur during the hearing; 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.

Written comments on the proposal should refer to Rule Log Number 95121-210-WT and may be submitted to Lutrecia Oshoko, Texas Natural Resource Conservation Commission, Of-

fice of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-4640. Comments may be faxed to (512) 239-5687, but must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. Written comments must be received by 5:00 p.m. 30 days from the date of publication of this proposal in the *Texas Register*. Such comments will not receive individual responses but, rather, will be addressed in the preamble of the adopted rules and published in the *Texas Register*. For further information concerning this proposal, please contact Louis C. Herrin, III, Wastewater Permits Section, Agriculture and Watershed Management Division at (512) 239-5552.

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.

These sections are proposed under the Texas Water Code, §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state.

There are no other codes, rules, or statutes that will be affected by this proposal.

§§310.1. Definitions.

§§310.2. Purpose and Scope.

§§310.3. Applicability.

§§310.4. Notification.

§§310.5. Permits Required.

§§310.6. General Requirements.

§§310.7. Storage Requiremets for Reclaimed Water.

§§310.8. Irrigation Using Reclaiemd Water.

§§310.9. Landscape Impoundment, Restricted Recreational Impoundments, or Ornamental Fountains.

§§310.10. Commercial and Industrial Use of Reclaimed Water.

§§310.11. Use of Reclaimed Water as Toilet Flush Water.

§§310.12. Sampling and Analysis.

§§310.13. Recordkeeping and Reporting.

§§310.14. Transfer of Reclaimed Water.

§§310.15. General Prohibitions.

§§310.16. Restrictions.

§§310.17. Responsibilities and Contracts.

§§310.18. Enforcement.

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

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Chapter 332. Composting

Subchapter D. Operations Requiring a Permit

30 TAC §332.47

The commission proposes an amendment to §332.47, concerning financial assurance requirements. Owners or operators seeking permits for compost facilities must provide evidence of financial responsibility for closure. This requirement is authorized by Texas Health and Safety Code, §361.085 and promulgated as §332.47(9).

Owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities must provide evidence of financial responsibility for closure and sudden liability coverage per 30 TAC Chapter 334, Subchapter K.

Changes to Chapter 332 are proposed along with a new 30 TAC Chapter 37. New Chapter 37 contains standard financial assurance wording of the mechanisms and requirements for financial responsibility and places them in one rule chapter. Initially, this chapter will provide financial assurance requirements for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities.

Proposed Chapter 37, Subchapter A sets forth the applicability of the proposed rule, definitions, and basic requirements for demonstrating financial assurance. This subchapter would require all mechanisms relied upon to show evidence of financial responsibility to be worded as set forth in Subchapter D or G, require approval of all mechanisms by the executive director, require substitution of financial assurance mechanisms in the event of failure or cancellation, and allow the use of multiple financial assurance mechanisms for a single facility, or use of a single mechanism for multiple facilities of the same type. Mechanisms used to show financial responsibility for closure must be at least equal in amount to the most recent closure cost estimates. Mechanisms used to show evidence of sudden liability coverage must be at least equal to the annual aggregate limit as specified. To receive approval for financial responsibility, mechanisms for permitted facility must be submitted at least 60 days prior to the acceptance of waste for processing or at least 60 days prior to operations, while registrants must submit mechanisms prior to issuance of a registration.

Proposed Chapter 37, Subchapter B sets forth the general criteria for approval of financial assurance for closure. This subchapter would allow the executive director to draw on the mechanism when required to do so, require continuous coverage until terminated, require annual adjustments for inflation, require necessary adjustments in the closure cost estimate, and require establishment of a standby trust for surety bonds or letters of credit.

Proposed Chapter 37, Subchapter C sets forth the criteria for approval of financial assurance mechanisms for closure, including trust funds, surety bonds guaranteeing payment, surety bonds guaranteeing performance, irrevocable standby letters of credit, insurances, financial tests and corporate guarantees.

Proposed Chapter 37, Subchapter D sets forth the required wording of financial assurance mechanisms for closure referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter E sets forth the criteria for approval of financial assurance for liability. This subchapter would address the liability requirements for sudden accidental occurrences.

Proposed Chapter 37, Subchapter F sets forth the criteria for approval of financial assurance mechanisms for liability, including trust funds, surety bonds guaranteeing payment, irrevocable standby letters of credit, insurances, financial tests and corporate guarantees.

Proposed Chapter 37, Subchapter G sets forth the required wording of financial assurance mechanisms for liability referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter J makes the requirements of Chapter 37 applicable to owners and operators seeking permits for compost facilities under §332.47.

Proposed Chapter 37, Subchapter K makes the requirements of Chapter 37 applicable to owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities under 30 TAC Chapter 334, Subchapter K. Amendment of §332.47 and §334.484(c)(16) reflects the requirement upon owners and operators of compost facilities and owners and operators of Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities to use the documents and language from Chapter 37.

Amendment of Chapter 332 would make the new Chapter 37 applicable to owners and operators of permitted compost facilities. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 332 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Amendment of Chapter 334 would make the new Chapter 37 applicable to owners and operators of Class A and B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 334 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Minick 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 increased efficiency in the review of financial assurance documents and additional safeguards for the resources of the state. 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.

The commission has prepared a Takings Impact Assessment for the amendment to this section pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of the new rule is to begin the consolidation of financial assurance requirements into one rule chapter. The new rule substantially advances this purpose by setting up a new Chapter 37 and making it initially applicable to financial assurance for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment and reuse facilities. Promulgation and enforcement of this rule will not affect private real property because it adds no new financial assurance requirements and it does not adversely affect property values.

A public hearing on this proposal will be held August 29, 1996, at 10:00 a.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, 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, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Comments may be mailed to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96127-037-AD. Comments must be received by 5:00 p.m., August 29, 1996. For further information, please contact Randall Terrell, Office of Policy and Regulatory Development, at (512) 239-0577.

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.

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

The proposed amendment implements Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§332.47. Permit Application Preparation.

To assist the commission in evaluating the technical merits of a compost facility, a site development plan shall be prepared and submitted to the commission along with Compost Form Number 3.

The site development plan shall be sealed by a registered professional engineer in accordance with the provisions of 22 TAC §131.138 **relating to (Engineers' Seals)** . If the site development plan is submitted in a three ring binder or in a format that allows the removal or insertion of individual pages, it shall not be considered a bound document. The site development plan shall contain all of the following information.

(1)-(8) (No change.)

(9) Financial assurance. The applicant shall prepare a closure plan acceptable to the executive director and provide evidence of financial assurance to the commission for the cost of closure. The closure plan at a minimum shall include evacuation of all material on-site (feedstock, in process and processed) to an authorized facility and disinfection of all leachate handling facilities, tipping area, processing area and post-processing area and shall be based on the worst case closure scenario for the facility, including the assumption that all storage and processing areas are filled to capacity. The financial assurance may be demonstrated by using one or more of the following mechanisms: trust funds, surety bonds, letters of credit, insurance, financial test and corporate guarantee. These mechanisms shall be prepared on forms approved by the executive director and shall be submitted to the commission 60 days prior to the receiving of any materials for processing. **Financial assurance mechanisms prepared are subject to the requirements of Chapter 37 of this title (relating to Financial Assurance).**

(10)-(11) (No change.)

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610221
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239-1966

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Chapter 334. Underground and Aboveground Storage Tanks

Subchapter K. Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil

30 TAC §§334.481, 334.482, 334.484-334.508

The commission proposes amendments to §§334.481, 334.482, and 334.484; the repeal of §§334.485-334.510; and new §§334.485-334.508, concerning terminology updates; addition of a provision for an executive director granted variance; addition of provisions for denial, suspension, revocation, and renewal of registration; addition of an exemption for petroleum contaminated soil treatment facilities located at municipal solid waste landfills permitted under 30 TAC Chapter 330 (concerning Municipal Solid Waste); amendment of a provision for notice to provide public opportunity to comment on a registration and to request a public meeting; amendment of a provision so as to require a registrant to hold a public meeting only when requested by the executive director; amendment of the requirement to report a spill within 24 hours of "occurrence" to within 24 hours of "discovery"; and movement of financial assurance requirements to the new 30 TAC Chapter 37 on general financial assurance requirements.

In proposed §334.481, the definition of "Designated facility" is amended to update its terminology. The definition of "Executive director" is deleted because an updated version is contained in 30 TAC Chapter 3 (concerning Definitions) which is applicable. The definition of "Existing facility" is deleted due to the repeal of the former §334.488, the only section using this term. A definition of "Maximum allowable inventory" is added to define this term that is included in new §334.485(a)(5). The definition of "Secondary containment" is proposed to be amended to add a clarification that it is to contain spills, leaks, or discharges "without environmental contamination" until removal. The definition of "Treatment facility" is proposed to be amended to add that a petroleum contaminated soil treatment facility can also recycle soils.

In proposed §334.482(a), the amendment is to clarify that the scope includes transport and reuse and to delete the enumeration of specific prohibitions. Proposed §334.482(b) is amended by adding a new provision for the executive director to grant a variance from the requirements of this subchapter and deleting the old section language. This variance is contemplated to be utilized in instances where small quantities of soil from multiple sites could be more efficiently managed and treated without facility registration and financial assurance requirements.

In proposed §334.484, a cross-reference to §334.508 (concerning Closure Requirements Applicable to Class A and Class B Facilities) is added to subsection (c) (11) and (16). This amendment is made to make it clear where to go to find the closure plan, closure cost estimate, and financial assurance for closure information. In subsections (g) and (h), the requirements for registration renewal after five years are deleted for placement of updated provisions in the new proposed §334.487. The language formerly in subsection (i) then becomes the new subsection (g).

Old §§334.485-334.510 are proposed to be repealed.

Proposed new §334.485 is inserted to allow registrations to be suspended or revoked for good cause and to provide the process for suspension or revocation.

Proposed new §334.486 is inserted to allow denial of registration or registration renewal for cause.

Proposed new §334.487 is inserted to expand on the process for renewal of registrations.

Proposed new §334.488 is repealed §334.485 renumbered and the cross-references updated.

Proposed new §334.489 is repealed §334.486 renumbered; and a new paragraph is added to exempt petroleum contaminated soil treatment facilities located at municipal landfills that comply with the requirements of §330.8 (concerning Notification Re-

quirements). This eliminates potential dual regulation of these facilities under both Chapters 330 and 334.

Proposed new §334.490 is repealed §334.487 renumbered; paragraph (1) is updated by changing "district" to "region," and paragraph (6) is updated by changing "TWC" to "commission."

Proposed new §334.491 is repealed §334.489 renumbered; and the terminology in subsection (b)(2) is updated by changing "Texas Water Commission" to "Texas Natural Resource Conservation Commission" in two places.

Proposed new §334.492 is repealed §334.490 renumbered and is amended to call for notice which provides the public an opportunity to comment in writing and to request a public meeting. This amendment will make these public notice provisions more consistent with other agency rules. Also, a clarification is added to §334.492(4)(A) as to how the 1,000-foot distance is measured. Other minor updating changes are also proposed.

Proposed new §334.493 is a complete replacement of repealed §334.491 (concerning Public Meetings for Class A Facilities). The new requirements are more consistent with those in other rules and only call for a registrant to provide a public meeting if it is requested by the executive director.

Proposed new §334.494 is repealed §334.492 renumbered; and the term "district" is proposed to be updated to "region" in the last sentence.

Proposed new §334.495 is repealed §334.493 renumbered, with "TWC" changed to "TNRCC" in subsection (c).

Proposed new §334.496 is repealed §334.494 with "Texas Water Commission (TWC)" updated to "Texas Natural Resource Conservation Commission (TNRCC)"; "affidavit" terms updated to "manifest"; and "TWC" updated to "TNRCC."

Proposed new §334.497 is repealed §334.495 with "excluding transporters and shippers" deleted from the first sentence because it is unnecessary; four "affidavit" terms updated to "manifest"; and a cross-reference updated.

Proposed new §334.498 is repealed §334.496 with 12 "affidavit" terms updated to "manifest" and a cross-reference updated.

Proposed new §334.499 is repealed §334.497. In §334.499(a)(1), a "TWC" is updated to "TNRCC"; in §334.499(a)(3), a section cross-reference is renumbered; in §334.499(c)(1), a "TWC" is updated to "TNRCC" and an extra "waste" term deleted; and in §334.499(c)(3), the word "director" is added to complete the title "executive director."

Proposed new §334.500 is repealed §334.498. In §334.500(a)(3), a "district" term is updated to "region"; in §334.500(c), cross-references are updated to account for the section renumbering; in §334.500(e)(1), the term "affidavit" is updated to "manifest"; in §334.500(e)(3) and (5), cross-references are updated to account for the section renumbering; and in §334.500(e)(6), two "affidavit" terms are updated to "manifest."

Proposed new §334.501 is repealed §334.499 renumbered; and the requirement to report an emergency or spill within 24 hours of "occurrence" is changed to within 24 hours of the "discovery of" the emergency or spill to agree with the statutory reporting language in Texas Water Code, §26.039(b).

Proposed new §334.502 is repealed §334.500 renumbered.

Proposed new §334.503 is repealed §334.501. Cross-references are updated due to section renumbering in §334.503(a); and a typographical error is corrected in §334.503(c)(3)(G). Proposed new §334.504 is repealed §334.502 with a "region" term updated to "district" in the last line of §334.504(e).

Proposed new §334.505 and §334.506 are repealed §334.503 and §334.504, respectively, renumbered.

Proposed new §334.507 is repealed §334.505. In §334.507(c), the word "affidavit" is updated to "manifest"; and in §334.507(e)(2), emergency reporting phone numbers are updated.

Proposed new §334.508 is repealed §334.506. The cross-reference in subsection (e) is proposed to be changed from a cross-reference to repealed §334.509 to a cross-reference to subsections (a) and (b) of §334.508. The language in subsection (f) is also proposed to be amended for greater clarity. Subsection (g) of repealed §334.506 has not been incorporated into the proposed new §334.508, and its requirements instead are to be covered by the new proposed Chapter 37, which is proposed to be cross-referenced in the newly added §334.508(j).

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five- year period the sections as proposed are in effect, there will be no fiscal implications for state or local government as a result of enforcement and administration of the sections.

Mr. Minick also 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 enforcement of and compliance with the sections will be the clarification of existing regulations, the elimination of duplicative or conflicting regulations, and more effective management of the state's efforts to regulate storage, treatment, and reuse of petroleum contaminated soils. There are no economic costs anticipated for persons, including small businesses, required to comply with the sections as proposed.

The commission has prepared a Takings Impact Assessment for this chapter pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purposes of the amendments, repeals, and new sections are to add a provision for an executive director granted variance; add provisions for denial, suspension, revocation, and renewal of registration; add an exemption from regulation under this chapter (concerning Underground and Aboveground Storage Tanks) for petroleum contaminated soil treatment facilities located at municipal landfills and registered under Chapter 330 to eliminate dual regulation of these facilities; change a provision for notice to provide public opportunity to comment on a registration and request a public meeting; allow a registrant to hold a public meeting only when requested by the executive director; and allow spill reporting within 24 hours of "discovery" instead of within 24 hours of "occurrence"; and movement of financial assurance requirements to new Chapter 37 on general financial assurance requirements. The amendments substantially advance these specific purposes by amending this chapter

(concerning Petroleum Substance Waste). Promulgation and enforcement of these amendments will not affect private real property, because the amendments merely provide more efficient regulation of petroleum contaminated soil treatment and do not affect property values.

Written comments may be mailed to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rules Tracking Log Number 95120-334-WS. Comments must be received within 30 days after the date of publication of the proposal in the *Texas Register* . For further information, please contact Janet Bauchman at (512) 239-2246.

The amendments and new sections are proposed under Texas Water Code, Chapter 26, Subchapter I, §§26.341-26.363, which provides the commission with the authority to establish a program to regulate underground and aboveground storage tanks and under Texas Water Code, §5.103 and §5.105, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and to establish and approve any general policy of the commission.

The proposed amendments and new sections implement Texas Water Code, §§5.103, 5.105, and 26.341-236.363.

§§334.481. Definitions.

Except as provided in this **subchapter** [subsection], the following words and terms, when used in this subchapter, shall have the meanings prescribed in §334.2 of this title (relating to Definitions), unless the word or term is redefined in this subchapter or unless the context clearly indicates otherwise.

Designated facility—The authorized storage, treatment, or disposal facility that has been designated on the petroleum-substance waste **manifest** [affidavit] by the generator.

[Executive director—The executive director of the Texas Water Commission, or its successor agency, or the executive director's designee.]

[Existing facility—Any petroleum substance contaminated soil storage, treatment, or recycling facility registered under and in compliance with this subchapter on or prior to the effective date of this subchapter.]

Maximum allowable inventory —The maximum amount of petroleum contaminated soil (not including soil that meets the "Clean fill standard" definition criteria) that may be at a registered facility at any one time. The maximum allowable inventory amount will be designated in the application for registration and will be the basis for the facility closure cost estimate required to meet financial assurance requirements.

Secondary containment—A system designed and constructed to collect rainfall run-on and to contain spills, leaks, or discharges within the facility **without environmental contamination** until such waste can be removed.

Treatment facility—A facility or unit which treats **, recycles, and/**or reuses petroleum-substance wastes.

§§334.482. General Prohibitions.

(a) No person may cause, suffer, allow, or permit the storage, treatment, **transport, reuse,** or disposal of petroleum-substance waste **except as authorized by this subchapter and the rules of the commission.** [in such a manner so as to cause:

[(1) the discharge or potential threat of discharge into or adjacent to the waters in the state without obtaining specific written authorization for such discharge from the Texas Water Commission;

[(2) the creation and maintenance of a nuisance;

[(3) unauthorized releases of contaminants to the air; or

[(4) the endangerment of the public health and welfare.]

(b) **Notwithstanding subsection (a) of this section, a person may apply for a variance from the requirements of this subchapter. The executive director shall have the sole discretion to grant a variance, if in his opinion the requirement(s) of this subchapter is/are not practical or reasonable under the circumstances. Any request for a variance must be in writing and of sufficient detail to allow the executive director to make an informed determination. A request for variance must be approved by the executive director before a person may perform an activity or procedure which is not specifically authorized by this subchapter** [No person may conduct storage or treatment of contaminated media that is not a petroleum-substance waste at a Class A or Class B facility except as authorized by the executive director or by other appropriate regulations. Any wastes accepted at the facility pursuant to the appropriate authorization shall be managed, stored, and treated separately from the petroleum-substance wastes].

§§334.484. Registration Required for Petroleum-Substance Waste Storage or Treatment Facilities.

(a)-(b) (No change.)

(c) Any person who intends to store or treat petroleum-substance waste at a Class A or Class B facility after the effective date of this subchapter shall submit an application for registration on a form approved by the executive director. Such person shall submit information to the executive director which is sufficiently detailed and complete to enable the commission to determine whether such storage or treatment is compliant with the terms of this subchapter. Such information shall include, at a minimum:

(1)-(10) (No change.)

(11) facility closure **plan and closure cost estimate** [specifications] **(see §334.508 of this title (relating to Closure Requirements Applicable to Class A and Class B Facilities))**;

(12)-(15) (No change.)

(16) documentation on the financial assurance required **(see §334.508 of this title)**;

(17)-(21) (No change.)

(d)-(e) (No change.)

(f) Any information required by this subsection shall be submitted to the executive director's office in Austin and to the appropriate **region** [district] office.

(g) [A registration under this subchapter shall expire five years from the date of issuance.]

[(h) The facility owner or operator shall submit a renewal application at least 60 days prior to the end of the five-year registration period on forms approved by the executive director.]

[(i)] The registration is not transferable to any other facility or facility owner. Any transfer of ownership shall require a change in registration of the facility. However, a change in registration of a facility shall not relieve the transferor of any liability which may have been incurred prior to the change in registration.

§§334.485. Suspension or Revocation of Registration.

(a) A registration may be suspended or revoked for the following reasons:

(1) if the registrant fails to maintain complete and accurate records required under this subchapter;

(2) if the registrant falsifies information in, or omits material information from, any records or documents maintained, received, or required by this chapter;

(3) if the registrant fails to comply with any rule or order entered by the commission pursuant to the requirements of Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks);

(4) if the registrant fails to maintain insurance or financial assurance as required by this subchapter;

(5) if the registrant exceeds maximum allowable inventory without prior written authorization from the executive director; or

(6) for any good cause which, in the opinion of the executive director, constitutes grounds for suspension or revocation of the registration.

(b) If the executive director determines that good cause exists for suspension or for revocation of a registration, he shall petition the commission for an order, suspending or revoking the registration.

(1) The executive director shall notify the registrant in writing, by registered or certified mail, of the grounds for the suspension or revocation, and provide the registrant with an opportunity for hearing on the executive director's petition.

(2) The executive director shall provide notice at least ten days prior to the date of the hearing.

(3) The registrant shall be afforded an opportunity to answer the executive director's petition for suspension or revocation in the manner generally described by this title.

(4) A registration may be suspended for any length of time which is warranted in the opinion of the commission. The commission may impose terms and conditions on the suspension, as well as conditions for reinstatement of the registration.

(5) If the term of the suspension does not exceed the original term of the registration, the registrant does not need to reapply at the termination of the suspension.

(6) A revocation pursuant to this section is permanent.

§§334.486. Denial of Application for Registration or Renewal.

(a) The executive director may deny an application for registration or an application for renewal of registration of a facility under this subchapter for the following reasons:

(1) if the applicant fails to meet any of the requirements set forth in §334.484 of this title (relating to Registration Required for Petroleum-Substance Waste Storage or Treatment Facilities);

(2) if the applicant fails to comply with any rule or order of the commission;

(3) if the applicant submits false information on or omits material information from the application or any other documentation required to be maintained or submitted under this chapter; or

(4) for any good cause which in the opinion of the executive director constitutes grounds for denial of the application for registration.

(b) Denial of an application for registration is without prejudice.

§§334.487. Renewal of Registration.

(a) All registrations under this subchapter shall expire five years from the date of issuance.

(b) The commission shall notify each registrant in writing of the impending registration expiration at least 60 days prior to the expiration of the registration.

(c) The executive director shall provide application forms for renewal of a registration.

(d) A properly completed application for renewal shall be submitted to the executive director at least 30 days prior to the expiration date of the registration. The current registration shall be valid until the executive director notifies the applicant of renewal or denial of the submitted renewal application, provided a properly completed application for renewal was submitted at least 30 days prior to the expiration date of the registration.

(e) Upon proper completion of the registration renewal process, the executive director shall either issue a renewed registration indicating the expiration date or deny the application for renewal, as authorized by §334.486 of this title (relating to Denial of Application for Registration or Renewal).

§§334.488. Authorization for Class C and Class D Facilities.

Authorization for Class C and Class D facilities is issued by the executive director when the leaking petroleum storage tank (LPST) site is subject to a corrective action plan involving storage and treatment activities pursuant to §334.81 of this title (relating to Corrective Action Plan). Executive director approval of the corrective action plan for the storage or treatment activities shall constitute authorization for the Class C or Class D facility. A Class C or Class D storage or treatment facility shall remain in operation only as long as is necessary to store or treat the soil from that one LPST site and it shall not accept soil from any other site at any time. The underground or aboveground storage tank owner or operator shall ensure that the approved storage and treatment activities comply with the following applicable provisions: §§334.482, 334.483, 334.490, 334.494, 334.496-334.503, and 334.505-334.507 of this title (relating to General Prohibitions; Disposal by Generator; Notification and Mobilization Requirements for Class B Facilities; Closure and Facility Expansion; Shipping Procedures Applicable to Generators of Petroleum-Substance Waste; Recordkeeping and Reporting Procedures Applicable to Generators; Shipping Requirements Applicable to Transporters of Petroleum-Substance Waste; Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities; Recordkeeping Requirements Applicable to Owners

or Operators of Storage, Treatment, or Disposal Facilities; Additional Reports; Design and Operating Requirements of Stockpiles and Land Surface Treatment Units; Reuse of Petroleum-Substance Waste; Security; Contingency Plan; and Emergency Procedures).

§§334.489. Exemptions.

The following are exempt from the requirements of this subchapter.

(1) facilities which operate under the jurisdiction of the Texas Railroad Commission or for the purpose of disposal, facilities permitted or regulated under other commission rules promulgated under the Texas Health and Safety Code, Solid Waste Disposal Act, Chapters 361, 363, or 371; and

(2) Leaking petroleum storage tank sites which treat petroleum-substance contaminated media if the media is treated in-situ in accordance with the provisions of Subchapter D of this chapter (relating to Release Reporting and Corrective Action). Such sites, however, are not exempt from the provisions of §334.482 of this title (relating to General Prohibitions);

(3) petroleum contaminated soil treatment facilities located at municipal landfills that comply with §330.8 of this title (relating to Notification Requirements).

§§334.490. Notification and Mobilization Requirements for Class B Facilities.

In addition to the required registration under §334.484 of this title (relating to Registration Required for Petroleum-Substance Waste Storage or Treatment Facilities).

(1) The owner or operator of a Class B facility shall notify the appropriate commission region field office at least 48 hours in advance of moving the treatment unit to the leaking petroleum storage tank (LPST) site.

(2) The owner or operator of the Class B facility shall notify the local fire marshal or other appropriate fire official at least 48 hours in advance of moving the treatment unit to the LPST site.

(3) The owner or operator of the underground or above-ground storage tank who intends to utilize a Class B facility at a particular LPST site shall obtain executive director approval pursuant to §334.81 of this title (relating to Corrective Action Plan).

(4) The Class B facility shall remain at the LPST site for only the time period necessary to complete the treatment, but no longer than 30 days, unless written authorization is obtained from the executive director.

(5) The Class B facility owner or operator shall provide notice to the public by means of posting signs at the LPST site at least 14 days prior to moving the treatment unit onto the LPST site or within another time frame as approved by the executive director. The signs shall be legible from a distance of at least 25 feet and shall be posted at all entrances to the facility. The signs shall state "Public Notice of Petroleum-Substance Contaminated Soil Treatment," the name and phone number of the treatment facility owner, the name and phone number of the tank owner or operator, the registration number of the treatment facility, the type of soil treatment to be conducted, and the date(s) the treatment will be conducted.

(6) The Class B facility owner or operator shall produce upon demand the registration certificate issued by the commission under this subchapter as well as any other permit or authorization required by law.

§§334.491. Notice to Owners or Operators.

(a) Written notice shall be provided in accordance with this section to any person, including the tank owner and operator, with any offer to perform any services of storage, treatment, or reuse of petroleum-substance contaminated soil proposed after the effective date of these rules.

(b) The notice shall contain the following:

(1) the facility registration number issued pursuant to this subchapter's registration requirements;

(2) the following disclaimer reproduced in its entirety: "The registration of a storage or treatment facility by the Texas Natural Resource Conservation Commission does not constitute endorsement, licensing, or promotion of any storage or treatment facility. Registration does not imply that the Texas Natural Resource Conservation Commission guarantees the quality of the work performed or that the cost of the work will be reimbursed."

§§334.492. Public Notice.

The Class A facility owner or operator shall provide notice to the general public regarding the location, construction, operation, and potential impacts of the storage or treatment facility.

(1) The facility owner or operator shall provide notice of the facility to the general public by means of a notice by publication and a notice by mail.

(2) The notice shall contain, at a minimum, the following information in accordance with forms approved by the executive director:

(A) the name, address, phone number, and contact person for the owner of the facility;

(B) the name, address, phone number, and contact person for the operator of the facility;

(C) the name, address, phone number, and contact person for the landowner (if different from the facility owner);

(D) the address and the physical description for the location of the facility;

(E) notice to the public of the opportunity to submit written comments regarding the application for registration of the facility and to request a public meeting regarding the proposed facility within 30 days of the date of the notice;

(F) notice that an application for registration has been filed with the Texas Natural Resource Conservation Commission;

(G) a complete description of the activities which will be conducted at the facility, including details on the construction of the facility, the soil storage methods, the soil treatment methods, the final disposition of the treated soils, and documentation on any points of discharge;

(H) the method for obtaining additional information on the facility.

(3) The notice by publication shall be published in a newspaper published daily, if available, and generally circulated in the county or area where the proposed facility is to be located and within each county or area wherein persons reside who would be affected by the facility.

(4) The notice by certified mail, return receipt requested, shall be sent to the following persons:

(A) all adjacent landowners and all owners of property within 1,000 feet of the boundary of the facility as defined in the application;

(B) the mayor and health authorities of the city in which the facility will be located, if applicable;

(C) the county judge and county health authority of the county in which the facility will be located;

(D) the appropriate state senator and representative for the area encompassing the facility;

(E) all persons or organizations who have requested the notice or expressed interest in the facility. The executive director may designate persons or organizations in addition to those specified by the facility owner or operator.

(5) The facility owner or operator shall provide copies of each notice sent by mail, copies of the published notice, and copies of the signed publisher's affidavits for the notices to the commission's Austin office and to the appropriate commission region office within two calendar days of publication and mailing.

§§334.493. Public Meetings for Class A Facilities.

(a) The executive director may, in response to a request from the public or at his own discretion, require the Class A facility owner or operator to hold a public meeting whenever such a meeting might clarify one or more issues concerning an application for registration of a facility.

(b) Upon request by the executive director, the Class A facility owner or operator, at his or her expense, shall schedule and hold a public meeting at a time and place which are convenient for the general public affected by the facility. Notice of the public meeting shall be provided by the Class A facility owner or operator to the public, not less than 30 days prior to the date of the meeting, in the manner described in §334.492(3), (4), and (5) of this title (relating to Public Notice).

(c) The forum chosen for the meeting shall be accessible to persons who are mobility impaired. Prior to scheduling of the meeting, the applicant shall coordinate the scheduling of the meeting with commission personnel to ensure the availability of commission personnel for the meeting. The applicant shall confirm with the executive director the date, time, and location of the meeting not less than 15 days prior to the meeting. The meeting shall be open to the public to provide information on the proposed facility and to allow for comments by the public. The executive director will consider all comments relating to the requirements of this subchapter when determining the outcome of the registration application. The applicant shall again confirm with the executive director on the time and place of the meeting at least 72 hours prior to the meeting.

(d) If the executive director does not request the Class A facility owner or operator to hold a public meeting as authorized by this section, no public meeting shall be required before the executive director may approve or deny an application for registration of a Class A facility.

§§334.494. Closure and Facility Expansion.

A person who stores or treats petroleum-substance waste at a Class A or B facility shall notify the executive director in writing of any closure activity or facility expansion not specifically stated in the original application for registration at least 30 days prior to conducting such activity. Such person shall submit to the executive director upon request such information as may reasonably be required to enable the executive director to determine whether such activity is compliant with this subchapter and whether additional public notice should be conducted. Any information provided under this section shall be submitted to the executive director's office in Austin and to the appropriate region field office.

§§334.495. Location Standards for Class A Petroleum-Substance Waste Storage or Treatment Facilities.

(a) The commission shall not issue a registration for a Class A petroleum-substance waste management facility unless it finds that the proposed site, when evaluated in light of proposed design, construction, and operational features, reasonably minimizes possible contamination of surface water and groundwater. In making this determination, the commission shall consider the following factors:

(1) flooding or active geologic processes such as erosion, subsidence, submergence, and faulting;

(2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge or discharge conditions;

(3) soil conditions such as stratigraphic profile, stratigraphic complexity, and hydraulic conductivity of strata;

(4) separation distance from the facility to the aquifer and to points of discharge to surface water; and

(5) climatological conditions.

(b) Class A storage or treatment facilities shall not be located:

(1) in the 100-year floodplain;

(2) in wetlands;

(3) on the recharge or transition zone of a sole-source aquifer;

(4) within 1,000 feet of an established residence, church, hospital, school, licensed day-care center, or dedicated public park;

(5) within 1,000 feet of any property owned by a person other than the facility owner unless the applicant obtains a variance from the executive director pursuant to subsection (d) of this section relating to variances;

(6) in areas of direct drainage within 1/2 mile of any surface water if the surface water is used to supply public drinking water through a public water system, unless it is designed, constructed, operated, and maintained to prevent any releases of contaminants from the facility;

(7) in the critical habitat of an endangered species of plant or animal; or

(8) in an area where the roads leading to the facility which will be utilized to transport soil are not adequate to handle the anticipated traffic volume and load.

(c) Nothing in this subchapter shall be construed to require the executive director to issue a registration. In addition to an applicant's compliance with location requirements, the executive director will consider public comment on the proposed facility, surrounding land uses, past performance record if any, and enforcement history

with the Texas Natural Resource Conservation Commission and other state agencies, when determining whether or not to register an applicant under this subchapter.

(d) The executive director may, in his discretion, grant a variance of the requirements of subsection (b) of this section, relating to location requirements for Class A Facilities. Before the executive director may issue a variance under this subsection, he shall require the applicant to demonstrate that the provisions of subsection (b) of this section are not necessary to ensure adequate protection of human health and the environment.

§§334.496. Shipping Procedures Applicable to Generators of Petroleum-Substance Waste.

(a) No generator shall transport petroleum-substance waste from the generating site unless the waste has been properly sampled in order to determine the levels of all possible contaminants in the waste. Necessary documentation shall, at a minimum, consist of documentation on the sampling, handling, chain-of-custody documentation, and copies of signed laboratory reports on samples collected from the specified wastes that contain results of analysis for:

(1) the major components of the petroleum-substance waste such as benzene, toluene, ethyl benzene, total xylenes, and total petroleum hydrocarbons or the major components of total petroleum hydrocarbons; and

(2) any other contaminants as specified by the executive director based on specific conditions of the generating site.

(b) No generator of petroleum-substance waste within the State of Texas shall allow the transport of such wastes to an off-site waste storage, treatment, reuse, or disposal facility unless the following requirements are met:

(1) a Texas Natural Resource Conservation Commission (TNRCC) petroleum-substance manifest is initiated, to include all applicable information, by the generator;

(2) the generator designates on the manifest at least one facility or area legally authorized to receive the waste. A generator may also designate one alternate facility or area which is legally authorized to receive the waste in the event an emergency prevents delivery of the waste to the primary designated facility. If the transporter is unable to deliver the waste to either the designated facility or the alternate facility, the generator shall either immediately designate another facility for receipt or instruct the transporter to immediately return the waste. Upon such redesignation by the generator, the generator shall immediately prepare an amended waste manifest.

(c) No generator of petroleum-substance waste from outside of the State of Texas shall allow transport of waste into the State of Texas unless the following requirements are met:

(1) a TNRCC petroleum-substance manifest is initiated by the generator to include all applicable information;

(2) the manifest shall accompany the waste to the receiving facility;

(3) the waste is classified as nonhazardous by the state in which it is generated.

(d) At the time of waste transfer, the generator or generator's authorized representative shall:

(1) sign the manifest by hand;

(2) obtain the handwritten signature of the initial transporter and date of acceptance on the manifest;

(3) retain one copy, in accordance with §334.497 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators); and

(4) give the transporter the remaining copies of the manifest.

§§334.497. Recordkeeping and Reporting Procedures Applicable to Generators.

Each generator of petroleum-substance waste shall comply with the following.

(1) The generator shall keep records of all petroleum-substance waste activities regarding the quantities generated and shipped off-site for storage, treatment, or disposal and which, at a minimum, includes the information described in paragraphs (1)-(5) of this section. The maintained records shall be retrievable, legible, and immediately available for inspection and copying by commission personnel. The required records shall be sufficiently detailed and complete to support any contentions or claims made by the generator with respect to the following:

(A) the description, character, and classification of each waste;

(B) the quantity of waste and the date(s) it was generated;

(C) identification of the generating location and the tank owner or operator;

(D) the methods of storage, treatment, or disposal;

(E) the quantity and date(s) the waste was shipped off-site for storage, treatment, or disposal including the name, address, and location of each off-site facility and transporter receiving shipments.

(2) The generator shall retain a legible copy of each waste manifest required by §334.496 of this title (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste) for a minimum of five years from the date of shipment by the generator.

(3) A generator of petroleum-substance waste shall keep records of all test results, waste analyses, or other determinations made for at least five years from the date that the waste was last sent to an off-site storage, treatment, disposal, or reuse area or facility.

(4) A generator who does not receive a copy of the manifest with the handwritten signature of the owner or operator of the designated facility within 35 days from the date the waste was accepted by the initial transporter shall contact the transporter and/or the owner or operator of the designated facility to determine the status of the petroleum-substance waste.

(5) A generator shall submit an exception report to the executive director if the generator has not received a copy of the manifest with the handwritten signature of the owner or operator of the designated facility within 45 days of the date that the waste was accepted by the initial transporter. The exception report shall be retained by the generator for at least five years from the date the waste was accepted by the initial transporter and shall include:

(A) a legible copy of the manifest for which the generator does not have confirmation of delivery; and

(B) a legible copy of a letter signed by the generator or his authorized representative explaining the efforts taken to locate the waste and the results of those efforts.

(6) The periods of record retention required by this section may be extended by the executive director during the course of any unresolved enforcement action regarding the regulated activity.

§§334.498. Shipping Requirements Applicable to Transporters of Petroleum-Substance Waste.

(a) No transporter shall ship petroleum-substance waste to an off-site storage, treatment, or disposal facility, unless the transporter:

(1) obtains a manifest initiated by the generator in accordance with §334.496 of this title (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste); and

(2) upon receipt and prior to shipment, signs and dates the manifest acknowledging the acceptance of waste from the generator where appropriate.

(b) The transporter shall ensure that the manifest accompanies the petroleum-substance waste.

(c) No transporter shall deliver a shipment of petroleum-substance waste to another transporter designated on the manifest, unless the delivering transporter:

(1) obtains the date of delivery and the handwritten signature of the accepting transporter on the manifest; and

(2) gives the legible copies of the manifest to the accepting transporter.

(d) No transporter shall deliver a shipment of petroleum-substance waste to a storage, treatment, or disposal facility, unless the transporter:

(1) obtains the date of delivery and the handwritten signature on the manifest of the owner or operator of the facility designated on the manifest; and

(2) gives the copies of the manifest to the owner or operator of the storage, treatment, or disposal facility designated on the manifest.

(e) The transporter shall deliver the entire quantity of petroleum-substance waste which the transporter has accepted from a generator or a transporter to:

(1) the designated facility listed on the manifest;

(2) the alternate designated facility if the waste cannot be delivered to the designated facility because an emergency prevents delivery; or

(3) the next designated transporter.

(f) If the transporter cannot deliver the waste in accordance with subsection (e) of this section, the transporter shall immediately contact the generator for further directions and shall revise the manifest according to the generator's instructions.

§§334.499. Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities.

(a) No owner or operator of a storage, treatment, or disposal facility may accept delivery of petroleum-substance waste for storage, treatment, or disposal unless:

(1) a Texas Natural Resource Conservation Commission (TNRCC) Petroleum Storage Tank (PST)-Waste Manifest accompanies the shipment which designates that facility to receive the waste;

(2) the facility owner or operator signs the PST-Waste Manifest and immediately gives at least one copy of the signed PST-Waste Manifest to the transporter;

(3) the facility owner or operator retains one copy of the PST-Waste Manifest in accordance with §334.500 of this title (relating to Recordkeeping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities); and

(4) within 30 days after receipt of the waste, the facility owner or operator sends a copy of the PST-Waste Manifest to the generator.

(b) When a facility or reuse area receives petroleum-substance waste accompanied by a PST-Waste Manifest, the facility owner or operator, or his agent, or the owner or operator of the property designated for the reuse area shall note any significant discrepancies on each copy of the PST-Waste Manifest.

(1) Significant discrepancies are differences between the quantity or type of waste designated on the PST-Waste Manifest and the quantity or type of waste a facility actually received. Significant discrepancies in type of waste are obvious differences which can be discovered by inspection or waste analysis.

(2) Upon discovering a significant discrepancy, the facility owner or operator shall attempt to reconcile the discrepancy with the waste generator or transporter (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after receiving the waste, the facility owner or operator shall, within five days, submit to the executive director a letter describing the discrepancy and attempts to reconcile it, and a copy of the PST-Waste Manifest at issue. The facility owner or operator shall ensure that the waste is a petroleum-substance waste eligible for acceptance by the facility pursuant to this subchapter and shall report any unreconciled discrepancies discovered during any analyses or evaluation.

(c) No owner or operator of a storage, treatment, or disposal facility in Texas shall accept wastes from an out-of-state generator or location unless the following requirements are met:

(1) the waste is accompanied by legible copies of the signed TNRCC PST-Waste Manifest for all wastes received pursuant to §334.496 of this title (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste);

(2) the facility owner or operator obtains documentation that the wastes contain only petroleum-substance contamination, have been generated from an underground or aboveground storage tank as defined in this chapter, and are classified as nonhazardous in the state where generated. This documentation shall consist of documentation on the sampling methods, sample handling, chain-of-custody documents, and legible copies of signed laboratory reports on samples collected from the specified wastes. The number of samples shall be sufficient to characterize the entire quantity of wastes. The analyses shall include:

(A) volatiles and semi-volatiles by United States Environmental Protection Agency (EPA) Methods 8240 and 8270, respectively;

(B) toxicity characteristic listed constituents as specified in 40 Code of Federal Regulations, Part 261;

(C) organochlorine pesticides and polychlorinated biphenyls by EPA Method 8080; and

(D) any other analyses necessary to characterize the wastes or as specified by the executive director; and/or

(3) the facility owner or operator obtains documentation from the appropriate governing agency in the originating jurisdiction that the wastes are classified as nonhazardous and meet the definition of petroleum-substance wastes (as such wastes are defined in §334.2 of this title (relating to Definitions)), and provides such documentation to the executive director prior to receiving the out-of- state soils.

(d) The facility owner or operator shall not accept any wastes for storage, treatment, or disposal from an in-state generator or location which contain any contaminants above natural background levels other than petroleum substances as defined in this subchapter, unless otherwise approved by the executive director. Documentation of the contaminants in the waste shall consist of a sufficient number of samples to characterize the waste and the samples shall be analyzed for all contaminants that may occur in that waste.

§§334.500. Recordkeeping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities.

(a) All records required by this subchapter shall be retained by the facility owner or operator for a minimum of five years from the date of receipt of the waste. The records shall be maintained in a secure location on the premises of the storage, treatment, or disposal facility and shall be immediately accessible by the facility owner and operator. In the event that copies of the required records cannot reasonably be maintained on the premises of the facility, such records may be maintained at a readily-accessible alternate site, provided that the following conditions are met.

(1) If the facility is in operation, the records shall be readily accessible for reference by the facility owner and operator.

(2) The records shall be readily accessible and available for inspection and copying upon request by commission personnel.

(3) The facility owner or operator shall provide the following information in writing to the executive director and to the commission's appropriate region office:

(A) the specific location where the required records are maintained; and

(B) the name, address, and telephone number of the authorized custodian of the records.

(4) The written information required in paragraph (3) of this subsection shall be submitted with the application for registration and within 15 days after the records are moved to an alternate site from that specified in the registration.

(b) For facilities which have completed the closure requirements and are no longer in service, the facility owner may submit the appropriate records required by this subchapter to the executive director in lieu of maintaining the records on the premises or at an alternate site, provided that the following conditions are met:

(1) the facility owner shall provide written justification adequate to explain why the records cannot be maintained at a readily-accessible alternate site; and

(2) the records shall be submitted at one time in one package for each facility, and the records shall be appropriately labeled with the facility identification number and location information.

(c) A facility owner or operator who initiates a shipment of petroleum-substance waste from a treatment or storage facility shall comply with the generator standards contained in §334.496 of this title (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste) and §334.497 of this title (relating to Recordkeeping and Reporting Procedures Applicable to Generators) and this subsection.

(d) The periods of record retention required by this subsection may be extended by the executive director during the course of any unresolved enforcement action regarding the regulated activity.

(e) The following information, at a minimum, shall be maintained by the facility owner or operator:

(1) documentation on all shipments of contaminated media received at the facility as specified on the waste manifest;

(2) the method(s) of storage or treatment for all media received;

(3) the method of reuse or disposal of all wastes removed from the facility including:

(A) the location of final disposition;

(B) the quantity and contaminant levels of wastes placed at any and every location;

(C) the name, work address, and work phone number of the authorized representative for the receiving facility or location. If the receiving facility cannot be identified by street address, other specifics shall be included to adequately identify the exact location;

(D) the name, work address, and work phone number of the authorized representative for the landowner at the receiving location;

(E) documentation on the soil sampling and analytical methods, chain-of-custody, and all analytical results for the soil received at the facility and transported off-site or reused on-site;

(F) a detailed description of the reuse methods;

(G) the date(s) of transport off-site and the dates of reuse;

(H) legible copies of the authorization from the landowner at the receiving location pursuant to §334.503 of this title (relating to Reuse of Petroleum-Substance Waste);

(4) documentation on the operations at the facility, including:

(A) information on the actual treatment efficiency of the unit;

(B) documentation on the results of all air emissions monitoring;

(C) any changes in the operations at the facility;

(D) documentation on any releases, fires, or explosions and the measures taken to abate the situation;

(5) monitoring data under §334.504 of this title (relating to Contaminant Assessment Program and Corrective Action) when required;

(6) a summary of the types and volumes of any petroleum-substance waste received without manifests. This documentation shall include the following information:

(A) the dates the facility received the wastes;

(B) the leaking petroleum storage tank or other identification number of the generating facility, and the names and addresses of the tank owner or operator and the transporter, if available;

(C) a description and the quantity of each petroleum-substance waste the facility received which was not accompanied by a Petroleum Storage Tank-Waste Manifest;

(D) the method of storage and/or treatment for each petroleum-substance waste;

(7) any other information deemed necessary by the executive director.

§§334.501. Additional Reports.

The owner or operator of a Class A or Class B facility shall report to the executive director within 24 hours of the discovery of any releases, fires, explosions, breakdowns, shutdowns, releases, or spills which result or may result in the discharge of any contaminants to the ground, surface water, or groundwater.

§§334.502. Design and Operating Requirements of Stockpiles and Land Surface Treatment Units.

(a) A stockpile or land surface treatment unit located at any storage or treatment facility or at any leaking petroleum storage tank site shall have an appropriate means of preventing any discharge or release of petroleum-substance waste or petroleum-substance waste constituents into any media. This shall be accomplished with:

(1) a synthetic, impermeable liner that is designed, constructed, and installed to prevent any migration of petroleum-substance wastes out of the stockpile or land surface treatment unit into the adjacent subsurface soil, groundwater, or surface water at any time during the active life (including the closure period) of the stockpile, or land surface treatment unit. The liner shall be constructed of materials that do not allow petroleum-substance waste or petroleum-substance waste constituents to migrate into the liner itself or into the adjacent subsurface soil, groundwater, or surface water during the active life of the facility. The liner shall:

(A) be constructed of materials that have appropriate chemical properties and sufficient strength and thickness to prevent failure due to pressure gradients (including static head and external hydro geologic forces), physical contact with the hydrocarbons or leachate to which they are exposed, climatic conditions, the stress of installation, and the stress of daily operations;

(B) be placed upon a foundation or base capable of providing support to the liner and resistance to pressure gradients above and below the liner to prevent failure of the liner due to settlement, compression, tearing, or uplift;

(C) be installed to cover all surrounding earth likely to be in contact with the petroleum-substance waste or leachate; and

(D) contain a leachate collection and removal system immediately above the liner that is designed, constructed, maintained, and operated to collect and remove leachate and rainwater from the stockpile or land surface treatment unit. The facility owner and operator shall specify the design and operating conditions which will ensure that the leachate depth over the liner does not exceed the depth of soil on the liner. The leachate collection and removal system shall be constructed of materials that are:

(i) chemically resistant to the hydrocarbons managed in the pile and the leachate expected to be generated; and

(ii) of sufficient strength and thickness to prevent collapse under the pressures exerted by overlaying petroleum-substance wastes, petroleum-substance waste cover materials, and any equipment used at the stockpile or treatment unit; and

(iii) designed and operated to function without clogging through the scheduled life of the stockpile or land surface treatment unit; or

(2) an alternate design or operating practice that is effective in preventing any release or discharge and is approved by the executive director. The facility owner or operator shall demonstrate that the alternate design or operating practices, together with location characteristics, will prevent the migration of any petroleum-substance waste constituents into the soil, groundwater, or surface water at any future time. In deciding whether to approve the alternate design, the executive director will consider:

(A) the nature and quantity of the wastes;

(B) the proposed alternate design and operation;

(C) the hydro geologic setting of the facility, including a tentative capacity and thickness of the liners and soils present between the stockpile or land surface treatment unit and groundwater or surface water; and

(D) all other factors which would influence the quality and mobility of the leachate produced and the potential for it to migrate to soil, groundwater, or surface water.

(b) The facility owner or operator shall design, construct, operate, and maintain a run-on control system capable of preventing flow onto the active portion of the stockpile or land surface treatment unit.

(c) The facility owner or operator shall design, construct, operate, and maintain a run-off management system to prevent flow from a stockpile or land surface treatment unit.

(d) Collection and holding facilities (e.g., tanks or basins) associated with run-on and run-off control systems shall be emptied and managed expeditiously in accordance with applicable state and federal requirements after storms to maintain design capacity of the system.

(e) If the stockpile or land surface treatment unit contains any particulate matter which may be subject to wind dispersal, the facility owner or operator shall cover or otherwise manage the stockpile or land surface treatment unit to control wind dispersal.

(f) The executive director may specify other design and operating practices that may be necessary to ensure that the requirements of this section are satisfied.

(g) The facility owner or operator shall ensure that treatment is initiated on stockpiled soil within 90 days from the date of receipt at the facility and that the treated soil is removed from the facility for final disposition within 90 days after completing treatment.

(h) In addition to the requirements specified in subsections (a)-(g) of this section, the facility owner or operator shall design, construct, operate, and maintain the land surface treatment unit to maximize the degradation, transformation, or immobilization of petroleum-substance waste constituents in the treatment area. At a minimum, the facility owner or operator shall specify the following items, if applicable, in the facility registration application:

(1) the rate and method of petroleum-substance waste application to the treatment area;

(2) measures to control soil ph.;

(3) measures to enhance microbial or chemical reactions (e.g., fertilization); and

(4) measures to control the moisture content of the treatment area.

(i) The facility owner or operator shall inspect the unit weekly and after storms to detect evidence of:

(1) deterioration, malfunctions, or improper operation of run-on and run-off control systems; and

(2) improper functioning of wind dispersal control measures.

§§334.503. Reuse of Petroleum-Substance Waste.

(a) Wastes that are intended for reuse are subject to all the applicable provisions of this subchapter, including, but not limited to, the following requirements. §§334.482, 334.496-334.500, and 334.502 of this title (relating to General Prohibitions; Shipping Procedures Applicable to Generators of Petroleum-Substance Waste; Recordkeeping and Reporting Procedures Applicable to Generators; Shipping Requirements Applicable to Transporters of Petroleum-Substance Waste; Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities; Record- keeping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities; and Design and Operating Requirements of Stockpiles and Land Surface Treatment Units).

(b) Recordkeeping and reporting requirements for any person who intends to reuse petroleum-substance wastes shall require that person to maintain records and provide to the executive director when requested such information deemed necessary by the executive director to ensure compliance with the requirements of this subsection. This information shall include, but is not limited to:

(1) identification, address, and name of the authorized representative of the generating facility;

(2) identification, address, and name of the authorized representative for the receiving facility or location;

(3) identification of the landowner of the receiving location or facility;

(4) the quantity, type, and contaminant levels of the reused wastes;

(5) documentation of the reuse methods and dates of reuse;

(6) documentation that asphalt mix or road base mix meets the specifications required by the final user;

(7) documentation that the landowner of the receiving location has approved the use of the reused wastes on his property.

(c) Reuse requirements are as follows.

(1) Any person who intends to utilize petroleum-substance wastes for reuse shall obtain written approval from the landowner of the land on which the wastes will be placed. The landowner's approval shall be submitted to the executive director upon demand.

(2) Petroleum-substance wastes shall be reused only in manners which are in accordance with §334.482 of this title and at contaminant levels specified by the executive director.

(3) Petroleum-substance wastes may be reused under the following conditions.

(A) Petroleum-substance wastes may be utilized in cold-mix-emulsion bituminous paving at a cold-mix asphalt-producing facility registered under the terms of this subchapter. The petroleum-substance waste shall be mixed with aggregate or other suitable materials at a rate which will result in a mixture meeting or exceeding the specifications required by the final user. The petroleum-substance waste shall contain less than 0.5 mg/kg for each component of benzene, toluene, ethyl benzene, and total xylenes prior to mixing. Authorization for the facility shall also be obtained from all other appropriate federal, state, or local governing agencies. Authorization from the owner of the road or other area where the asphalt is to be utilized shall be obtained prior to laying the asphalt.

(B) Petroleum-substance wastes may be utilized in asphalt mix at hot-mix asphalt-producing facilities registered under this subchapter. The petroleum-substance waste shall contain less than 0.5 mg/kg for each component of benzene, toluene, ethyl benzene, and total xylenes prior to mixing. The petroleum-substance waste shall be mixed with aggregate at a rate which will result in a mixture meeting or exceeding the specifications required by the final user. Authorization for the facility shall also be obtained from all other appropriate federal, state, or local governing agencies. Authorization from the owner of the road or other area where the asphalt is to be utilized shall be obtained prior to laying the asphalt.

(C) Petroleum-substance wastes may be utilized in road base or parking lot stabilized base when the base will be covered with concrete or asphalt if the contaminant levels of the soil prior to mixing into the stabilized base are less than 0.5 mg/kg for each component of benzene, toluene, ethyl benzene, and total xylenes, and less than 500.0 mg/kg total petroleum hydrocarbons or at contaminant levels otherwise specified by the executive director. The base shall be mixed according to the specifications required by the final user. Soil which is not mixed into stabilized road base shall meet the criteria for clean soil as specified by the executive director in order to be spread on a road or parking lot. The generator shall obtain prior written consent for the placement of the soil from the owner of the road (if different from the landowner).

(D) Petroleum-substance wastes may be utilized in road base or parking lot stabilized base when the base will not be covered with asphalt or concrete if the contaminant levels are less than 0.5 mg/kg for each component of benzene, toluene, ethyl benzene, and total xylenes, and less than 200 mg/kg of total petroleum hydrocarbons or at contaminant levels otherwise specified by the executive director. The base shall be mixed according to the specifications required by the final user. The base shall be professionally mixed by a facility registered under the terms of this subchapter. Soil which is not mixed into stabilized road base shall meet the criteria for clean soil in order to be spread on a road or parking lot. The generator shall obtain prior written consent for the placement of the soil from the owner of the road (if different from the landowner).

(E) Petroleum-substance wastes will be considered clean, and may be used as fill in another leaking petroleum storage tank site tankhold if the contaminant levels do not exceed 0.5 mg/kg for each component of benzene, toluene, ethyl benzene, and total xylenes, and 10.0 mg/kg total petroleum hydrocarbons. Other contaminant levels may be considered by the executive director if documentation indicates that there is no threat to public health or safety and if there is no threat of groundwater contamination at the receiving site. The owner of the underground storage tanks at the receiving facility, and the landowner (if different from the tank owner) shall give written consent for this activity. The soil shall not be utilized in a tankhold in which a new tank installation will occur.

(F) Petroleum-substance waste may be reused by alternative methods or contaminant levels deemed appropriate and as authorized by the executive director. The generator shall obtain authorization, including authorization pursuant to the requirements of this subchapter, from the executive director prior to reusing the waste by alternative methods.

(G) The executive director may, in his discretion, grant a variance for the pre-treatment requirements set forth in subparagraphs (A)-(E) of this paragraph. It shall be the burden of the applicant to apply for a variance under this subparagraph.

§§334.504. Contaminant Assessment Program and Corrective Action.

(a) The facility owner or operator shall conduct an assessment when, in the opinion of the executive director, there exists a possibility of migration of contaminants into or adjacent to waters in the state. The assessment shall be capable of determining:

(1) whether petroleum-substance waste or petroleum-substance waste constituents have entered the groundwater, surface water, or soils.

(2) the rate and extent of migration of any petroleum-substance waste or petroleum-substance waste constituents in the soil, groundwater, or surface water; and

(3) the concentrations of petroleum-substance waste or petroleum-substance waste constituents in the soil, groundwater, or surface water.

(b) The owner or operator of the facility shall conduct corrective action at the facility when, in the opinion of the executive director, petroleum-substance waste constituents exist in the soil, groundwater, or nearby surface water at levels which are harmful to human health and safety or the environment.

(c) The corrective action program shall be capable of preventing the migration of contaminants and shall prevent the contaminants from exceeding the levels determined by the executive director.

(d) The facility owner or operator shall ensure that the corrective action measures under this subsection shall be initiated and completed within a reasonable period of time as determined by the executive director considering the extent of contamination. The executive director may issue additional directives should the corrective action activities prove to not be effective in reducing the contaminant levels at a sufficient rate.

(e) The facility owner or operator shall report in writing to the executive director the effectiveness of the corrective action program. The facility owner or operator shall submit these reports to the commission's Austin office and to the appropriate commission region office upon request by the executive director.

§§334.505. Security.

(a) The facility owner or operator shall prevent unauthorized entry by persons or animals onto the facility.

(b) A facility shall have:

(1) a 24-hour surveillance system (e.g., television monitoring or surveillance by guards or facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or

(2) an artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and

(3) a means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

(c) A sign with the legend, "Caution-Unauthorized Personnel Keep Out" shall be posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to the active portion. The legend shall be written in English and in any other language predominant in the area surrounding the facility, and shall be legible from a distance of at least 25 feet. Existing signs with a legend other than "Caution-Unauthorized Personnel Keep Out" may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the active portion, and that entry onto the active portion can be dangerous.

(d) The owner or operator of the facility shall submit details of the proposed security measures in the application for registration.

§§334.506. Contingency Plan.

(a) Each facility owner or operator shall have a contingency plan for each facility. The contingency plan shall be designed to minimize hazards to human health or the environment from fires, explosions, or any release of petroleum-substance waste or petroleum-substance waste constituents to air, soil, groundwater, or surface water.

(b) The provisions of the plan shall be carried out immediately whenever there is a fire, explosion, or release of petroleum-substance waste or petroleum-substance waste constituents which could threaten human health or the environment.

(c) The contingency plan shall describe the actions facility personnel shall take in order to respond to fires, explosions, or any

release of petroleum-substance waste or petroleum-substance waste constituents to air, soil, groundwater, or surface water at the facility.

(d) The plan shall list names, addresses, and phone numbers (office and home) of all persons qualified to act as facility emergency coordinators and this list shall be kept up to date. Where more than one person is listed, one shall be named as primary emergency coordinator and others shall be listed in the order in which they will assume responsibility as alternates.

(e) The plan shall include a list of all emergency equipment at the facility, such as fire extinguishing systems, spill control equipment, communications, and alarm systems (internal and external). This list shall be kept up to date. In addition, the plan shall include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(f) The plan shall include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan shall describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by release of petroleum-substance waste or fires).

(g) A legible copy of the contingency plan and all revisions to the plan shall be:

(1) submitted to the executive director with the application for registration;

(2) maintained at the facility; and

(3) submitted to all local fire departments or emergency response officials who may be called upon to provide emergency services.

(h) The contingency plan shall be reviewed, and immediately amended, if necessary, whenever:

(1) the facility registration is revised;

(2) the plan fails in an emergency;

(3) the facility changes its design, construction, operations, maintenance, or other circumstances in a way that materially increases the potential for fires, explosions, or release of petroleum-substance waste or petroleum-substance waste constituents, or changes the response necessary in an emergency;

(4) the list of emergency coordinators changes; or

(5) the list of emergency equipment changes.

§§334.507. Emergency Procedures.

(a) At all times, there shall be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator shall be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person shall have the authority to commit the resources needed to carry out the contingency plan.

(b) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) shall immediately:

(1) activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(2) notify appropriate state or local agencies with designated response roles if their help is needed.

(c) Whenever there is a release, fire, or explosion, the emergency coordinator shall immediately identify the character, exact source, amount, and areal extent of any released materials. The emergency coordinator may do this by observation or review of facility records or manifests, and, if necessary, by chemical analysis.

(d) Concurrently, the emergency coordinator shall assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment shall consider both direct and indirect effects of the release, fire, or explosion (e.g., the effects of any toxic, irritating, or asphyxiating gases that regenerated, or the effects of any surface water run-off from water or chemical agents used to control fire and heat-induced explosions).

(e) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health or the environment outside the facility, the emergency coordinator shall report his findings as follows.

(1) If the emergency coordinator's assessment indicates that evacuation of local areas may be advisable, the emergency coordinator shall immediately notify appropriate local authorities. The emergency coordinator shall be available to help appropriate officials decide whether local areas should be evacuated.

(2) The emergency coordinator shall notify as soon as possible, but not later than 24 hours: during working hours, the local Texas Natural Resource Conservation Commission regional office; during non-working hours, the Texas Emergency Response Unit at (512) 239-2507 or the State Toll Free Emergency Hotline at 1-800-832-8224; and if federal reportable spill quantities are exceeded, the National Response Center (using their 24-hour toll free number 1-800-424-8802). The report shall include:

(A) name and telephone number of reporter;

(B) name and address of facility;

(C) time and type of incident (e.g., release, fire);

(D) name and quantity of material(s) involved, to the extent known; and

(E) the possible hazards to human health or the environment outside the facility.

(f) During an emergency, the emergency coordinator shall take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other petroleum-substance waste at the facility. These measures shall include, where applicable, stopping processes and operations, collecting and containing released waste, and removing or isolating containers.

(g) If the facility stops operations in response to a fire, explosion, or release, the emergency coordinator shall monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(h) Immediately after an emergency, the emergency coordinator shall provide for treating, storing, and/or disposing of recovered water, contaminated soil and surface water, and any other material that results from a release, fire, or explosion at the facility.

(i) The emergency coordinator shall ensure that, in the affected area(s) of the facility, all emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(j) The facility owner or operator shall notify the executive director and appropriate state and local authorities that the facility is in compliance with subsection (h) of this section before operations are resumed in the affected areas(s) of the facility.

(k) The facility owner or operator shall note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, the facility owner or operator shall submit a written report on the incident to the executive director. The report shall include:

(1) name, address, and telephone number of the facility owner or operator;

(2) name, address, and telephone number of the facility;

(3) the facility's registration number;

(4) date, time, and type of incident (e.g. fire, explosion);

(5) name and quantity of material(s) involved;

(6) the extent of injuries, if any;

(7) an assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(8) estimated quantity and disposition of recovered material that resulted from the incident.

§§334.508. Closure Requirements Applicable to Class A and Class B Facilities.

(a) The facility owner or operator shall submit his closure plan to the executive director for approval with the application for registration.

(b) In the closure plan, the facility owner or operator shall address the following objectives and indicate how they will be achieved:

(1) removal and decontamination of all structures, equipment, or improvements which will no longer be utilized at the facility;

(2) removal and proper disposal or treatment and reuse of all petroleum-substance wastes from the facility; and

(3) removal or treatment of any petroleum-substance waste and petroleum-substance waste constituents which exist above the established cleanup levels that have been released from the facility into the soil, groundwater, or surface water.

(c) During the closure period, the facility owner or operator of a petroleum-substance treatment facility shall:

(1) continue the contaminant assessment or corrective action at the facility as directed by the executive director;

(2) maintain the run-on and run-off control systems required under §334.502 of this title (relating to Design and Operating Requirements of Stockpiles and Land Surface Treatment Units);

(3) control wind dispersal of particulate matter which may be subject to wind dispersal.

(d) When closure is completed, the facility owner or operator shall submit to the executive director for approval certification both by the facility owner or operator and by an independent qualified hydro geologist, geologist, or an independent registered professional engineer, that the facility has been closed in accordance with the specifications in the approved closure plan.

(e) The facility owner or operator shall prepare a written estimate, in current dollars, of the cost of closing the facility in accordance with the closure plan as specified in subsections (a) and (b) of this section. The closure cost estimate shall equal the cost of closing at the point in the facility's operating life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan. The closure cost estimate shall be based on the costs to the facility owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary for the facility owner or operator. Notwithstanding other closure costs, such estimate shall also include the costs associated with third party removal, shipment off-site, and treatment or disposal off-site of the following wastes to an authorized storage, treatment, or disposal facility:

(1) maximum inventory of wastes in storage and/or treatment units;

(2) any contaminated soils, groundwater, or surface water generated as a result of releases at the site;

(3) wastes generated as a result of closure activities;

(4) contaminated storm water or leachate.

(f) The closure cost estimate may not incorporate a positive cost that may be realized by the sale of petroleum-substance wastes, facility structures or equipment, land, or other facility assets at the time of partial or final closures rather than or in addition to waste disposal and clean-up costs. The facility owner or operator may also not incorporate a zero cost for petroleum-substance waste that might have economic value rather than the waste disposal cost.

(g) The facility owner or operator shall revise the closure cost estimate whenever a change in the closure plan increases the cost of closure. The revised closure cost estimate shall be adjusted for inflation as specified in this subsection.

(h) The facility owner or operator shall keep the following at the facility during the operating life of the facility: the latest closure cost estimate prepared in accordance with subsections (e) and (f) of this section and, when this estimate has been adjusted in accordance with subsection (g) of this section, the latest adjusted closure cost estimate.

(i) For the remaining financial assurance requirements, see Chapter 37, Subchapter E of this title (relating to Financial Assurance Requirements for Class A or B Petroleum-Substance Contaminated Soil Storage, Treatment, or Reuse Facilities).

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610250
Kevin McCalla
Executive, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239–1966

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30 TAC §§334.485-334.510

(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Water Code, Chapter 26, Subchapter I, §§26.341-26.363, which provides the commission with the authority to establish a program to regulate underground and aboveground storage tanks and under Texas Water Code, §5.103 and §5.105, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of the State of Texas, and to establish and approve any general policy of the commission.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, and 26.341-236.363.

§§334.485. Authorization for Class C and Class D Facilities.

§§334.486. Exemptions.

§§334.487. Notification and Mobilization Requirements for Class B Facilities.

§§334.488. Effect on Existing Facilities.

§§334.489. Notice to Owners or Operators.

§§334.490. Public Notice.

§§334.491. Public Meetings for Class A Facilities.

§§334.492. Closure and Facility Expansion.

§§334.493. Location Standards for Class A Petroleum-Substance Waste Storage or Treatment Facilities.

§§334.494. Shipping Procedures Applicable to Generators of Petroleum-Substance Waste.

§§334.495. Recordkeeping and Reporting Procedures Applicable to Generators.

§§334.496. Shipping Requirements Applicable to Transporters of Petroleum-Substance Waste.

§§334.497. Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities.

§§334.498. Recordkeeping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities.

§§334.499. Additional Reports.

§§334.500. Design and Operating Requirements of Stockpiles and Land Surface Treatment Units.

§§334.501. Reuse of Petroleum-Substance Waste.

§§334.502. Contaminant Assessment Program and Corrective Action.

§§334.503. Security.

§§334.504. Contingency Plan.

§§334.505. Emergency Procedures.

§§334.506. Closure Requirements Applicable to Class A and Class B Facilities.

§§334.507. General Requirements for Financial Assurance.

§§334.508. Mechanisms for Financial Assurance.

§§334.509. Liability Requirements for Class A and Class B Facilities.

§§334.510. Incapacity of Owners or Operators, Guarantors, or Financial Institutions.

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610251
Kevin McCalla
Executive, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239–1966

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30 TAC §334.509

The commission proposes new §334.509, concerning financial assurance requirements. Owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities must provide evidence of financial responsibility for closure and sudden liability coverage per Chapter 334, Subchapter K.

Owners or operators seeking permits for compost facilities must provide evidence of financial responsibility for closure. This requirement is authorized by Texas Health and Safety Code, §361.085 and promulgated as 30 TAC §332.47(9).

Changes to Chapter 334 are proposed along with a new 30 TAC Chapter 37. New Chapter 37 contains standard financial assurance wording of the mechanisms and requirements for financial responsibility and places them in one rule chapter. Initially, this chapter will provide financial assurance requirements for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities.

Proposed Chapter 37, Subchapter A sets forth the applicability of the proposed rule, definitions, and basic requirements for demonstrating financial assurance. This subchapter would require all mechanisms relied upon to show evidence of financial responsibility to be worded as set forth in Subchapter D or G, require approval of all mechanisms by the executive director, require substitution of financial assurance mechanisms in the event of failure or cancellation, and allow the use of multiple financial assurance mechanisms for a single facility, or use of a single mechanism for multiple facilities of the same type. Mechanisms used to show financial responsibility for closure must be at least equal in amount to the most recent closure cost estimates. Mechanisms used to show evidence of sudden liability coverage must be at least equal to the annual aggregate limit as specified. To receive approval for financial responsibility, mechanisms for permitted facility must be submitted at least 60 days prior to the acceptance of waste for processing or at least 60 days prior to operations, while registrants must submit mechanisms prior to issuance of a registration.

Proposed Chapter 37, Subchapter B sets forth the general criteria for approval of financial assurance for closure. This subchapter would allow the executive director to draw on the mechanism when required to do so, require continuous coverage until terminated, require annual adjustments for inflation, require necessary adjustments in the closure cost estimate, and require establishment of a standby trust for surety bonds or letters of credit.

Proposed Chapter 37, Subchapter C sets forth the criteria for approval of financial assurance mechanisms for closure, including trust funds, surety bonds guaranteeing payment, surety bonds guaranteeing performance, irrevocable standby letters of credit, insurances, financial tests and corporate guarantees.

Proposed Chapter 37, Subchapter D sets forth the required wording of financial assurance mechanisms for closure referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter E sets forth the criteria for approval of financial assurance for liability. This subchapter would address the liability requirements for sudden accidental occurrences.

Proposed Chapter 37, Subchapter F sets forth the criteria for approval of financial assurance mechanisms for liability, including trust funds, surety bonds guaranteeing payment, irrevocable standby letters of credit, insurances, financial tests and corporate guarantees.

Proposed Chapter 37, Subchapter G sets forth the required wording of financial assurance mechanisms for liability referenced as figures in the *Texas Register*.

Proposed Chapter 37, Subchapter J makes the requirements of Chapter 37 applicable to owners and operators seeking permits for compost facilities under §332.47.

Proposed Chapter 37, Subchapter K makes the requirements of Chapter 37 applicable to owners and operators seeking registrations for Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities under 30 TAC Chapter 334, Subchapter K. Amendment of §332.47 and §334.484(c)(16) reflects the requirement upon owners and operators of compost facilities and owners and operators of Class A or B petroleum-substance contaminated soil storage, treatment, and reuse facilities to use the documents and language from Chapter 37.

Amendment of Chapter 332 would make the new Chapter 37 applicable to owners and operators of permitted compost facilities. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 332 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Amendment of Chapter 334 would make the new Chapter 37 applicable to owners and operators of Class A and B petroleum-substance contaminated soil storage, treatment, or reuse facilities required to provide evidence of financial assurance under Chapter 334, Subchapter K. These facilities are already required to provide evidence of financial assurance to the commission. Amendment of Chapter 334 to make Chapter 37 applicable will merely formalize the requirements already in place for financial assurance mechanisms.

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Minick 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 increased efficiency in the review of financial assurance documents and additional safeguards for the resources of the state. 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.

The commission has prepared a Takings Impact Assessment for the amendment to Chapter 37 pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of the new rule is to begin the consolidation of financial assurance requirements into one rule chapter. The new rule substantially advances this purpose by setting up a new Chapter 37 and making it initially applicable to financial assurance for permitted composting facilities and registered Class A or B petroleum-substance contaminated soil storage, treatment and reuse facilities. Promulgation and enforcement of this rule will not affect private real property because it adds no new financial assurance requirements and it does not adversely affect property values.

A public hearing on this proposal will be held August 29, 1996, at 10:00 a.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, 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, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Comments may be mailed to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 96127-037-AD. Comments must be received by 5:00 p.m., August 29, 1996. For further information, please contact Randall Terrell, Office of Policy and Regulatory Development, (512) 239-0577.

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.

The new section is proposed under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 26.341-26.363, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and

other laws of Texas and to establish and approve all general policy of the commission.

The proposed new section implements Texas Health and Safety Code, §361.084 and Texas Water Code, §§26.341-26.363.

§334.509. Financial Assurance Mechanisms.

The facility owner or operator shall provide evidence of financial responsibility for each facility, and shall be subject to the requirements of Chapter 37 of this title (relating to Financial Assurance).

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

Issued in Austin, Texas, on July 10, 1996.

TRD-9610222
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: October 23, 1996
For further information, please call: (512) 239-1966

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part II. Texas Parks and Wildlife Department

Chapter 51. Executive

The Texas Parks and Wildlife Department proposes the repeal of existing §51.92 and new §51.92, concerning requests for easements on department property. The repeal and new section are necessary to provide a mechanism for commission deliberation on requests for easements on department lands. The department has also proposed the repeal of §51.91 and §§51.93-51.97, which were published in the June 7, 1996, issue of the *Texas Register* (21 TexReg 5144).

The repeal and new section will function by establishing a procedure for evaluating easement requests and for forwarding staff recommendations to the commission for approval.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeal and new section as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeal and new section.

Mr. Macdonald also has determined that for each of the first five years the repeal and new section as proposed are in effect the public benefit anticipated as a result of enforcing the repeal and new section as proposed will be a mechanism for department, commission, and public review of easement requests on department lands.

There are no anticipated economic costs to persons required to comply with the repeal and new section as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as this agency has determined that the repeal and new section as proposed will not impact local economies.

The department has determined that the proposed repeal and new section do not require a takings impact assessment under the provisions of Government Code, Chapter 2007.

Comments on the proposed repeal and new section may be submitted to Roy Frye, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512)389-4579 or 1-800-792-1112, extension 4579.

Easement Requests and Unauthorized Easement Activity

31 TAC §51.92

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Parks and Wildlife Code, Chapter 13, Subchapter B, which provides the Commission with the authority to establish regulations governing the conservation, preservation, and use of state property.

The repeal affects Parks and Wildlife Code, Chapter 13, Subchapter B.

§51.92. Requirements for Requests.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610210
William D. Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996
For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

The new section is proposed under Parks and Wildlife Code, Chapter 13, Subchapter B, which provides the Commission with the authority to establish regulations governing the conservation, preservation, and use of state property.

The new section affects Parks and Wildlife Code, Chapter 13, Subchapter B.

§51.92. Easement Requests.

(a) An entity requesting an easement on property owned or managed by the department shall submit a written request that:

(1) identifies the site of the proposed easement by a metes and bounds description;

(2) describes the activity to take place on the site of the proposed easement; and

(3) contains a statement that:

(A) every reasonable attempt has been made to minimize adverse impacts to the property;

(B) no feasible and prudent alternative exists to the easement on state property; and

(C) discusses alternatives to the location of the easement.

(b) The department shall review requests fairly and expeditiously in accordance with the best available management guidelines.

(c) Upon reaching a determination, the department shall present to the commission its findings and recommendations.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610209

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

Earliest possible date of adoption: August 26, 1996

For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Chapter 57. Fisheries

Issuance of Oyster Transplant and Harvest Permits

31 TAC §§57.231–57.233

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §§57.231-57.233 concerning Issuance of Oyster Transplant and Harvest Permits. This action represents a streamlining and recodification of current regulations concerning oyster transplant and harvest permits as part of the Parks and Wildlife Commission regulations sunset process. These regulations will be recodified in a new proposed Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeals in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeals in effect the public benefit anticipated as a result of enforcing the repeals will be removal of redundant sections of the Texas Administrative Code and streamlining of oyster transplant and harvest permits.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeals as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repeals will not impact local economies.

Comments may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeals are proposed under Parks and Wildlife Code §§76.001-76.118.

The repeals affect Parks and Wildlife Code §§76.001-76.118.

§57.231. Transplant Permits.

§57.232. Harvest Permits.

§57.233. Permit Cancellation.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610195

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

Earliest possible date of adoption: August 26, 1996

For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Issuance of Oyster Leases

31 TAC §§57.241–57.242, 57.245

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §§57.241, 57.242 and 57.245 concerning Issuance of Oyster Leases. This action represents a streamlining and recodification of current regulations concerning oyster leases as part of the Parks and Wildlife Commission regulations sunset process. These regulations will be recodified in a new proposed Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeals are in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeals are in effect the public benefit anticipated as a result of the repeals will be removal of redundant sections of the Texas Administrative Code and streamlining of oyster transplant and harvest permits.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeals as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repeals will not impact local economies.

Comments may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeals are proposed under Parks and Wildlife Code §§76.001-76.118.

The repeals affect Parks and Wildlife Code §§76.001-76.118.

§57.241. Application for Oyster Lease.

§57.242. Approved Application for Oyster Lease.

§57.245. Oyster Transaction Receipt.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610196
William D. Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996
For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Collection of Broodfish from Texas Waters

The Texas Parks and Wildlife Department proposes repeal of §§57.391-57.402 and new §§57.391-57.401, concerning collection of broodfish from public waters. The proposed repeals and new rules provide criteria for taking of broodfish from the public waters of Texas for use in aquaculture activities.

New §57.391 provides definitions necessary for clarification and implementation of following sections. Proposed new §57.392 establishes general rules regulating collection of broodfish from public waters. Provisions of new §57.393 establish notification requirements when broodfish collected from public waters are sold or purchased and new §57.394 provides notification requirements for collection of broodfish. Proposed new §57.395 sets fees and issuance terms for broodfish permits. New §57.396 establishes expiration dates for broodfish permits and new §57.397 sets criteria for revocation of broodfish permits. New proposed §57.398 provides criteria for denial of broodfish permits and new §57.399 provides an appeal process for broodfish permits. Proposed new §57.400 sets requirements for reports related to broodfish collection and new §57.401 provides for restitution for the value of broodfish collected in public waters.

Mr. Robin Riechers, staff economist, has determined that there will be no fiscal implications to state government as a result of proposed amendments. There will be no fiscal implications for units of local government.

Mr. Riechers also has determined that the public benefits anticipated as a result of enforcing or administering the repeal and new rules as proposed will be the protection of aquatic life in the natural waters of Texas.

There will be no additional economic cost to persons required to comply with rules as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as this agency has determined that the rule as proposed will not impact local economies.

Comments on the proposed rule may be submitted to Joedy Gray, Inland Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8037 or 1-800-792-1112, extension 8037.

31 TAC §§57.391-57.402

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Parks and Wildlife Code, Chapter 43, Subchapter P, which gives the commission authority to regulate the collection of broodfish from public waters.

The proposed repeal affects Parks and Wildlife Code, Chapter 43, Subchapter P, §§43.551-43.554.

§57.391. Definitions.

§57.392. General Rules.

§57.393. Sale and Purchase of Broodfish; Notification.

§57.394. Broodfish Collection; Devices, Methods and Notification.

§57.395. Broodfish Permits; Fees, Terms of Issuance.

§57.396. Broodfish Permits; Expiration.

§57.397. Broodfish Permits; Revocation.

§57.398. Permit Denial.

§57.399. Appeal.

§57.400. Prohibited Acts.

§57.401. Reports.

§57.402. Restitution for Broodfish.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610208
William D. Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996
For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

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31 TAC §§57.391, 57.392, 57.394–57.401

The new rules are proposed under Parks and Wildlife Code, Chapter 43, Subchapter P, which gives the commission authority to regulate the collection of broodfish from public waters.

The proposed new rules affects Parks and Wildlife Code, Chapter 43, Subchapter P, §§43.551-43.554.

§57.391. Definitions.

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

Aquaculture (or fish farming)-The business of producing and selling cultured aquatic species raised in private facilities.

Aquaculturist-A person holding a valid license, issued under the Agriculture Code, Chapter 134, to engage in aquaculture or fish farming.

Aquaculture facility (or fish farm)-The property including private ponds from which fish, shellfish, or aquatic plants are produced, propagated, transported, or sold.

Broodfish-A fish taken from the public waters of this state for the purpose of aquaculture.

Collection-Any boating, fishing, or fish transportation activity involved in the take or attempted take of broodfish.

Cultured species-Aquatic species raised under conditions where at least a portion of their life cycle is controlled by an aquaculturist.

Department-The Texas Parks and Wildlife Department.

Designated agent-A person designated by an aquaculturist and approved by permit to act on behalf of that aquaculturist in collection of broodfish.

Director-The executive director of the Texas Parks and Wildlife Department or his designee.

Progeny-Offspring of fish, including eggs, fry, and fingerlings.

Public waters-Bays, estuaries, and water of the Gulf of Mexico within the jurisdiction of the state, and the rivers, streams, creeks, bayous, reservoirs, lakes, and portions of those waters where public access is available without discrimination.

Sportfishing-The act of using legal means or methods to take or to attempt to take aquatic life for noncommercial purposes from the public waters of this state.

§57.392. General Rules.

(a) While collecting broodfish, an aquaculturist or designated agent must be in possession of a valid sportfishing license in all public waters, a saltwater fishing stamp in public salt water, and broodfish permit issued by the department.

(b) Violation of any provision of a permit issued under these rules is a violation of these rules.

§57.394. Broodfish Collection; Notification.

The department's aquaculture coordinator and nearest law enforcement office must be notified no less than 48 hours prior to commencement of broodfish collection.

§57.395. Broodfish Permits; Fees, Terms of Issuance.

(a) The director may issue broodfish permits only to an aquaculturist who has not violated, during the one-year period preceding the date of application, any provision of these rules or rules promulgated under:

(1) the Parks and Wildlife Code, Chapter 66; or

(2) the Agriculture Code, Chapter 134.

(b) The permit shall prescribe:

(1) collection location;

(2) means and methods of collection;

(3) number and total length of fish collected; and

(4) time period of collection.

(c) Broodfish permits will not be issued for the collection of black bass of the genus Micropterus or crappie of the genus Pomoxis.

(d) The fee for broodfish permit application shall be $25 and is not refundable if a permit is denied.

(e) To be considered for a broodfish permit, the applicant shall:

(1) complete and submit a broodfish permit application on a form provided by the department;

(2) provide a copy of the applicant's aquaculture license issued by the Texas Department of Agriculture with the application;

(3) submit the amount of $25 to the department.

(f) An applicant for a broodfish permit or a permittee shall allow inspection of their aquaculture facility by authorized employees of the department during normal business hours.

(g) If a permittee discontinues aquaculture activities, broodfish collected under permit from the department may be returned to the public waters of the state only by permit as required by the Parks and Wildlife Code, §66.015.

§57.396. Broodfish Permit; Expiration.

(a) Broodfish permits required by these rules expire 60 days from the date of issuance.

(b) Broodfish permits are not transferable.

§57.397. Broodfish Permit; Revocation.

(a) The director may revoke a broodfish permit upon finding that a permittee or his agent:

(1) does not hold a valid aquaculture (fish farming) license issued by the Texas Department of Agriculture;

(2) does not hold a valid sportfishing license while collecting in all public waters of this state in addition to a saltwater stamp in public salt water;

(3) has violated any provision of that broodfish permit;

(4) fails to report, as required in §57.401 of this title (relating to Reports), the number and sizes of broodfish collected;

(5) provides false information in a broodfish report; or

(6) fails to remit to the department within 30 days of broodfish collection all restitution fees assessed to the permittee for recovery of the value of broodfish collected.

(b) The director may revoke a broodfish permit upon finding that a permittee's designated agent:

§57.398. Permit Denial.

A broodfish permit may be denied if:

(1) the applicant fails to satisfy all required criteria for issuance listed in §57.392(a)of this title (relating to General Rules) and §57.395(a)-(c) of this title (relating to Broodfish Permits; Fees, Terms of Issuance);

(2) the department finds that collection of broodfish could be detrimental to existing fish populations at a specified collection site;

(3) the department finds that issuance of the permit is inconsistent with department management or stocking programs in specified public water;

(4) the department finds that issuance of the permit could be reasonably expected to interfere with sportfishing activities at a specified site;

(5) fish species and numbers requested in the permit application are reasonably available from commercial aquaculturists licensed to operate aquaculture facilities within the state;

(6) a designated agent named in the broodfish permit application has violated any of these rules in the five-year period preceding the date of permit application.

§57.399. Appeal.

An opportunity for hearing shall be provided to the applicant or permit holder for any denial of a broodfish permit where the terms of the issuance are different from those requested by the applicant.

(1) Requests for hearings shall be made in writing to the department no more than 30 days from the receipt of the permit denial.

(2) All hearings shall be conducted in accordance with the rules of practice and procedure of the Texas Parks and Wildlife Department and the Administrative Procedure and Texas Register Act.

§57.400. Reports.

The broodfish permit holder must submit a broodfish collection report to the department within seven days of broodfish collection. The report shall be submitted on a form provided by the department.

§57.401. Restitution for Broodfish.

The Parks and Wildlife Code, §43.554, authorizes the department to set fees equal to the value of the broodfish to be taken under authority of that subchapter. The value of fish taken from the public waters of Texas is prescribed by rule in §§69.20-69.30 of this title (relating to Fish and Wildlife Values). Upon receipt of a broodfish collection report, the department shall provide the permittee with a restitution request in an amount equal to the established value of any and all fish collected. Permittee shall remit to the department the full restitution value of all broodfish taken within 14 days of receipt of restitution request from the department.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610207

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

Earliest possible date of adoption: August 26, 1996

For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

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Texas Oyster Management Plan and Economic Impact Analysis

31 TAC §57.601

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §57.601 concerning Texas Oyster Management Plan and Economic Impact Analysis. This action represents a streamlining and recodification of current regulations concerning oyster management as part of the Parks and Wildlife Commission regulations sunset process. This section will be recodified in new Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeal of rules as proposed is in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeal of rules as proposed is in effect the public benefit anticipated as a result of the repeal as proposed will be removal of redundant sections of the Texas Administrative Code.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeal as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repea will not impact local economies.

Comments may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeal is proposed under Parks and Wildlife Code §§76.001-76.118.

The repeal affects Parks and Wildlife Code §§76.001-76.118.

§57.601. Fishery Management Plan for Oysters in Texas and Economic Impact Analysis.

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.

Issued in Austin, Texas, on 16, 1996.

TRD-960197

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

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For further information, please call: 1–800–792–1112, Ext. 4642 or (512) 389–4642

Oyster Harvest

31 TAC §57.601, §57.611

(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 Parks and Wildlife Department or in the Texas Register

office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §57.610 and §57.611 concerning Oyster Harvest. This action represents a streamlining and recodification of current regulations concerning oyster harvest as part of the Parks and Wildlife Commission regulations sunset process. This section will be recodified as new Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeals in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeals are in effect the public benefit anticipated as a result of the repeals will be removal of redundant sections of the Texas Administrative Code.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeals as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repeals will not impact local economies.

Comments may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeals are proposed under Parks and Wildlife Code §§76.001-76.118.

The repeals affect Parks and Wildlife Code §§76.001-76.118.

§57.610. General Rules.

§57.611. Penalty for Violation.

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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TRD-9610198

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

Earliest possible date of adoption: August 26, 1996

For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

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Texas Shrimp Fishery Management Plan and Economic Impact Analysis

31 TAC §57.651

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §57.651 concerning Texas Shrimp Fishery Management Plan and Economic Impact Analysis. This action represents a streamlining and recodification of current regulations concerning shrimp management as part of the Parks and Wildlife Commission regulations sunset process. This section will be recodified in new Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeal is in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeal is in effect the public benefit anticipated as a result of the repeal will be removal of redundant sections of the Texas Administrative Code.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeal of rules as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repeal will not impact local economies.

Comments may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeal is proposed under Parks and Wildlife Code §77.004

The repeal affects Parks and Wildlife Code §77.004.

§57.651. Shrimp Management Plan.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610199

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

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For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Shrimp

31 TAC §§57.660–57.662

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes repeal of §§57.660-57.662 concerning Shrimp. This action represents a streamlining and recodification of current regulations concerning shrimp management as part of the Parks and Wildlife Commission regulations sunset process. These sections will be recodified in new Chapter 58, concerning Oysters and Shrimp.

Dr. Bill Harvey, Regulatory Coordinator, has determined that for each of the first five years the repeals are in effect, there will be no fiscal implications for state or local governments.

Dr. Harvey also has determined that for each of the first five years the repeals are in effect the public benefit anticipated as a result of the repeals will be removal of redundant sections of the Texas Administrative Code.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the repeals as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, §2001.022, as this agency has determined that the repealed rules as proposed will not impact local economies.

Comments on the proposed repeal of rules may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112, extension 4650.

The repeals are proposed under Parks and Wildlife Code §77.004 and §77.007.

The repeals affect Parks and Wildlife Code §77.004 and §77.007.

§57.660. Definitions.

§57.661. General Rules.

§57.662. Penalty for Violation.

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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William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

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For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Chapter 58. Oysters and Shrimp

Subchapter A. Statewide Oyster Fishery Proclamation

31 TAC §§58.10–58.12, 58.21–58.24, 58.30, 58.40, 58.50, 58.60

The Parks and Wildlife Department proposes new §§58.10-58.12, 58.21-58.24, 58.30, 58.40, 58.50, and 58.60 concerning the Statewide Oyster Fishery Proclamation which pertains to the taking, attempting to take, possession, purchase, and sale of oyster resources in the salt waters of Texas, and to private oyster leases including the permitting and marking of, as well as transplant of oysters to, and harvest of oysters from private oyster leases.

The proposed new sections: (1) recodify oyster harvest and oyster lease regulations from current 31 TAC, Chapter 57 into new 31 TAC, Chapter 58; (2) restructure and reorganize regulatory provisions to eliminate duplication and promote user-friendliness of rules; and (3) implement regulatory changes as authorized under Parks and Wildlife Code, Chapter 76 whereby the 71st Legislature gave the Commission authority to regulate by proclamation the taking, purchase, and sale of oysters, provided an oyster management plan and economic impact analysis were approved and adopted by the Commission. A proclamation issued under this authority may limit the quantity and size of oysters that may be taken, possessed, sold or purchased and may prescribe times, places, conditions, and means and manner of taking oysters. In 1990, the Commission approved and adopted the Texas Oyster Fishery Management Plan and Economic Impact Analysis.

The new sections will function by implementing statutory duty of the department to: (1)prevent the depletion of oyster beds while achieving, on a continuing basis, the optimum yield for the oyster industry; (2) provide measures based on the best scientific information available; (3) provide measures to manage oysters; (4) provide measures, where practicable, that will promote efficiency in utilizing oyster resources, except that economic allocation may not be the sole purpose of the measures; (5) provide measures, where practicable, that will minimize cost and avoid unnecessary duplication in their administration; and (6) provide measures which will enhance enforcement.

New §58.10, concerning Application, establishes how the new rules will function.

New §58.11, concerning Definitions, establishes definitions necessary for clarification of the meanings of words and terms used in these rules.

Proposed new §58.12, concerning the Texas Oyster Fishery Management Plan, references the existence and availability of the Texas Oyster Fishery Management Plan and new §58.21, concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules, establishes general rules and provisions for seasons, times, places and methods for the harvest of oysters from public oyster beds.

Proposed new §58.22, concerning Commercial Fishing, establishes rules and provisions for the commercial harvest of oysters from public oyster beds.

New §58.23, concerning Non-Commercial (Recreational) Fishing, establishes rules and provisions for the recreational harvest of oysters from public oyster beds. New §58.24, concerning Penalties, references penalties for violation of these rules and proposed new §58.30, concerning Private Oyster Lease, establishes rules, provisions, and procedures regarding application for, and marking and permitting of private oyster leases. Provisions of new §58.40, concerning Oyster Transplant Permits, establishes rules and provisions regarding oyster transplanting including permits, seasons, times, transplanting restrictions, and reporting requirements. New §58.50, concerning Oyster Harvest Permits, establishes rules and provisions regarding oyster harvest from private oyster leases including permit and reporting requirements. New §58.60, concerning Transplant or Harvest Permit Cancellation, establishes rules and provisions whereby

Oyster Transplant permits and Oyster Harvest permits may be canceled.

Robin Riechers, staff economist, has determined for each of the first five years that the proposed rules are in effect, there will be minimal fiscal impacts to state or local governments or small businesses as a result of enforcing or administering the rules as most of the proposed rules represent clarification of and reduction of duplication in current rules.

The minimal impacts will occur to small businesses and non-commercial sport oyster boat license holders and non-license holders (those harvesting oysters by hand) who will be affected by the changes which (1) applies the current open oyster season period of November 1 -April 30 to the entire coast thereby reducing harvest opportunity days for those areas of the lower Laguna Madre south of the Port Mansfield Channel that previously were exempt from seasonal restrictions, and (2) reduces the sport oyster possession limit to two bushels.

Mr. Riechers also has determined that for each of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the rules as proposed will be a reduction in the complexity and volume of regulations, a better organized regulatory scheme, and the enhanced protection of the oyster resources of the state.

There will be minimal effect on small businesses as a result of compliance with the rules as proposed. Local businesses affected by the proposed rule to establish for consistency a uniform oyster season coastwide may be affected by a reduction in fishing days or delays in harvest. Additional rules changing anchor requirements for buoys marking private oyster leases should provide benefits to small businesses.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedures Act, §2001.022, as this agency has determined that the rule as proposed will not impact local economies.

Comments on the proposed rules may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112.

The new sections are proposed under Parks and Wildlife Code, Chapter 76, Oysters, §§76.301-76.302, which provides the Commission with authority to establish oyster regulations for this state.

The proposed new sections affect Parks and Wildlife Code, Chapter 76, Oysters, §§76.301-76.302.

§58.10. Application.

(a) This subchapter applies to the taking, attempting to take, possession, purchase, and sale of oyster resources in the salt waters of Texas. It carries out the Commmission's rulemaking authority granted by the legislature in Parks and Wildlife Code, Chapter 76. The law covering the taking, attempting to take, possession, purchase, and sale of oyster resources in the salt waters of Texas is set forth in both Parks and Wildlife Code, Chapter 76 and this subchapter whereby the provisions of this subchapter prevail over any conflicting provision of Parks and Wildlife Code, Chapter 76 to the extent of the conflict as set forth in Parks and Wildlife Code, §77.301.

(b) This subchapter also applies to private oyster leases including the permitting and marking of, as well as transplant of oysters to, and harvest of oysters from private oyster leases.

§58.11. Definitions.

The following words and terms, when used in the subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

Approved area- A molluscan shellfish growing area determined to be acceptable for harvesting of molluscan shellfish for direct marketing according to the National Shellfish Sanitation Program (NSSP).

Barrel of oysters-A barrel of oysters is equal to three boxes (bushels) of oysters in the shell. The dimensions of a box are 10 inches by 20 inches by 13 1/2 inches. In filling a box for measurement the oysters may not be piled more than 2 1/2 inches above the height of the box at the center. Two gallons of shucked oysters without shells equals one barrel of oysters in the shell.

Conditionally approved area-The classification of a shellfish growing area determined by the Texas Department of Health Seafood Safety Division to meet approved area criteria for a predictable period. The period is conditional upon established performance standards specified in a management plan. A conditionally approved area is a closed area when the area does not meet the approved growing area criteria.

Commission-Refers to the nine member Parks and Wildlife Commission.

Department-Refers to the Texas Parks and Wildlife Department.

Natural oyster bed (reef)-A natural oyster bed exists when at least five barrels of oysters are found within 2,500 square feet of any position on a reef.

Oyster-That species of molluscan shellfish identified as the Eastern oyster, Crassostrea virginica and its subspecies. No other species of molluscan shellfish are included within this proclamation.

Possess-The act of having in possession or control, keeping, detaining, restraining, or holding as owner, or under a fishing ley, or as an agent, bailee, or custodian of another.

Private oyster lease-Those state water bottoms leased by the state for the purpose of producing oysters to individuals or corporations incorporated under the laws of this state.

Prohibited area-The classification of a shellfish growing area determined by the Texas Department of Health Seafood Safety Division to be unacceptable for the transplanting, gathering for depuration, or harvesting of shellfish. The only shellfish removal permitted from a prohibited area is for the purpose of depletion, as defined in the Control of Harvesting Section of Part 1 of the NSSP.

Public oyster bed (reef)-All natural oyster beds (reefs) are public. All oyster beds not designated as private are public.

Restricted area-The classification of a shellfish growing area determined by the Texas Department of Health Seafood Safety Division to be unacceptable for harvesting of shellfish for direct marketing, but which is acceptable for transplanting or gathering for depuration. A restricted area may be closed for transplanting or gathering for depuration when the Seafood Safety Division determines that the area does not meet the restricted area criteria established in the NSSP.

§58.12. Texas Oyster Fishery Management Plan.

(a) The Oyster Fishery Management Plan and the Economic Impact Analysis are adopted by reference.

(b) Copies may be obtained at the Texas Parks and Wildlife Department offices at 4200 Smith School Road, Austin, Texas 78744.

§58.21. Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules.

(a) Seasons and Times.

(1) The open season extends from November 1 of one year through April 30 of the following year.

(2) Legal oystering hours - sunrise to sunset.

(b) Size Limits and Possession of Undersized Oysters.

(1) Size limit - Legal oysters must be three inches or larger as measured along the greatest length of the shell.

(2) It is unlawful for any person to take or possess a cargo of oysters more than 15% of which are between 3/4 inch and three inches measured from beak to bill or along an imaginary line through the long axis of the shell.

(3) Oysters less than three inches in length must be returned to the reef at the time of harvest.

(4) Unculled oysters shall be kept separate from culled oysters.

(c) Area Closures. There is no open public season for oysters from areas declared to be restricted or prohibited by the Texas Department of Health or areas closed by the Commission.

§58.22. Commercial Fishing.

(a) Gear Restrictions. It is unlawful while taking or attempting to take oysters for pay or the purpose of sale, barter, or exchange or any other commercial purpose to:

(1) use more than one dredge;

(2) use a dredge which exceeds 48 inches in width and a two-barrel capacity; or

(3) have more than one dredge connected in any manner to a winch, chain or other lifting device during the open public season.

(b) Possession Limits. It is unlawful while taking or attempting to take oysters for pay or the purpose of sale, barter, or exchange or any other commercial purpose to have on board any licensed commercial oyster boat:

(1) more than 50 barrels of culled oysters of legal size; or

(2) more than 2 barrels of unculled oysters while on the reef.

(c) Reporting requirements. A dealer who purchases or receives oysters directly from any person other than a licensed dealer must file a report with the department each month as prescribed under Parks and Wildlife Code, §66.019(c).

§58.23. Non-Commercial (Recreational) Fishing.

(a) Gear Restrictions. It is unlawful while taking or attempting to take oysters for personal use to:

(1) use a dredge that exceeds 14 inches in width; or

(2) have more than one dredge connected in any manner to a winch, chain or other lifting device during the open public season.

(b) Possession Limit. It is unlawful to take or possess more than two bushels of legal sized oysters per person.

(c) Prohibition of Sale. It is unlawful to sell oysters taken without a valid commercial oyster fishing license.

§58.24. Penalties.

The penalties for violation of this subchapter are prescribed by Parks and Wildlife Code, Chapter 76.

§58.30. Private Oyster Leases.

(a) General Rules.

(1) No person or corporation incorporated under the laws of this state, may own, lease, or control more than 100 acres of land covered by water as a private oyster lease.

(2) Leases will not be granted on areas determined to be natural oyster beds or that have been publicly fished within eight years of the lease application.

(3) No permit will be issued for a lease on:

(A) a natural oyster bed;

(B) a bay shore area within 100 yards of the shore;

(C) an area subject to an exclusive riparian right as provided under Parks and Wildlife Code §76.004 and §76.005;

(D) an area already under certification as a private lease; or

(E) an area within 1000 feet of an established lease not owned or controlled by the applicant.

(4) No corporation other than those incorporated under the laws of this state may lease or control land as a private oyster lease.

(5) The failure to pay any rental when due terminates the lease.

(b) Application For Oyster Lease.

(1) All applications for private oyster leases will be submitted to the department for consideration and shall be accompanied by a non refundable application fee of $20.

(2) The applicant shall mark the proposed lease site or sites with temporary poles and/or buoys in such a manner that the outline of the site or sites can be clearly determined.

(3) Each application shall contain:

(A) applicant's name and address;

(B) affirmation that applicant is a United States citizen;

(C) a description of the lease, including a plat showing approximate size and location in relation to state land tracts; and

(D) signed letters each from the U.S. Army Corps of Engineers, General Land Office, and the Seafood Safety Division of the Texas Department of Health indicating approval for the proposed lease site.

(4) An authorized employee(s) of the department shall inspect the proposed lease site or sites to determine its location with respect to:

(A) natural oyster reefs;

(B) shoreline;

(C) areas restricted or prohibited by the Texas Department of Health;

(D) spoil disposal areas;

(E) other private leases; and

(F) riparian rights.

(5) An authorized employee(s) of the department shall inspect the proposed lease site or sites to determine the presence of exposed shell.

(6) If exposed shell is found within the proposed lease site or sites, an authorized employee(s) of the department shall determine the presence of live oysters.

(c) Public Hearing on Application.

(1) After having determined the proposed lease site meets location and exposed shell requirements, the department shall:

(A) hold a public hearing to determine if the site has been publicly fished within eight years of the lease application;

(B) publish a notification of the date, time, and purpose of the public hearing at least once in a newspaper of general circulation in the county in which the proposed lease site is located;

(C) publish the notification between 10 and 20 days prior to the public hearing;

(D) make available to the public information about the proposed lease site ten days prior to the date of the hearing; and

(E) present the investigation report at the public hearing.

(2) Persons objecting to the proposed lease must submit a sworn affidavit or testify under oath at the public hearing stating reasons for the objection.

(3) The department shall review findings of the public hearing and submit recommendations to Coastal Fisheries Division Director for approval.

(4) The applicant will be notified within ten days after the hearing of either approval or denial of lease application.

(5) The application approved by the department will be forwarded to Coastal Coordination Council for final approval.

(d) Approved Lease Procedures for Applicant.

(1) Applicant shall be responsible for having a final survey of the approved lease conducted by a registered surveyor who will furnish the department with survey notes and a plat of the lease showing:

(A) the location of the lease in relation to state land tract boundaries; and

(B) Global Positioning System (GPS) coordinates for all lease markers.

(2) The applicant shall mark the boundaries of the lease with buoys at the time of the final survey and maintain buoys until lease termination. Supplemental markers may be required along the lease boundaries if one corner marker is not clearly visible from another corner marker.

(A) All marker buoys must be:

(i) at least six inches in diameter;

(ii) extend at least three feet out of the water at mean high tide;

(iii) the shape and color must be visible for at least 1/2 mile under normal weather conditions;

(iv) marked with the lease number (Buoys common to two or more leases must be marked with all lease numbers);

(v) marked with at least two-inch high letters in plain Arabic block letters in a location where it will not be obscured by water or marine growth; and

(vi) marked with all required U.S. Coast Guard markings.

(B) Buoys must be anchored by:

(i) A screw anchor with a minimum one-inch galvanized sucker rod and 12-inch head inserted 10-foot into the bottom; or

(ii) 2 anchors per buoy and each anchor having a minimum weight of 300 pounds.

(C) If replacement of buoys is necessary, original GPS coordinates of the final survey must be used to relocate markers.

(3) An authorized employee(s) of the department shall inspect and verify GPS coordinates;

(4) The department shall return approved application for appropriate registration by applicant with the county clerk in the county of location as prescribed in Parks and Wildlife Code §76.014.

(5) Rental Fee.

(A) No rental fee is owed on any lease when oysters are not sold or marketed from the lease for a period of five years after the date of the establishment of the lease.

(B) When oysters are sold or marketed from the lease and thereafter, the holder of the certificate shall pay to the department $3 per acre of lease per year.

(C) Rental fees are due annually by March 1.

(D) Failure to pay any rental when due terminates the lease.

(E) If oysters from the lease are not sold or marketed within five years from the date of establishment of the lease, the lease is void.

§58.40. Oyster Transplant Permits.

(a) Oysters for transplanting to a private oyster lease may be taken only under a permit issued by the department.

(b) Oyster Transplant Application.

(1) The application for a transplant permit must include the following information:

(A) oyster lease number;

(B) name and address of the lease holder and/or that of his designated agent;

(C) name, if documented, and/or registration number of all boats to be used in transplanting operations;

(D) quantity of unculled oysters requested and description of areas from which the oysters are requested to be taken;

(E) a description of the type, number, and location of lease markers; and

(F) beginning and ending dates of transplant operations.

(2) Written applications for transplant permits must be received by the department ten days prior to the beginning of transplanting operations.

(3) Written applications for transplant permit amendments must be received by the department at least five days prior to the desired effective date of the amendment.

(4) No more than four transplant permits for a lease will be issued during a one month period.

(5) No transplant permit will be issued for an oyster lease while a harvest permit for the same lease is in effect.

(6) Transplant permits will be issued upon monthly verification and approval of lease markers by the department.

(7) A valid transplant permit must be on the vessel during any transplanting activities.

(c) Oyster Transplant Season and Times.

(1) The department shall establish the oyster transplant season giving consideration to information furnished to the department by leaseholders.

(2) All transplanting operations shall begin after sunrise and shall be completed before sunset each day.

(3) No transplanting will not be permitted on Saturdays, Sundays, major holidays, or on the same days that harvest operations are permitted.

(d) Transplant Restrictions.

(1) Transplanting of oysters is subject to the conditions and provisions described in the permit issued by the department.

(2) Oysters taken for the purposes of transplanting to a private oyster lease may be taken only from areas designated by the department.

(3) Oysters may not normally be taken for the purpose of transplanting from the following areas:

(A) public oyster reefs in areas approved for oyster harvest and which have been subjected to any degree of oyster fishing in recent years;

(B) near-shore reefs around public or private fishing piers where a conflict of interest has arisen or might arise;

(C) reefs or areas in which the incidence of diseases, parasites, and/or predators have been judged potentially dangerous to the public reef fishery if the oysters are transplanted to other areas; or

(D) areas declared to be unsuitable for transplanting by the Texas Department of Health because of the presence of persistent chemicals or diseases that might be dangerous to public health.

(4) All oysters obtained under a transplant permit must be deposited upon the lease identified in the permit.

(5) The cargo of oysters transplanted will consist of unculled oysters and shell, unless specified otherwise.

(6) The permit may require oysters to be culled on the reef from which they are taken if the department determines that the reef area may be protected or improved by such action.

(7) The permit holder may cull the cargo of oysters on his oyster lease.

(8) Oysters may be transplanted only to a private oyster lease which is properly marked at all corners.

(9) No oysters may be transplanted to a lease adjacent to or adjoining a lease approved for harvest. (e) Reporting Requirement. Weekly transplant reports must be prepared by the permittee at the end of each week and supplied to the department.

§58.50. Oyster Harvest Permits.

(a) Oysters may be harvested from a private lease only under a permit issued by the department.

(b) Oyster Harvest Application.

(1) Written application for a harvest permit must be received 10 days prior to the requested harvest dates and include the following:

(A) the oyster lease number;

(B) the name of the lease holder and/or that of his designated agent;

(C) the name and/or registration number of all boats to be used in harvesting operations; and

(D) beginning and ending dates for the permit.

(2) No more than four harvest permits for a lease will be issued during a one month period.

(3) A harvest permit will not be valid until 15 days after expiration of a transplant permit for the same lease or leases adjacent thereto and with approval of the Texas Department of Health.

(4) Harvest permits will be issued upon monthly verification and approval of lease markers by the department.

(5) A valid harvest permit must be on the vessel during any harvesting activities.

(c) Harvest of oysters from a private lease is subject to conditions as provided in the department issued permit.

(d) Reporting Requirement. Monthly harvest report forms must be prepared by the permittee at the end of each month and supplied to the department.

§58.60. Transplant or Harvest Permit Cancellation.

(a) Violations of the transplanting or harvesting procedures include, but are not limited to, the following:

(1) harvesting oysters from areas or leases other than covered under permit;

(2) harvesting oysters from restricted or prohibited areas as designated by the Texas Department of Health;

(3) transplanting oysters from unauthorized areas or to unauthorized leases;

(4) transplanting oysters without a valid transplanting permit;

(5) harvesting oysters without a valid harvesting permit;

(6) transplanting on or harvesting oysters from a lease which is not properly marked;

(7) failure to adhere to any conditions of the permit;

(8) failure to amend a transplant or harvest permit to include additions or deletions of boats; or

(9) failure to submit weekly transplant reports or monthly harvest reports.

(b) Violations of paragraphs (1) and (2) of subsection (a) of this section, shall result in a one year cancellation and withholding of all permits for the affected leases.

(c) Violations of paragraphs (3), (4), and (5) of subsection (a) of this section, shall result in a 45-day cancellation and withholding of all permits for the affected leases.

(d) Violations of paragraphs (6), (7), (8), and (9) of subsection (a) of this section, or the other provisions in the permits, shall result in cancellation of all permits for the affected leases for a period of five working days.

(e) In the event a transplant or harvest permit is canceled, the lease holder may appeal to the executive director within five days, stating, in writing, why the permit should be reinstated.

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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610201

William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

Earliest possible date of adoption: August 26, 1996

For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

Subchapter B. Statewide Shrimp Fishery Proclamation

31 TAC §§58.101–58.104, 58.130, 58.150, 58.160–58.165

The Parks and Wildlife Department proposes new §§58.101-58.104, 58.130, 58.150, and 58.160-58.165 concerning the Statewide Shrimp Fishery Proclamation which pertains to the taking, attempting to take, possession, purchase, handling, and sale of shrimp resources in the salt waters of Texas.

The proposed new sections: (1) recodify shrimp harvest, possession, purchase and sale regulations from current 31 TAC, Chapter 57 into new 31 TAC, Chapter 58; (2) restructure and reorganize regulatory provisions to eliminate duplication and promote user-friendliness of rules; and (3) implement regulatory changes as authorized under Parks and Wildlife Code, Chapter 77 whereby the 71st Legislature gave the Commission authority to regulate by proclamation the taking, possession, purchase, and sale of shrimp, provided a shrimp management plan and economic impact analysis were approved and adopted by the Commission. A proclamation issued under this authority may limit the quantity and size of shrimp that may be taken, possessed, sold or purchased and may prescribe times, places, conditions, and means and manner of taking shrimp. In 1989, the Commission approved and adopted the Texas Shrimp Fishery Management Plan and Economic Impact Analysis.

The new sections will function by implementing statutory duty of the department to: (1)prevent overfishing while achieving, on a continuing basis, the optimum yield for the fishery; (2) provide measures based on the best scientific information available; (3) provide measures to manage shrimp throughout their range; (4) provide measures, where practicable, that will promote efficiency in utilizing shrimp resources, except that economic allocation may not be the sole purpose of the measures; (5) provide measures, where practicable, that will minimize cost and avoid unnecessary duplication in their administration; and (6) provide measures which will enhance enforcement.

New §58.101, concerning Application, establishes how the new rules will function. Proposed new §58.102, concerning Definitions, establishes definitions necessary for clarification of the meanings of words and terms used in these rules and new §58.103, concerning Texas Shrimp Fishery Management Plan, references the existence and availability of the Texas Shrimp Fishery Management Plan. New §58.104, concerning Penalties and Responsibilities for Violation, references penalties for violation of these rules. New §58.130, concerning Shrimp License Buyback Program, establishes rules, provisions, and criteria by which the department selects commercial bay shrimp boat and commercial bait shrimp boat licenses for purchase. New §58.150, concerning Sale, Purchase, and Handling of Shrimp-General Rules, establishes rules and provisions for the sale, purchase, and handling of shrimp. New §58.160, concerning Taking or Attempting to Take Shrimp-General Rules, establishes general rules and provisions concerning the taking or attempting to take shrimp from public waters of this state. Proposed new §58.161, concerning Shrimping in Outside Waters, establishes rules and provisions for seasons, times, places and means and manners for taking or attempting to take shrimp from outside waters of this state. New §58.162, concerning Shrimping in Inside Waters-General Rules, establishes general rules and provisions concerning the taking or attempting to take shrimp from public inside waters of this state. New §58.163, concerning Shrimping in Inside Waters-Commercial Bay Shrimping, establishes rules and provisions for seasons, times, places and means and manners for commercial taking or attempting to take food shrimp from inside waters of this state. New §58.164, concerning Shrimping in Inside Waters-Commercial Bait Shrimping, establishes rules and provisions for seasons, times, places and means and manners for commercial taking or attempting to take bait shrimp from inside waters of

this state. Proposed new §58.165, concerning Non-commercial (Recreational) Shrimping, establishes rules and provisions for seasons, times, places and means and manners for the non-commercial taking or attempting to take shrimp from inside waters of this state.

Robin Riechers, staff economist, has determined for each of the first five years that the proposed rules (except §58.130) are in effect, there will be no additional fiscal implications to state or local governments or small businesses as a result of enforcing or administering the rules as the proposed rules represent clarification of and reduction of duplication in current rules.

There will be fiscal implications to state government and small businesses as a result of implementation of §58.130, Shrimp License Buyback Program. Specifically, state government will incur costs associated with implementation and administration of the buyback program. Local businesses will incur minimal costs to apply for the buyback program and those who qualify will receive direct economic and fiscal benefits from the sale of their license.

Mr. Riechers also has determined that for each of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the rules as proposed will be a reduction in the complexity and volume of regulations, a better organized regulatory scheme, and the enhanced protection of the shrimp resources of the state. Additionally, public benefits and benefits to individual producers will occur associated with §58.130, Shrimp License Buyback Program. Individual producers will receive direct payment for their license(s) and the public benefits accrue through long-term sustainable management of the shrimp resource.

There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the rules as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedures Act, §2001.022, as this agency has determined that the rule as proposed will not impact local economies.

Comments on the proposed rule may be submitted to Paul Hammerschmidt, Coastal Fisheries Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4650 or 1-800-792-1112.

The new sections are proposed under Parks and Wildlife Code, Chapter 77, Shrimp, §§77.061-77.072, which provides the Commission with authority to establish shrimp regulations for this state.

The new sections affect Parks and Wildlife Code, Chapter 77, Shrimp, §§77.061-77.072.

§58.101. Application.

(a) This subchapter applies to the taking, attempting to take, possession, purchase, and sale of shrimp resources in the salt waters of Texas. It carries out the Commission's rulemaking authority granted by the legislature in Parks and Wildlife Code, Chapter 77. The law covering the taking, attempting to take, possession, purchase, and sale of shrimp resources in the salt waters of Texas is set forth in both Parks and Wildlife Code, Chapter 77 and this subchapter whereby the provisions of this subchapter prevail over any conflicting provision of Parks and Wildlife Code, Chapter 77 to the extent of the conflict as set forth in Parks and Wildlife Code, §77.007.

(b) This subchapter also applies to shrimp caught in the Exclusive Economic Zone (EEZ) and landed in this state, under the authority of Parks and Wildlife Code, §47.019(b) (Federal Law also regulates species managed under Federal Fishery Management Plan).

(c) Foreign Shrimp. Provisions of this subchapter prohibiting possession, sale, purchase, unloading, or other handling of shrimp apply to shrimp caught in this state and shrimp coming from another state or country unless specifically provided otherwise.

§58.102. Definitions.

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

Aquatic products-Any aquatic life, alive or dead, uncooked, fresh or frozen, which is intended to be used for human consumption or bait.

Bait bays-Includes major bays, Chocolate Bay, West Bay, the Old Brazos River lying north of the Gulf Intracoastal Waterway in Brazoria County, Copano Bay east of a line running from Rattlesnake Point to the northeastern boundary of the Bayside township, Nueces Bay from the bridge at State Highway 181 west to the second overhead power line dissecting the bay, Upper Laguna Madre, Baffin Bay, Alazan Bay, Carlos Bay, Baroom Bay, Lower Laguna Madre, and the gulf Intracoastal Waterway exclusive of all tributaries.

Bait-shrimp dealer-A person who operates an established place of business in a coastal county of the state for compensation or profit for the purpose of handling shrimp caught for use as bait from the inside water of this state, but doese not include a person holding a wholesale fish dealer's license under Parks and Wildlife Code §47.009.

Coastal waters-All the salt water of this state (as defined in 31 TAC §65.3), including that portion of the Gulf of Mexico within the jurisdiction of the state extending 9 nautical miles from the Gulf shoreline.

Commercial bait shrimp boat-A boat that is required to be numbered or registered under the laws of the United States or of this state and that is used for the purpose of taking or attempting to take shrimp for use as bait and other aquatic products from the inside water of the state for pay or for the purpose of sale, barter, or exchange.

Commercial bay shrimp boat-A boat that is required to be numbered or registered under the laws of the United States or of this state and that is used for the purpose of taking or attempting to take shrimp and other aquatic products from the inside water of the state for pay or for the purpose of sale, barter, or exchange.

Commercial gulf shrimp boat-Any boat that is required to be numbered or registered under the laws of the United States or of this state and that is used for the purpose of taking or attempting to take shrimp and other aquatic products from the outside water of the state for pay or for the purpose of sale, barter, or exchange, or from salt water outside the state for pay or for the purpose of sale, barter, or exchange, and that unloads at a port or other point in the state without having been previously unloaded in another state or foreign country.

Contiguous zone-That area of the Gulf of Mexico lying adjacent to and offshore of the jurisdiction of the State of Texas and in which shrimp of the genus Penaeus are found.

Individual bait-shrimp trawl-A trawl used for the purpose of catching shrimp for personal use.

Inside waters-All bays, inlets, outlets, passes, rivers, streams, and other bodies of water landward from the shoreline of the state along the Gulf of Mexico and contiguous to, or connected with, but not a part of, the Gulf of Mexico and within which the tide regularly rises and falls and in which saltwater shrimp are found or into which saltwater shrimp migrate.

Major bays-The deeper, major bay areas of the inside water, including Sabine Lake north of Cameron Causeway, Trinity Bay, Galveston Bay, East Galveston Bay, West Galveston Bay, Matagorda Bay (including East Matagorda Bay), Tres Palacios Bay south of a line from Grassey Point to the mouth of Pinkerton Bayou, Espiritu Santo Bay, Lavaca Bay seaward of State Highway 35, San Antonio Bay seaward of a line from McDowell Point to Grassey Point to Marker 32 on the Victoria Barge Canal, Ayres Bay, Carlos Bay, Aransas Bay, Mesquite Bay, and Corpus Christi Bay, all exclusive of tributary bays, bayous, and inlets, lakes and rivers.

Nursery areas-Includes tributary bays, bayous, inlets, lakes, and rivers, which are proven to serve as significant growth and development environments for postlarval and juvenile shrimp not including the outside waters, major bays, or bait bays as defined in this section.

Outside waters-All the salt water of the state contiguous to and seaward from the shoreline of the state along the Gulf of Mexico as the shoreline is projected and extended in a continuous and unbroken line, following the contours of the shoreline, across bays, inlets, outlets, passes, rivers, streams, and other bodies of water; and that portion of the Gulf of Mexico extending from the shoreline seaward and within the jurisdiction of the state.

Permanent structure-A building designed, planned, and constructed so as to remain at one location.

Place of business-A permanent structure on the mainland or a barrier island where aquatic products or orders for aquatic products are received, or where aquatic products are sold or purchased, but does not include a vehicle, a boat, or any type of floating device, a public cold storage vault, or the portion of a structure that is used as a residence.

Possess-The act of having in possession or control, keeping, detaining, restraining or holding.

Second offense and third and subsequent offenses-Offenses for which convictions have been obtained within three years prior to the date of the offense charged.

Shrimping-The taking or attempting to take shrimp from the public waters of this state.

Shrimp house operator-A person who operates a shrimp house, plant, or other establishment for compensation or profit for the purpose of unloading and handling, from commercial gulf shrimp boats or commercial bay shrimp boats, fresh shrimp and other edible aquatic products caught or taken from the coastal water of the state or from salt water outside the state and brought into the state without having been previously unloaded in another state or foreign country, but does not include a person holding a wholesale fish dealer's license under Parks and Wildlife Code, §47.009.

Trawl-A beam trawl or otter trawl with a bag-shaped net which is used to catch shrimp.

Beam Trawl-A trawl, without wings, the mouth of which is held open by a rigid beam of wood or metal.

Otter Trawl-A funnel-shaped trawl, with wings, the mouth of which is held open by floats and weights and spread by trawl doors fastened to the wings.

§58.103. Shrimp Management Plan.

(a) The Shrimp Fishery Management Plan and the Economic Impact Analysis are adopted by reference.

(b) Copies may be obtained at the Texas Parks and Wildlife Department offices at 4200 Smith School Road, Austin, Texas 78744.

§58.104. Penalty and Responsibility for Violation.

A person who violates a provision of this subchapter is subject to penalties and provisions as authorized by Parks and Wildlife Code, Chapter 77.

§58.130. Shrimp License Buyback Program.

(a) Delegation of Authority. The commission delegates power and authority to the executive director to administer the Shrimp License Buyback Program.

(b) License Buyback Bid Application Period.

(1) The department may open one or more license buyback bid offer application periods (hereafter referred to as application) per license year.

(2) The department shall establish during each application period a deadline for receipt of all applications.

(c) License Buyback Application Requirements.

(1) The department shall consider all applications to the Shrimp License Buyback Program provided the applicants meet the following requirements :

(A) A completed License Buyback Application form furnished by the department has been submitted to the department by the application deadline;

(B) The applicant is the owner of the license submitted for buyback; and

(C) The applicant has submitted to the department copies of all supplemental information as required in this subsection.

(2) A completed License Buyback Application shall contain:

(A) full name of the applicant;

(B) current address of applicant's residence;

(C) social security number of applicant;

(D) a copy of legal documentation that:

(i) documents applicant as the sole owner of the vessel and holds the sole rights and privileges to the license; or

(ii) documents that all members of a partnership or corporation are in agreement to apply to the license buyback program and the submitted bid offer for license buyback;

(E) USCG vessel documentation number or State of Texas registration number;

(F) a copy of current commercial bay and/or bait shrimp boat license; and

(G) the applicant's bid offer, in U.S. dollars.

(3) Department records will be used to verify all information supplied by or pertaining to the applicant's history in the shrimp fishery or will be used in cases where the applicant has not provided adequate information for proper consideration of the application.

(4) Applications received after the established application deadline shall be held for consideration during the next bid offer application period.

(d) Established Maximum Value Criteria.

(1) The department may establish each license year criteria which will be used as appropriate to assign an Established Maximum Value to each application.

(2) The department will assign an Established Maximum Value to each application according to criteria provided in this section.

(3) The Established Maximum Value for each application will be based on the following criteria:

(A) length of vessel;

(B) duration of license in fishery prior to enactment of Parks and Wildlife Code, §§77.117-77.123;

(C) amount of funds accumulated in the Shrimp License Buyback Account;

(D) number of bay and bait licenses in the fishery issued in the license year of the specific bid offer application period;

(E) bid offers from previous years;

(F) established open market prices for licenses;

(G) number of licenses offered for sale by applicant; and

(H) other relevant factors.

(4) Adjustments to Established Maximum Value: If an applicant offers both a commercial bay shrimp license and a commercial bait shrimp license issued for the same vessel, the department will add a premium of 7.5% to the Established Maximum Value of each license offered.

(e) Application Ranking Procedures.

(1) Ranking values will be assigned to all applications based on the greatest difference between the Established Maximum Value and the bid offers which are less than the Established Maximum Value.

(2) The department will purchase licenses beginning with the highest ranking to the lowest.

(3) Equally ranked bid offers:

(A) If bid offers are equally ranked and one vessel is larger in length, the department will rank the larger vessel ahead of the smaller;

(B) If bid offers are equally ranked and both vessels are the same length, the department will rank according to the ascending alphabetical order of the applicant's last name.

(4) The department may purchase licenses from applicants whose offers fall within 10% of the Established Market Value and are greater than the Established Market Value.

(f) Notification of Acceptance or Rejection of Application.

(1) Department will notify each applicant in writing within 45 days of receipt of application regarding acceptance or rejection of application bid offer.

(2) Applicants whose bids are accepted must then notify the department of their intent to accept or reject the offer from the department within 15 days of the postmark of the notification letter sent by the department.

(3) The department may retain unsuccessful applications and include them in the next application period.

(4) The unsuccessful applicant may withdraw, resubmit, or amend an application for consideration during any future application periods.

(5) The department will continue to purchase in rank order as the buyback fund permits.

(g) Delegation of purchasing authority. The department may designate other qualified agents to purchase licenses on behalf of the department provided all purchased licenses are surrendered to the department and retired.

§58.150. Sale, Purchase, and Handling of Shrimp-General Rules.

(a) Reporting by licensee. A licensee under this section who lands shrimp in the state shall submit to the department by the 10th day of each month, on forms furnished by the department, a report stating:

(1) the number of pounds of shrimp landed at points in the state by the licensee during the reporting period;

(2) the water from which the shrimp were taken; and

(3) the names of the species of shrimp.

(b) Possession after season: No person may retain saltwater shrimp in their fresh state legally taken in the coastal water of this state for more than five days after the end of an open season for the taking of shrimp unless he is a licensed bait dealer, bait-shrimp dealer, or sports fisherman.

(c) Handling of shrimp.

(1) No shrimp house operator, wholesale fish dealer, retail fish dealer, wholesale truck dealer, retail truck dealer, bait dealer, bait-shrimp dealer, or other person holding a license issued by the department may knowingly unload, buy, sell, transport, or handle in any way shrimp or bait shrimp:

(A) from an unlicensed gulf shrimp boat, an unlicensed commercial bay shrimp boat or an unlicensed commercial bait shrimp boat;

(B) of a prohibited size;

(C) caught in the inside water or outside water during respective closed seasons as provided in this subchapter; or

(D) in violation of a provision of this subchapter.

(2) No licensed commercial bait-shrimp boat captain may deliver or unload shrimp caught under authority of a commercial bait-shrimp boat license except directly to the established place of business of a licensed bait-shrimp dealer or a sports fisherman.

(3) No licensed bait-shrimp dealer may knowingly unload, buy, or handle in any way bait shrimp from an unlicensed commercial bait-shrimp boat.

§58.160. Taking or Attempting to Take Shrimp (Shrimping)-General Rules.

(a) It is unlawful to:

(1) take or attempt to take shrimp within the boundaries of any natural or man-made pass leading from the inside waters to the outside waters (Gulf of Mexico) of the state;

(2) use a trawl at a time when shrimping is prohibited;

(3) possess a trawl of any type or mesh size in an area where the trawl or mesh size are prohibited. Such trawls may be possessed on vessels in port or in a marked channel going directly to or from an area where the use of the trawl is permitted; or

(4) head shrimp aboard a boat in inside water or dump or deposit shrimp heads in the inside water.

(b) A commercial shrimp boat license must be prominently displayed as to be clearly visible from both sides of the boat.

(c) All commercial shrimp boats are required to exhibit the vessel's documentation or registration number on the port and starboard sides of the deckhouse or hull and on an appropriate weather deck. The number in block Arabic numerals in contrasting color to the background must be at least 18 inches in height on vessels over 65 feet and 10 inches in height for all other vessels and be permanently attached.

(d) Gear Measurements: Except as otherwise provided in this section, all gear measurements are made as follows:

(1) Otter trawls (main net and try net)-measured along an uninterrupted corkline from leading tip of door to leading tip of door including any and all add-on devices or attachments to the corkline.

(2) Beam Trawls (main net and try net)-measured along the beam of a beam trawl in its fully extended position.

(3) Doors-measured along the door centerline from the leading tip to the trailing edge of the door, excluding any add-on devices of any type.

(4) Mesh sizes-measured between the two most widely separated knots in any consecutive series of 5 stretched meshes after the trawl has been used, and applies to the trawl, bag and bag liner. Mesh size requirements do not apply to net material used in any approved excluder device.

§58.161. Shrimping in Outside Waters.

(a) Gulf net restrictions.

(1) Except as otherwise provided in this section, no trawls may have a mesh size smaller than 8 3/4 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been used.

(2) Except as otherwise provided in this section, the presence of a shrimp trawl (excluding doors) not stored within the confines of the hull of a vessel in outside water during the closed periods provided by subsection (d) of this section is prima facie evidence of a violation of this section.

(3) In outside waters of more than 7 fathoms, an electro-trawl having an applied voltage of no more than 3 volts may be used for taking shrimp.

(4) There are no restrictions on the number of trawls that may be used in outside waters except as provided in this section.

(b) Bag and possession limits: During the gulf open season there are no bag and possession limits on shrimp.

(c) Size limits: Shrimp of any size may be retained when caught lawfully in the outside waters.

(d) Gulf shrimping seasons. The outside waters are open to shrimping except:

(1) Night: the outside waters within 7 fathoms are closed to night shrimping (30 minutes after sunset to 30 minutes before sunrise) throughout the year;

(2) Summer closed season:

(A) The outside waters are closed from 30 minutes after sunset on May 15 to 30 minutes after sunset July 15.

(B) The commission may change the opening and closing dates to provide an earlier, later, or longer season not to exceed 75 days.

(C) The department will provide 72 hours public notice prior to a change in the closing date, and 24 hours public notice prior to reopening the season.

(3) Winter closed season-the outside waters up to and including 7 fathoms are closed from December 16 through February 1 the following year, unless taking seabobs.

(4) Seabob season:

(A) Seabobs may be taken:

(i) during daylight hours only (30 minutes before sunrise to 30 minutes after sunset);

(ii) during the gulf open season; and

(iii) during the winter closed season.

(B) No person catching seabobs may catch or have on board a boat any other species of shrimp which exceed 10%, in weight or number, of the entire catch.

(C) Not more than one trawl may be used for taking seabobs.

(D) Trawl restrictions for taking seabobs:

(i) Trawl width may not exceed 25 feet as measured along the corkline from board to board or between extremes of any other spreading device.

(ii) Mesh size: there are no mesh size restrictions for the take of seabobs.

§58.162. Shrimping in Inside waters-General Rules.

(a) It is unlawful:

(1) during the period April 1 through August 14, to take or attempt to take shrimp from the inside water except between the hours of 30 minutes before sunrise to 2:00 p.m.;

(2) to use a trawl at a time when shrimping is prohibited;

(3) to fail to have the spreading devices:

(A) out of the water and on the deck of the vessel, and the trawl bag untied at a time when shrimping is prohibited; or

(B) out of the water and at the towing block, and the trawl bag untied at a time when shrimping is prohibited.

(4) to take or attempt to take shrimp from inside water from 30 minutes after sunset to 30 minutes before sunrise except as provided in this section;

(5) to take or attempt to take shrimp with a trawl at any other time or in any other place in the Laguna Madre north of a line starting on the mainland at the most northeasterly point on the north side of the entrance to Whiteley Channel then proceeding in a straight line to the north end of Pita Island; then continuing on a line to the southernmost point on the westerly most spoil island bordering the north side of the New Humble Channel (commonly referred to as Hap's Channel); then continuing on a line along the north edge of the New Humble Channel (commonly referred to as Hap's Channel) to its junction with the gulf Intracoastal Waterway; then continuing on a straight line to the Nueces/Kleberg County line marker on Padre Island;

(6) to use or have on board more than one set of doors or spreading device for the main trawl;

(7) to use or have on board more than one set of doors or spreading device for the try net; or

(8) use more than one trawl at a time except a try net.

(b) Dual licensed boats. During the period May 15 through July 15, it is unlawful for the operator of a boat licensed both as a commercial bay shrimp boat and a commercial bait shrimp boat to:

(1) take more than 600 pounds of shrimp per boat per calendar day in major bays;

(2) possess or have on board a boat in the inside water or unload or attempt to unload at any point in this state more than 600 pounds of shrimp; or

(3) to take or attempt to take shrimp in both a major bay and any other water within the same calendar day.

§58.163. Shrimping in Inside Waters-Commercial Bay Shrimping.

(a) General rules.

(1) Open waters-commercial bay shrimp boats may shrimp only in major bays.

(2) It is unlawful for any person:

(A) aboard a vessel licensed as a commercial bay shrimp boat to off-load, transfer, sell, or barter any amount of live or dead shrimp to a person aboard another vessel; or

(B) aboard a vessel to off-load, transfer, purchase or barter from a person aboard a vessel licensed as a commercial bay shrimp boat any amount of live or dead shrimp.

(b) Spring open season.

(1) The spring open season extends from May 15 through July 15 in major bays only.

(2) Legal shrimping hours: 30 minutes before sunrise to 2:00 pm.

(3) Bag and possession limits: No more than 600 pounds of whole shrimp per day may be taken or possessed on board.

(4) Size limits: Shrimp of any size may be retained when caught lawfully during spring open season in inside waters.

(5) Net restrictions.

(A) Try nets.

(i) A trawl used as a try net may not exceed 21 feet in total width.

(ii) Try net trawl doors or boards may not exceed 450 square inches each.

(iii) A beam trawl used as a try net may not exceed 10 feet in width.

(B) Main trawl:

(i) must have doors at least 3 feet long as measured along the door centerline from leading tip to the trailing edge of the door; and

(ii) must not exceed any of the following dimensions, as measured along an uninterrupted corkline from leading tip of door to leading tip of door including any and all add-on devices or attachments to the corkline:

Figure 1. 31 TAC §58.163(b)(5)(B)(ii)

(C) A beam trawl used as a main trawl may not exceed 25 feet in total width.

(D) Mesh size may not be less than 6 1/2 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been used.

(c) Fall open season.

(1) The fall open season extends from August 15 through December 15 in major bays only.

(2) Legal shrimping hours: 30 minutes before sunrise to 30 minutes after sunset.

(3) Bag and possession limits are not restricted.

(4) Size limits:

(A) From August 15 through October 31, the legal shrimp count is 50 heads on per pound.

(B) From November 1 through December 15 there are no count or size requirements.

(5) Net restrictions.

(A) Try nets.

(i) A trawl used as a try net may not exceed 21 feet in total width.

(ii) Try net trawl doors or boards may not exceed 450 square inches each.

(iii) A beam trawl used as a try net may not exceed 10 feet in width.

(B) Main trawl may not exceed 95 feet in total width.

(C) Mesh size in the main trawl:

(i) Mesh size may not be less than 8 3/4 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been used, EXCEPT

(ii) from November 1 through December 15, mesh size may not be less than 6 1/2 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been used.

(d) Winter open season.

(1) The winter open season extends from February 1 through April 15 in major bays only south of the Colorado River.

(2) Legal shrimping hours: 30 minutes after sunset to 30 minutes before sunrise.

(3) Bag and possession limits are not restricted.

(4) Size limits: Shrimp of any size may be retained when caught lawfully during winter open season in inside waters.

(5) Net restrictions.

(A) Try nets.

(i) A trawl used as a try net may not exceed 21 feet in total width.

(ii) Try net trawl doors or boards may not exceed 450 square inches each.

(iii) A beam trawl used as a try net may not exceed 10 feet in width.

(B) Main trawl:

(i) must have doors at least 3 feet long as measured along the door centerline from leading tip to the trailing edge of the door; and

(ii) must not exceed any of the following dimensions, as measured along an uninterrupted corkline from leading tip of door to leading tip of door including any and all add-on devices or attachments to the corkline:
Figure 2. 31 TAC §58.163(e)(5)(B)(ii)

(C) A beam trawl used as a main trawl may not exceed 25 feet in total width.

(D) Mesh size may not be less than 6 1/2 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been placed in use.

§58.164. Shrimping Inside Waters-Commercial Bait Shrimping.

(a) General rules.

(1) A person who has on board or displays a commercial bait-shrimp boat license must operate only under the bait-shrimp rules of this section.

(2) Open waters: commercial bait shrimp boats may shrimp only in bait bays and major bays, except as otherwise provided in this subchapter.

(3) It is unlawful for any person:

(A) aboard a vessel licensed as a commercial bait-shrimp boat to off-load, transfer, sell, or barter any amount of live or dead shrimp, except an amount of live or dead shrimp not to exceed two quarts per sport fisherman or one gallon (by volume) for two or more sport fishermen may be off-loaded, transferred, sold or bartered to a person aboard a sport fishing vessel; or

(B) aboard a vessel to off-load, transfer, purchase, or barter from a person aboard a vessel licensed as a commercial bait-shrimp boat any amount of live or dead shrimp, except a person aboard a sport fishing vessel may off-load, transfer, purchase, or barter an amount of live or dead shrimp not to exceed two quarts per sport fisherman or one gallon (by volume) for two or more sport fishermen.

(b) Commercial bait-shrimp season.

(1) Commercial bait-shrimp season is open year-round.

(2) Legal shrimping hours.

(A) From August 15 through March 31, legal shrimping hours are 30 minutes before sunrise to 30 minutes after sunset;

(B) From April 1 through August 14 legal shrimping hours are 30 minutes before sunrise to 2:00 p.m.;

(C) In the Gulf Intracoastal Waterway between markers 17 and 57 in the Laguna Madre in Nueces County, bait-shrimp may be taken only from 1:00 a.m. to 30 minutes before sunrise each day.

(c) Bag and possession limits.

(1) No more than 200 pounds of whole shrimp per day may be taken or possessed on board.

(2) At least 50% of the on-board catch must be kept in a live condition, except during the period August 16 through November 14.

(3) All shrimp on board must have heads attached.

(d) Size limits: Shrimp of any size may be retained when caught lawfully during commercial bait-shrimp operations in inside waters.

(e) Net restrictions.

(1) Try nets.

(A) A trawl used as a try net may not exceed 12 feet in total width.

(B) Try net trawl doors or boards may not exceed 450 square inches each.

(C) A beam trawl used as a try net may not exceed 5 feet in width.

(2) Main trawl:

(A) must have doors at least 3 feet long as measured along the door centerline from leading tip to the trailing edge of the door; and

(B) must not exceed any of the following dimensions, as measured along an uninterrupted corkline from leading tip of door to leading tip of door including any and all add-on devices or attachments to the corkline:
Figure 3. 31 TAC §58.164(e)(2)(B)

(C) A beam trawl used as a main trawl may not exceed 25 feet in total width.

(3) Mesh size may not be less than 61/2 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been placed in use.

(4) In the Gulf Intracoastal Waterway between markers 17 and 57 (as indicated on the most current United States Coastal Survey Charts on the effective date of these rules) in the Laguna Madre in Nueces County, bait-shrimp may be taken with a legal beam trawl only.

§58.165. Non-commercial (recreational) Shrimping.

(a) General rules.

(1) It is unlawful for any person:

(A) to take or attempt to take non-commercial shrimp in coastal waters by any means except an individual bait-shrimp trawl, cast net, or minnow seine not larger than 20 feet in length that is manually operated without the use of any mechanical means or devices;

(B) to buy, sell, offer for sale, or handle in any way for profit non commercial shrimp caught with an individual bait-shrimp trawl, cast net, or minnow seine not larger than 20 feet; or

(C) to possess or have on board more than one individual bait-shrimp trawl.

(2) Net restrictions-Individual bait-shrimp trawls.

(A) Trawls may not exceed 20 feet in width as measured between the doors and along the uninterrupted corkline, including any and all add-on devices or attachments to the corkline.

(B) Trawl doors or boards may not exceed 450 square inches each.

(C) Mesh size may not be less than 8 3/4 inches in length between the two most widely separated knots in any consecutive series of five stretched meshes after the trawl has been placed in use.

(b) Shrimping for personal use and bait-Outside waters.

(1) Open waters-the outside waters are open to shrimping except:

(A) Night-the outside waters within seven fathoms are closed to night shrimping (30 minutes after sunset to 30 minutes before sunrise) throughout the year;

(B) Summer closed season.

(i) The outside waters are closed from 30 minutes after sunset on May 15 to 30 minutes after sunset July 15.

(ii) The commission may change the opening and closing dates to provide an earlier, later, or longer season not to exceed 75 days.

(iii) The department will provide 72 hours public notice prior to a change in the closing date, and 24 hours public notice prior to reopening the season.

(C) Winter closed season: the outside waters out to and including 7 fathoms are closed from December 16 through February 1 the following year.

(2) Bag and possession limits.

(A) Personal use: No more than 100 pounds of shrimp (in their natural state with heads attached) per day may be taken or possessed on board;

(B) Bait: No more than two quarts of shrimp (in their natural state with heads attached) per person or four quarts of shrimp per boat may be on board or possessed.

(3) Size limits: shrimp of any size may be retained when caught lawfully in the outside waters.

(c) Shrimping for personal use-Inside waters.

(1) Open waters. Major bays only are open to taking of shrimp for food for personal use.

(2) Spring open season.

(A) The spring open season extends from May 15 through July 15.

(B) Legal shrimping hours: 30 minutes before sunrise to 2:00 pm.

(C) Bag and possession limits: No more than 15 pounds of shrimp (in their natural state with heads attached) per person per day may be taken or possessed on board.

(D) Size limits: Shrimp of any size may be retained when caught lawfully during spring open season in inside waters.

(3) Fall open season.

(A) The fall open season extends from August 15 through December 15.

(B) Legal shrimping hours: 30 minutes before sunrise to 30 minutes after sunset.

(C) Bag and possession limits: No more than 15 pounds of shrimp (in their natural state with heads attached) per person per day may be taken or possessed on board.

(D) Size limits.

(i) From August 15 through October 31, the legal shrimp count is 50 heads on per pound.

(ii) From November 1 through December 15 there are no count or size requirements.

(d) Shrimping for bait-Inside waters.

(1) Open waters: Bait bays and major only are open to taking of shrimp for bait.

(2) Non-commercial bait-shrimp season. Bait bays and major bays are open year-round for non-commercial bait shrimping.

(3) Legal shrimping hours.

(A) From August 15 through March 31, legal shrimping hours are 30 minutes before sunrise to 30 minutes after sunset.

(B) From April 1 through August 14 legal shrimping hours are 30 minutes before sunrise to 2:00 p.m.

(4) Bag and possession limits: No more than 2 quarts of shrimp (in their natural state with heads attached) per person or 4 quarts of shrimp per boat may be on board or possessed.

(5) Size limits: Shrimp of any size may be retained when caught lawfully for bait in the inside waters.

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.

Issued in Austin, Texas, on July 16, 1996.

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William D. Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996
For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

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Chapter 65. Wildlife

The Texas Parks and Wildlife Department proposes the repeal of existing §§65.171-65.177 and §§65.181-65.184, and new §§65.171-65.176, concerning taking, possessing, and transporting nongame species of fish and wildlife. The repeals and new sections are necessary to retain existing regulations before they are subject to automatic nullification under the terms of §65.701.

The repeals and new sections will function by protecting certain species of nongame fish and wildlife and by specifying the conditions under which such species may be taken, possessed, transported, or propagated.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeals and new sections as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeals and new sections.

Mr. Macdonald also has determined that for each of the first five years the repeals and new sections as proposed are in effect the public benefit anticipated as a result of enforcing the repeals and new sections will be the protection and management of threatened and endangered nongame fish and wildlife.

There are no anticipated economic costs to persons required to comply with the repeals and new sections as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as this agency has determined that the repeals and new sections as proposed will not impact local economies.

The department has determined that there will not be a taking of private property, as defined by Government Code, Chapter 2007, as a result of the proposed repeals and new sections. A copy of the analysis is available from the Wildlife Division upon request.

Comments on the proposed repeals and new sections may be submitted to Gary Graham, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 912-7045.

Subchapter G. Regulations for Taking, Possessing, and Transporting Threatened Nongame Species

31 TAC §§65.171-65.177, §§65.181-65.184

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin).

The repeals and new sections are proposed under Parks and Wildlife Code, Chapters 43 and 67, which provide the Commission with the authority to establish regulations governing the take, possession, transportation, and propagation of nongame species of fish and wildlife.

The repeals and new sections affect Parks and Wildlife Code, Chapters 43 and 67.

§65.171. Definitions.

§65.172. Closed Seasons.

§65.173. Threatened Species.

§65.174. Permit Required.

§65.175. Permit Exceptions.

§65.176. Rule Exception.

§65.177. Penalties.

§65.181. Definitions.

§65.182. Permits to Take Certain Fish or Wildlife.

§65.183. Closed Seasons.

§65.184. 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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Subchapter G. Taking, Possessing, and Transporting Threatened Nongame Species

Threatened Nongame

31 TAC §§65.171-65.174

The new sections are proposed under Parks and Wildlife Code, Chapters 43 and 67, which provide the Commission with the authority to establish regulations governing the take, possession, transportation, and propagation of nongame species of fish and wildlife.

The new sections affect Parks and Wildlife Code, Chapters 43 and 67.

§65.171. Closed Seasons.

Except as otherwise provided in this subchapter, no person may:

(1) take, possess, transport, export, sell or offer for sale, or ship any species of fish or wildlife listed in this undesignated head ; or

(2) possess, transport, export, sell, or offer for sale goods made from fish or wildlife listed in this undesignated head.

§65.172. Threatened Species.

Figure 1: 31 TAC §65.172

§65.173. Permit Exceptions.

No permit is required:

(1) to take or transport species listed in this undesignated head to the nearest Department of Health or medical facility if the species poses an immediate threat to human safety or welfare;

(2) to transport within this state mounted or preserved specimens of species listed in this undesignated head, provided that any transfer of such specimens is:

(A) without monetary consideration and is between educational or research institutions, nonprofit municipal zoological gardens, or nonprofit foundations or associations; and

(B) the specimens were originally obtained under a valid scientific or zoological permit. A copy of the voucher or other evidence of transfer shall be forwarded to the department within 20 days following the transfer, and shall specifically indicate the types and numbers of specimens transferred.

(3) possess and transport live, mounted, or preserved specimens of species legally collected in another state, except that a copy of a valid out-of-state permit authorizing the possession of the specimens must accompany each specimen during transport within this state and must be retained by the person or institution possessing the specimen.

§65.174. Exception.

The provisions of this undesignated head do not apply to live, mounted, or preserved specimens of species listed in this undesignated head that were acquired from the wild in this state prior to March 1, 1987. Offspring born in captivity from specimens possessed under this section shall be reported to the Wildlife Division within 30 days of birth for authorization of possession. Proof of legal possession must be provided upon demand of the department.

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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Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4642

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Endangered Species

31 TAC §65.175, §65.176

The new sections are proposed under Parks and Wildlife Code, Chapter 68, which provides the Commission with the authority to establish regulations necessary to administer the provisions of that chapter.

The new sections affect Parks and Wildlife Code, Chapters 43 and 68.

§65.175. Prohibited Acts

It is unlawful for any person to collect, hold, possess, display, transport, release, or propagate any species of fish or wildlife listed in this section for zoological gardens or scientific purposes, or for commercial propagation unless that person possesses a permit issued under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter C.

Figure 1. 31 TAC §65.175

§65.176. Penalties.

Penalties for violation of this subchapter are prescribed by Texas Parks and Wildlife Code Chapter 43, Subchapter C; Chapter 67; and Chapter 68.

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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Subchapter P. Alligators

The Texas Parks and Wildlife Department proposes the repeal of existing §§65.351-65.364, §65.368 and §65.369, and new §§65.351-65.363, concerning alligators. The repeals and new sections are necessary to streamline and simplify regulations governing the take, possession, propagation, transport, and sale of alligators in this state.

The repeals and new sections will function by defining terminology; establishing general requirements for licensure, possession of alligators, and tagging of hides; setting open seasons and bag limits; specifying the means and methods by which alligators may be lawfully taken; setting forth specific tagging requirements for the various classes of licensees; establishing permit and license restrictions; specifying requirements for importation and exportation of alligators; providing for control of

dangerous alligators; setting forth reporting requirements; establishing facility requirements for alligator farms; and providing for penalties for violations.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeals and new sections as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeals and new sections.

Mr. Macdonald also has determined that for each of the first five years the repeals and new sections as proposed are in effect the public benefit anticipated as a result of enforcing the repeals and new sections will be a simplified regulatory scheme that reduces burdensome regulations within the framework of sound biological management practices.

There are anticipated economic costs to persons required to comply with the repeals and new sections as proposed. The proposed new regulations would require wholesale alligator dealers to possess a dealer's license. Dealer's licenses are currently set at $200 for residents and $650 for nonresidents.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, 2001.022, as this agency has determined that the repeals and new sections as proposed will not impact local economies.

The department has determined that there will not be a taking of private property, as defined by Government Code, Chapter 2007, as a result of the proposed repeals and new sections.

Comments on the proposed repeals and new sections may be submitted to Markus Peterson, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4410 or 1-800-792-1112, extension 4410.

31 TAC §§65.351-65.363

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin).

The repeals and new sections are proposed under Parks and Wildlife Code, Chapter 65, which provides the Commission with the authority to regulate the taking, possession, propagation, transportation, exportation, importation, and sale of alligators.

The repeals and new sections affect Parks and Wildlife Code, Chapter 65.

§65.351. Application.

§65.352. Definitions.

§65.353. General Rules.

§65.354. Licenses, Permits, and Fees.

§65.355. Means and Methods.

§65.356. Hide Tag Procurement and Tagging Requirements.

§65.357. Open Seasons, Open Areas, and Bag Limits-Hunting in the Wild.

§65.358. Possession.

§65.359. Importation, Exportation, Purchase, and Sale.

§65.360. Nuisance Alligator Control.

§65.361. Report Requirements.

§65.362. Disposal of Alligators by the Department.

§65.363. Alligator Egg Collection.

§65.364. Alligator Farm Facility Requirements.

§65.368. Exceptions.

§65.369. Penalty for Violation.

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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Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
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31 TAC §§65.351-65.363

The new sections are proposed under Parks and Wildlife Code, Chapter 65, which provides the Commission with the authority to regulate the taking, possession, propagation, transportation, exportation, importation, and sale of alligators.

The new sections affect Parks and Wildlife Code, Chapter 65.

§65.351. Application.

Except for special permits or contracts issued under Parks and Wildlife Code, Chapters 43 or 81, this subchapter governs the taking, possession, propagation, transportation, exportation, importation, and sale of alligators in this state.

§65.352. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned in Subchapter A of this chapter and in the Parks and Wildlife Code.

Alligator-For the purposes of this subchapter, alligator means any American alligator (Alligator mississippiensis), living or dead, or any part of an alligator, including their eggs.

Egg collector-A person authorized by the department to collect, possess, or transport alligator eggs.

Farm-A premises where alligators are bred or raised under department-sanctioned conditions.

Farmer-A person holding an alligator farming permit.

Shed-An enclosed structure used to house alligators.

Control hunter-A person authorized by the department to take specific alligators.

Egg collection -to remove or possess alligator eggs from wild nests.

Harpoon or gig -A pole or staff less than ten feet long, equipped with either six or fewer immovable prongs or two or more spring-loaded grasping arms.

Hatchling alligator-Any alligator less than 12 inches in length.

Hunting or collecting party-Any person traveling in the same conveyance with, in the immediate presence of, or assisting a person actively involved in taking and tagging an alligator or collecting alligator eggs.

Processed or manufactured alligator part-Any alligator part (and its resulting products) that has been treated to prevent decomposition and/or packaged for sale.

Propagation-The holding of live animals for production of offspring.

Retail dealer-A person who buys processed or manufactured alligator parts from an alligator buyer, farmer, or from a legal out-of-state source for resale to the consumer only.

Wholesale dealer -An alligator buyer who buys nonliving alligators for the purpose of selling, canning, preserving, processing, or handling for shipment or sale.

§65.353. General Provisions.

(a) No person shall hunt alligators or be a member of a hunting party without possessing a valid alligator hunting license.

(b) An alligator hunter or hunting party must physically possess at least one valid, unused alligator hide tag while taking alligators.

(c) No person may possess an untagged alligator hide or undocumented alligator parts.

(d) When collecting, an alligator egg collector must possess on his or her person one or more current nest stamps and an Alligator Nest Stamp Authorization (PWD-453). At least one person in a collecting party must possess a current nest stamp and PWD-453.

(e) Except as provided in this subchapter, no person may possess the raw or salted hide of an alligator at any time. Raw or salted hides that are tagged and legally documented may be transported by common carrier or possessed for tanning or taxidermy.

(f) Any alligator removed from a taking device must immediately be killed and permanently tagged around a medial scute in the last six inches of the alligator's tail.

(g) No person may possess a live alligator or alligator eggs without possessing a valid alligator farming permit.

(h) Except as provided in this subchapter, no person may purchase an alligator taken in this state without possessing a valid alligator dealer's license.

(i) No person may collect alligator eggs without possessing a valid alligator hunting license and an alligator egg collector's permit. Landowners on their own property are not required to possess any license or permit when accompanying licensed egg collectors.

(j) All alligators possessed, sold, purchased, exported, or imported shall be accompanied by evidence of lawful take, including but not limited to:

(1) a resource user license or permit number issued by the state or country of origin, which shall be firmly attached to the alligator; and

(2) a tag or label affixed to the outside of any package or container of alligators, specifying the contents and any applicable license or permit numbers.

(3) Meat products finally processed and packaged by a wholesale dealer must be accompanied by an invoice or bill of sale that:

(A) specifies the amount of packaged alligator meat by weight: and

(B) identifies the wholesale dealer from which the packaged meat originated.

§65.354. Open Seasons and Bag Limits.

The general open season for taking alligators in the wild is September 10 through September 30. The daily and annual bag limits are equal to the number of valid alligator hide tags that a licensed alligator hunter possesses.

§65.355. Means and Methods.

(a) Legal devices for taking alligators in the wild are as follows:

(1) hook and line (line set);

(2) harpoon or gig;

(3) lawful archery equipment and barbed arrow; and

(4) hand-held snare with integral locking mechanism.

(b) A line of at least 300-pound test shall be securely attached to all taking devices being used to hunt alligators. Hook-bearing lines must be attached to a stationary or floating object capable of maintaining a portion of the line above water when an alligator is caught on the line.

(c) Alligator hunters shall neither remove alligators from line sets nor use any taking device other than line sets from sunset to one-half hour before sunrise.

(d) Alligators caught on legal taking devices may be killed by firearms, axes, or hatchets.

(e) A hunter shall set no more than one line per unused hide tag in possession.

(f) Alligator hunters shall inspect their line sets and remove captured alligators daily.

(g) Each baited line shall be labeled with a plainly visible, permanent, and legibly marked gear tag that contains the full name and current address of the licensed alligator hunter or hunters who set it.

(h) Hook-bearing lines may not be set prior to the general open season and shall be removed no later than sunset of the last day of the open season.

(i) All taking devices shall be used only on the tracts of land or water specified for the hide tags. All line sets shall be secured at one end on the tract of land or water specified for the hide tags.

§65.356. Hide Tag Procurement and Tagging Requirements.

(a) Alligator hide tags may be obtained as follows:

(1) Hunters. Hunters shall obtain hide tags from the landowner.

(2) Farmers. Applications for hide tags (PWD-372) shall be submitted to the department prior to harvest, except for non-harvest mortalities, in which case the permittee shall notify a game warden before skinning operations begin.

(3) Landowners. Application for hide tags (PWD-369) shall be submitted to the department.

(b) All persons to whom hide tags have been issued shall notify the department in writing within 15 days in the event that any tags are lost, stolen, mutilated, or destroyed. The department shall not replace tags so reported.

§65.357. Permit and License Restrictions.

(a) General.

(1) Any person holding a valid license or permit issued under this subchapter, other than a licensed alligator hunter, may sell processed or manufactured alligator parts to a retail dealer.

(2) Any retail dealer may sell legally obtained and documented processed or manufactured alligator parts to anyone.

(b) Permit and license restrictions.

(1) Hunters. Alligators taken under an alligator hunting license may be sold to any person authorized by the department to purchase alligators.

(2) Farmers. A farmer may purchase live alligators from another farmer and alligator eggs from an authorized collector. A farmer may sell live alligators to another farmer or to the holder of a permit issued under Parks and Wildlife Code, Chapter 43, Subchapter C. It is an offense for any to:

(A) transport or receive a live alligator unless a game warden at the point of origin (if in Texas) and the destination (if in Texas) are notified at least 24 hours prior to transport; or

(B) transport live alligators from a farm for exhibition purposes unless authorized by a permit issued under Parks and Wildlife Code, Chapter 43, Subchapter C.

(3) Wholesale dealers. Wholesale dealers may purchase legally taken alligators from an alligator hunter, a dealer, a farmer, an import permit holder, or a control hunter.

(4) Collectors. Alligator egg collectors may sell alligator eggs only to designated farmers. Landowners may obtain alligator nest stamps by submitting a completed Nest Stamp Application (PWD-369) to the department.

(A) It is unlawful for a landowner to issue a nest stamp for a tract of land or water other than the tract for which the stamp was originally issued. An alligator egg collector shall collect only on tracts designated for the stamps he or she possesses.

(B) Alligator eggs shall be collected from the wild by hand. Immediately upon collection and throughout transportation and incubation each clutch of eggs must be accompanied by a completed nest stamp.

(C) No less than 24 hours prior to each collection trip, an egg collector shall notify a game warden in the collection area of the date, time, and location of the collection.

(5) Control hunters. A control hunter may sell only to a farmer or a wholesale dealer. A control hunter may sell a live alligator only to a farmer.

§65.358. Importation and Exportation.

(a) No alligator may be imported into this state unless the importer possesses a valid department-issued alligator import permit. In the case of alligators taken in another state under a sport hunting license, no import permit is required.

(b) Legally tagged and documented alligators and alligator parts may be exported from this state by all categories of license and permit holders. No live alligators originating in Texas shall be exported outside of the United States without specific departmental authorization.

§65.359. Alligator Control.

(a) Complaints concerning alligators shall be investigated by the department prior to approval for removal by a control hunter.

(b) Control hunters may take alligators by only by means or methods specified by the department at the time of authorization for take.

(c) Control hunters may take alligators approved for removal at any time.

§65.360. Report Requirements.

(a) An alligator Hide Tag Report (PWD-304) shall be completed by an alligator hunter or control hunter immediately after taking each alligator and submitted to the landowner within 24 hours of take. The landowner shall forward the completed form to the department no later than the 7th day following the date of take. A dealer or person possessing the alligator hide shall retain a copy of the PWD-304 until the hide is shipped or sold out of state, at which time the copy shall be forwarded to the department.

(b) A person receiving hide tags from the department shall file an annual report (PWD 370) accounting for all tags by October 10 following the end of the open season for which tags were issued. Unused tags shall be returned with this report.

(c) A wholesale dealer shall file reports (PWD 306) by October 31 and by the last day of every third month thereafter detailing purchase and sale transactions during the license year. A wholesale dealer shall retain a copy of each PWD-360 so filed for a minimum of two years and shall produce such records upon demand by the department.

(d) A retail dealer shall retain records of all purchases from wholesale dealers for a minimum of two years.

(e) An alligator import permit holder shall report all import activities during a reporting period within 30 days following permit period termination.

(f) A farmer shall submit quarterly reports (PWD-371) within 15 days of the end of each quarterly period (February, May, August, and November).

(g) An alligator egg collector shall submit an annual report and return all unused nest stamps by August 15.

§65.361. Alligator Farm Facility Requirements.

(a) A first-time applicant for an alligator farmer's permit must, prior to permit issuance, show evidence of the following during a facility inspection by the department:

(1) adequate barriers to prevent escape or entry by alligators;

(2) a reliable source of clean, fresh water;

(3) provision for protection from the cold, either available denning space or an enclosed, controlled-temperature environment;

(4) pooled water sufficient to allow complete submersion of alligators and dry ground sufficient to permit alligators to completely exit from the water;

(b) Alligator farmers possessing alligator eggs outside an alligator nest shall house such eggs in identifiable original clutch groups in an incubation facility approved by the Department.

(c) Complete written records of all alligator stock shall be kept, including shipping tickets, invoices, and bills of lading.

(d) Farmers may collect eggs from nests of captive alligators inside alligator farms at any time, provided each clutch is accompanied by a captive nest stamp provided by the department. Nesting activity of captive alligators shall be recorded on a daily basis. An annual summary of nesting activity (PWD-371A) shall be submitted to the department by September 15 of each year.

(e) Farmers possessing alligator eggs collected from the wild shall complete and submit an annual report (PWD- 371A) to the department by September 30 of each year.

(f) The department reserves the right to deny permits to:

(1) any incubation facility with less than a 70% hatching success over any period of two consecutive years; or

(2) any farm facility with less than a 70% hatchling survival (hatch-to-harvest) over any period of two consecutive years.

(g) All facilities, alligator stock, and records are subject to examination by department personnel prior to permitting and thereafter during farm operation.

(h) No alligator eggs collected or obtained under authority of this subchapter may be shipped out of state.

§65.362. Exceptions.

This subchapter shall not prohibit a person from killing an alligator in immediate defense of his or her life or the lives of others. Alligators killed under this provision must be reported to the department within 24 hours.

§65.363. Violations and Penalties.

(a) Each alligator or part of an alligator taken or possessed in violation of this subchapter shall constitute a separate offense.

(b) Any person who is delinquent in excess of 15 days in returning hide tags or nest stamps, or in filing a report required by this subchapter, commits an offense.

(c) The penalties for violation of these sections are as prescribed by Parks and Wildlife Code, §65.008.

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.

Issued in Austin, Texas on July 17, 1996.

TRD-9610289
Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996

For further information, please call: (512) 389-4642

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Subchapter R. Deer Antlers

31 TAC §§65.400–65.406

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Parks and Wildlife Department proposes the repeal of existing §65.400-65.406 and new §65.401, concerning deer antlers. The repeals and new section are necessary to eliminate outdated and unnecessary regulations.

The repeals and new section will function by removing burdensome restrictions on the possession and sale of deer antlers.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeals and new section as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeal and new section.

Mr. Macdonald also has determined that for each of the first five years the repeals and new section as proposed are in effect the public benefit anticipated as a result of enforcing the repeals and new section as proposed will be the elimination of unnecessary regulations.

There are no anticipated economic costs to persons required to comply with the repeals and new section as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as this agency has determined that the repeals and new section as proposed will not impact local economies.

The department has determined that the proposed repeals and new section do not require a takings impact assessment under the provisions of Government Code, Chapter 2007.

Comments on the proposed repeals and new section may be submitted to Robert Macdonald, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 or 1-800-792-1112, ext. 4775.

The repeals and new sections are proposed under Parks and Wildlife Code, Chapter 62, Subchapter B, which provides the Commission with the authority to establish regulations governing the sale, purchase, and possession of deer antlers.

The repeals and new section affect Parks and Wildlife Code, Chapter 62, Subchapter B.

§65.400. Application.

§65.401. Definitions.

§65.402. Sale or Purchase of Antlers.

§65.403. Invoice Required.

§65.404. Invoice Compliance.

§65.405. Exceptions.

§65.406. Penalty.

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.

Issued in Austin, Texas, on July 16, 1996.

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William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

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For further information, please call: 1–800–792–112, Ext. 4642 or (512) 389–4642

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31 TAC §65.401

The new section is proposed under Parks and Wildlife Code, Chapter 62, Subchapter B, which provides the Commission with the authority to establish regulations governing the sale, purchase, and possession of deer antlers.

The new section affects Parks and Wildlife Code, Chapter 62, Subchapter B.

§65.401. Purchase and Sale of Deer Antlers.

Legally taken deer antlers may be sold, purchased, and possessed after sale.

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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William D. Harvey, Ph.D.

Regulatory Coordinator

Texas Parks and Wildlife Department

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Chapter 69. Resource Protection

The Texas Parks and Wildlife Department proposes the repeal of existing §§69.1-69.14 and new §§69.1-69.8, concerning protected, threatened, and endangered plants. The repeals and new sections are necessary to streamline and simplify existing regulations before they are subject to automatic nullification under the terms of §69.81.

The repeals and new sections will function by setting forth the criteria under which scientific and commercial plant permits are issued for the take, possession, transport, and propagation of protected, threatened, and endangered native plants; set forth reporting requirements; and provide for penalties and fees.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeals and new sections as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeals and new sections.

Mr. Macdonald also has determined that for each of the first five years the repeals and new sections as proposed are in effect the public benefit anticipated as a result of enforcing the repeals and new sections will be the protection and management of protected, threatened, and endangered native plants.

There are no anticipated economic costs to persons required to comply with the repeals and new sections as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, 2001.022, as this agency has determined that the repeals and new sections as proposed will not impact local economies.

The department has determined that there will not be a taking of private property, as defined by Government Code, Chapter 2007, as a result of the proposed repeals and new sections. A copy of the analysis is available from the Wildlife Division upon request.

Comments on the proposed repeals and new sections may be submitted to Gary Graham, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 912-7045.

Endangered, Threatened, and Protected Native Plants

31 TAC §§69.1-69.14

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin).

The repeals and new sections are proposed under Parks and Wildlife Code, Chapter 88, which provide the Commission with the authority to establish regulations implementing the provisions of that chapter.

The repeals and new sections affect Parks and Wildlife Code, Chapter 88.

§69.1. Definitions.

§69.2. List of Endangered, Threatened, and Protected Plant Species.

§69.3. Amendments - Public Hearing.

§69.4. Scientific Plant Permit - Qualifications.

§69.5. Scientific Plant Permit - Application.

§69.6. Scientific Plant Permit - Criteria for Issuance.

§69.7. Scientific Plant Permit - Annual Report.

§69.8. Permit: Scientific Plant Permit - Criteria for Reissuance.

§69.9. Commercial Plant Permit.

§69.10. Commercial Plant Permit - Tag Requirement.

§69.11. Permit and Tag Fees.

§69.12. Permits: Period of Validity.

§69.13. Exceptions.

§69.14. 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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Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
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31 TAC §§69.1-69.8

The new sections are proposed under Parks and Wildlife Code, Chapter 88, which provide the Commission with the authority to establish regulations implementing the provisions of that chapter.

The new sections affect Parks and Wildlife Code, Chapter 88.

§69.1. Permit Required.

Except as provided in Parks and Wildlife Code, §88.009, no person may:

(1) take, possess, transport, or sell a protected, endangered, or threatened native plant from the public lands of this state unless that person possesses a valid scientific plant permit authorizing such activity; or

(2) take, possess, transport, or sell an endangered, threatened, or protected native plant for commercial purposes from private lands unless that person possesses a valid commercial plant permit authorizing such activity.

§69.2. Scientific Plant Permit.

(a) Qualifications. A scientific plant permit shall be issued only to a person who provides evidence to the department's satisfaction that:

(1) there exists a legitimate scientific need to conduct research and that the information obtained will benefit the department in the management of the target species;

(2) the research would not substantially or unnecessarily duplicate existing research conducted under other permits issued under this subchapter;

(3) the applicant possesses or has access to facilities to properly care for the permitted plants;

(4) the applicant possesses a degree or certification in a botanical or horticultural discipline or possesses letters of recommendation from two acknowledged authorities in a botanical or horticultural discipline, and;

(5) the proposed research follows generally accepted principles of experimental design.

(b) Application requirements. Prior to permit issuance, an applicant for a scientific plant permit shall submit to the department:

(1) a completed application on a form supplied by the department;

(2) a letter of recommendation from each of two people in the field of botany or horticulture attesting to the professional status or competence that qualifies the applicant to conduct the proposed research;

(3) a letter of permission from an agency or entity to take plants on lands under the jurisdiction of the agency or entity; and

(4) the name of each person assisting in the collecting and transporting of endangered, threatened, or protected plants.

(c) Special provisions.

(1) A permit may be amended at any time during the permit year to reflect changes in the propagation, educational, or scientific studies of the permittee, provided the amendment satisfies the criteria set forth in subsection (a) of this section.

(2) While conducting any permit activities on public lands, each person named on a permit shall carry copies of the permit and the letter of permission required by subsection (a)(3) of this section, and shall produce such documents upon demand by a game warden.

(3) Specimens collected under a scientific plant permit may not be sold or bartered.

(4) Persons engaged in the selling or holding for sale of native plants designated as endangered, threatened or protected are prohibited from holding a scientific plant permit.

§69.3. Reporting Requirements.

By the date specified on the permit, a permittee shall complete and submit an annual report on a form provided by the department. A copy of any final report and/or publication relating to the permitted activities shall also be submitted to the department.

§69.4. Renewal.

The department may require information in addition to that required by paragraphs (1)-(4) of this section. Scientific plant permits shall be renewed, provided:

(1) the permittee has submitted the annual report by the date specified on the permit;

(2) the permittee has complied with all permit provisions;

(3) the permittee has demonstrated reasonable progress toward the completion of research activities authorized by the permit; and

(4) the permittee has not been convicted of a violation of Parks and Wildlife Code.

§69.5. Commercial Plant Permit.

A commercial plant permit authorizes the take, possession, and/or transport of protected, threatened, and endangered native plants from private lands. A person applying for a Commercial Plant Permit shall submit an application on a form provided by the department.

§69.6. Permit and Tag Fees.

The fee for the issuance of a Commercial Plant Permit is $50.

§69.7. Period of Validity.

All permits issued under this subchapter expire one year from the date of issuance unless suspended or revoked by the executive director.

§69.8. Penalties.

The penalties for a violation of any provisions of this subchapter are prescribed in Texas Parks and Wildlife Code, §88.011.

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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Texas Parks and Wildlife Department
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Wildlife Rehabilitation Permits

The Texas Parks and Wildlife Department proposes the repeal of existing §§69.41, 69.43, 69.45, 69.47, 69.49, 69.51, 69.53, 69.55, and 69.57; and new §§69.43-69.53, concerning wildlife rehabilitation permits. The repeals and new sections are necessary to streamline and simplify the procedures and permitting process for the rehabilitation of sick, injured, and orphaned wildlife.

The repeals and new sections will function to provide definitions of terminology; set forth provisions generally applicable to the practice of wildlife rehabilitation; specify the situations and conditions under which certain persons may possess, treat, rehabilitate, retain, transfer, or release wildlife; set forth procedures for permit applications and renewals; establish criteria for permit qualification; set forth facilities standards; provide for reporting requirements; and establish penalties for violations of the regulations.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the repeals and new sections as proposed are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the repeals and new sections.

Mr. Macdonald also has determined that for each of the first five years the repeals and new sections as proposed are in effect the public benefit anticipated as a result of enforcing the repeals and new sections will be a more efficient system for the permitting of wildlife rehabilitators and therefore, a more efficient methodology for protecting the wildlife resources of this state.

There are no anticipated economic costs to persons required to comply with the repeals and new sections as proposed.

The department has not filed a local impact statement with the Texas Employment Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as this agency has determined that the repeals and new sections as proposed will not impact local economies.

The department has determined that there will not be a taking of private property, as defined by Government Code, Chapter 2007, as a result of the proposed repeals and new sections.

Comments on the proposed repeals and new sections may be submitted to John Herron, Wildlife Division, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4771 or 1-800-792-1112, extension 4771.

31 TAC §§69.41, 69.43, 69.45, 69.47, 69.49, 69.51, 69.53, 69.55, 69.57

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin).

The repeals and new sections are proposed under Parks and Wildlife Code, Chapter 43, Subchapter C, which provides the Commission with the authority to establish regulations governing the taking and possession of protected wildlife for rehabilitation purposes.

The repeals and new sections affect Parks and Wildlife Code, Chapter 43, Subchapter C.

§69.41. Purpose of Rules.
§69.43. Definitions.
§69.45. Applications and Permits.
§69.47. Permit Renewals.
§69.49. Violations and Enforcement.
§69.51. Hearings.
§69.53. Permit Requirements.
§69.55. Annual Reports.
§69.57. General Facilities 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.

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31 TAC §§69.43-69.53

The new sections are proposed under Parks and Wildlife Code, Chapter 43, Subchapter C, which provides the Commission with the authority to establish regulations governing the taking and possession of protected wildlife for rehabilitation purposes.

The new sections affect Parks and Wildlife Code, Chapter 43, Subchapter C.

§69.43. Definitions.

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

Fostering-Using a captive animal to rear young animals of the same species.

Holding-Retaining in captivity.

Human imprinting or human bonding-A dependency or fixation upon humans as parent substitutes or companions.

Non-releasable animal-An animal which, after rehabilitation, is determined by the department to be unlikely to survive in the wild if released.

Propagate-To allow animals to produce offspring.

Rehabilitation-The temporary caring for injured, orphaned, or sick wildlife until such animals can be released to the wild.

Release to the wild-Release of wildlife to an area where it is capable of leaving at will.

Socialize-Using a captive animal to teach wild behaviors to juvenile animals of the same species.

Subpermittee-A person authorized by a permit to conduct activities only while under the supervisory responsibility of a permit holder.

Supervisory responsibility-The responsibility that a permit holder has to direct the actions of an individual under his or her control, and for which that supervisor accepted legal responsibility.

Transportation-The transfer of captive protected wildlife from one permit holder to another, from an out-of-state source to an in-state permit holder, from an in-state permit holder to an out-of-state destination, from site of legal capture to holding, or to site of final disposition.

Volunteer-An individual who works with permitted wildlife in the presence of the permit holder or subpermittee.

§69.44. General Provisions.

(a) Activities authorized by a permit issued under this section shall be made only by the permittee(s) or subpermittee(s) named on the permit. Volunteers may assist in these activities, but only when in the presence of a permittee or subpermittee. A permittee utilizing volunteers shall keep on file at the permitted facility a signed and dated affidavit authorizing the status of each volunteer.

(b) Protected wildlife held under the authority of a rehabilitation permit may not be sold, bartered, or exchanged for any consideration. A permit issued under this section shall not authorize a person, firm, or corporation to engage in the propagation or commercial sale of protected wildlife.

(c) A permit holder shall conduct rehabilitation in an environment which minimizes human contact and prevents human and domestic animal imprinting.

(d) Except for permitted educational purposes, wildlife possessed under the permit shall not come in contact with anyone other than the permit holder, subpermittees, volunteers, licensed veterinarians or the staff of licensed veterinarians.

(e) A permit holder shall not allow the viewing, exhibit, or display to the public of animals under rehabilitation unless specifically authorized by permit provision.

(f) A permit holder shall not conduct rehabilitation on the same property as a fur-bearing animal propagation facility. This restriction may be waived by the department on a case-by-case basis.

(g) Non-releasable protected wildlife shall be euthanized. The department may grant exceptions for approved educational, fostering, or socialization purpose, or for transfer to zoological permit holders, scientific permit holders, or educational permit holders. Requests for exceptions must be made in writing to the department and no transfer shall take place until the department has approved the request. Permission to retain non-releasable wildlife may be granted only to rehabilitators who have at least three years' experience as a permitted wildlife rehabilitator.

(h) Permit holders possessing non-releasable raptors shall band the raptors with markers supplied by the department.

(i) All medical treatment shall be performed in consultation with a licensed veterinarian.

(j) Euthanized wildlife and wildlife that has died while under the care of a permittee may retained by the permittee or transferred to another permitted wildlife rehabilitator.

(k) This subchapter does not apply to department personnel in the performance of official duties or persons assisting department personnel in the performance of official duties.

§69.45. Permit Required.

(a) A permit is required for the rehabilitation of any protected wildlife as defined in Parks and Wildlife Code, Chapter 43, Subchapter C.

(b) Licensed veterinarians may hold, possess, and transport protected wildlife to provide emergency medical care or stabilization care for periods of up to 48 hours, after which time the wildlife must be transferred to a permitted rehabilitator.

(c) Subpermittees may possess protected wildlife for rehabilitation purposes provided they have in their possession a copy of the valid permit naming them as a subpermittee.

(d) No permittee shall change facility location, consulting veterinarian, or subpermittees, receive unauthorized species, or conduct unauthorized activities unless the permittee possesses an amended permit authorizing such activity.

(e) Permits issued under this section may be issued for any period of time not exceeding three years from the date of issuance.

§69.46. Application for Permit.

(a) Applications shall be made on forms supplied by the department, and shall be submitted with the letters of recommendation required by ˚69.47 of this title (relating to Qualifications). Incomplete applications will not be processed.

(b) Applications must be accompanied by evidence of one the following:

(1) completion of a training course offered by the International Wildlife Rehabilitation Coalition or the National Wildlife Rehabilitator's Association within the preceding three years;

(2) attendance at a department-sponsored wildlife rehabilitation conference or a national wildlife rehabilitation conference within the preceding three years;

(3) membership in a state or national wildlife rehabilitation organization; or

(4) a test score of 80 or above on a department-administered wildlife rehabilitation examination.

(c) Permits for the taking or holding of federally protected species shall not be valid unless the permit holder also possesses a valid federal permit.

(d) Rehabilitation permits shall not be issued to holders of any permits authorizing the propagation for sale of any protected wildlife other than finfish or aquatic invertebrates.

§69.47. Qualifications.

(a) Wildlife rehabilitation permits may be issued only to qualified individuals who:

(1) are 18 years of age or older; and

(2) have letters of recommendation from two persons who have known the applicant for at least two years. The letters of recommendation must be from:

(A) conservation scientists or game wardens currently employed by the department;

(B) licensed veterinarians; or

(C) permitted wildlife rehabilitators.

(b) Evidence of certification by the International Wildlife Rehabilitation Coalition or the National Wildlife Rehabilitator's Association can be substituted for one of the required letters of recommendation.

§69.48. Permit Renewals.

(a) Renewal applications shall be made on a form provided by the department and shall be submitted no later than thirty days prior to the expiration date of the permit.

(b) Renewal applications shall not be processed until the department has received all reports required by ˜69.52 of this title (relating to Reports).

(c) The department may deny a renewal if the permittee has violated any of the provisions of the permit, regulations of the department, or federal or state wildlife laws.

§69.49. General Facilities Standards.

All facilities shall be subject to inspections by the department. A first-time applicant's facilities shall be inspected by the department and no permit shall be issued until the facilities are determined to satisfy all of the applicable facilities standards of this subchapter.

(1) The department may specify individual caging requirements on a case-by-case basis.

(2) Clean water shall be available at all times except where medical circumstances require the temporary denial of water.

(3) Feces and waste materials shall be removed on a daily basis except for species which normally re-ingest fecal material.

(4) Cages shall be cleaned and disinfected using non-irritating methods.

(5) A person authorized by permit shall observe and provide care for wildlife at least once daily unless otherwise specified by the permit.

§69.50. Transfers.

A wildlife rehabilitation permit authorizes the permit holder to transfer wildlife to other individuals legally permitted to hold that species in Texas.

§69.51. Release of Rehabilitated Wildlife.

(a) A permit holder shall not release wildlife in such a manner or at such a location so that the released animals are likely to become a nuisance or a depredation threat.

(b) Wildlife releases shall not be made in or to fenced or enclosed area that prevent the animal from leaving at will.

(c) Protected wildlife shall be released only to habitat appropriate for the species.

(d) Permittees may not release wildlife on department property without the permission of the department.

(e) A permittee commits an offense if the permittee is on private property and fails to have on their person the written permission of the landowner, lessee, or operator to be on that property.

§69.52. Reports.

(a) Permit holders shall complete and submit an annual report on a form provided by the department. The report shall include the activities of all individuals listed on the permit.

(b) Reports must be received by the department by January 31 of each year.

(c) Copies of all reports shall be retained at the permitted facility and kept available for inspection by the department for a period of two years.

§69.53. Violations and Penalties.

The penalties for violations of this subchapter are as prescribed by Parks and Wildlife Code, Chapter 43, Subchapter C.

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.

Issued in Austin, Texas on July 17, 1996.

TRD-9610291
Bill Harvey, Ph.D.
Regulatory Coordinator
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 389-4642

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter V. Franchise Tax

34 TAC §3.549

The Comptroller of Public Accounts proposes an amendment to §3.549, concerning taxable capital: apportionment. A provision is added requiring the same accounting methods for computing gross receipts that are used for computing surplus in accordance with legislation enacted by the 74th Legislature, 1995. A provision has been added reflecting the treatment of distributions from trusts in accordance with agency policy. Definitions of legal domicile and location of payor have been added.

Amendments have been made to the provisions for litigation awards, revenues from trademarks, franchises, and licenses, insurance proceeds, and subsidies. A new provision addressing

natural gas production has been added. This group of amendments were a result of the *Pennzoil* decision and agency policy.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no revenue impact on the state or local government. The *Pennzoil v. Sharp* litigation resulted in a franchise tax revenue loss to the state, the impact of which was included in the comptroller's September 1995 certification revenue estimate. These proposed rule changes related to that litigation have no additional fiscal impact. In addition, the proposed rule changes related to legislation will have no fiscal impact on the state.

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 clarification of changes in comptroller rules related to franchise taxable capital apportionment. This rule 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 rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

The 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, §171.112.

§3.549. Taxable Capital: Apportionment.

(a) (No change.)

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

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

(6) Legal domicile-The legal domicile of a corporation is its state of incorporation. The legal domicile of a partnership or trust is the principal place of business of the partnership or trust. The principal place of business of a partnership or trust is the location of its day-to-day operations. Where the day-to-day operations are conducted equally or fairly evenly in more than one state, the principal place of business is the commercial domicile.

(7) Location of payor-The legal domicile of the payor.

(8)[(6)] Revenue-Except as otherwise specifically provided for in this section or the Tax Code, Chapter 171, revenue means the value of inflows of economic resources from separate legal entities for delivering or producing goods, rendering services, or carrying out other activities that constitute the entity's operations.

(c) (No change.)

(d) General rules for reporting gross receipts.

(1)-(9) (No change.)

(10) Except as otherwise provided under the Tax Code, §171.112, a corporation is required to use the same accounting methods in computing gross receipts as it uses in computing surplus. Accounting methods are those methods of allocating the cost, benefit, or expense of an asset or liability to accounting periods.

(e) Treatment of specific items in computing gross receipts.

(1)-(20) (No change.)

(21) Insurance proceeds.

(A) Business interruption insurance proceeds are gross receipts when the proceeds are to replace lost net profits, and are apportioned **to the legal domicile of the payor of the proceeds** [based on the actual location of the interrupted business operations for which the proceeds are being paid].

(B) (No change.)

(C) Any gain resulting from life insurance proceeds paid on the death of a corporate officer or other key personnel **is a gross receipt and is apportioned to the legal domicile of the payor of the proceeds** [are gross receipts and are apportioned to the corporation's commercial domicile].

(22)-(25) (No change.)

(26) Litigation awards. **Revenues realized from** [All] litigation awards are gross receipts with the following exception. Those litigation awards consisting of a recovery of compensatory damages for fire or other casualty losses on property are gross receipts to the extent the recovery exceeds the net book value of the property. Litigation awards are apportioned to the **legal domicile of the payor of the proceeds provided that a litigation award for receipts that are otherwise subject to a specific apportionment rule is subject to the specific rule. For example, if a vendor sued to recover on the sales of goods in Texas to a Delaware corporation, a judgment for the amount of the sales would not convert the receipts from Texas receipts to Delaware receipts. Subsection (f)(2) and (7) of this section is controlling for judgments, compromises, or settlements related to natural gas production** [commercial domicile of the recipient corporation].

(27)-(29) (No change.)

(30) Patents, copyrights, and other intangibles.

(A) Receipts from the use of intangible rights.

(i)-(ii) (No change.)

(iii) Revenues received by the owner of a trademark, franchise, and license are **apportioned to the location of payor. In** [included in Texas receipts to the extent used in Texas; however, in] regard to the sale/licensing of computer programs, paragraph (7) of this subsection is controlling.

(B) (No change.)

(31)-(39) (No change.)

(40) Subsidies/grants. Subsidies or grants received by a corporation from a governmental agency are gross receipts, except when the funds are required to be expended dollar for dollar (i.e., passed through) to third parties on behalf of the agency. Receipts from a governmental subsidy or grant are apportioned **in the same manner as the item to which the subsidy/grant was attributed. For example, if a corporation qualifies for a grant to conduct research for the government, the receipts from that grant would**

be considered receipts from a service and would be apportioned to the location where the research is performed [to the location where the activity which qualified for the subsidy or grant is performed].

(41)-(46) (No change.)

(47) Trusts. Distributions to the beneficiaries of a trust are apportioned based on the legal domicile of the trust. See subsection (b)(6) of this section regarding the legal domicile of a trust.

(f) Natural gas production.

(1) Revenues realized by a producer of gas that relate to the price of gas produced and taken by the purchaser pursuant to the terms of a contract for the sale of gas are gross receipts and are apportioned to Texas if the gas is delivered in Texas.

(2) Revenues realized by a producer of gas in connection with any judgment, compromise, or settlement agreement relating to the recovery of the contract price of gas produced are gross receipts and are apportioned to Texas to the extent the contract specified delivery in Texas.

(3) Revenues realized by a producer of gas from payments by a purchaser under a contract for the sale or purchase of gas to be produced, if the gas is never produced and delivered to the purchaser pursuant to that contract, are gross receipts and are apportioned to the legal domicile of the payor.

(4) Revenues realized by a producer of gas from breach of contract litigation awards, reimbursements for litigation-related expenses (e.g., documented attorney's fees or court costs), or interest (agreed upon by the parties, determined by or from the records of the producer, or an amount ordered by a court) are gross receipts and are apportioned to the legal domicile of the payor.

(5) Revenues realized by a producer of gas for payments made by a purchaser to terminate a gas purchase contract are gross receipts and are apportioned to the legal domicile of the payor.

(6) Revenues realized by a producer of gas for payments made by a purchaser to amend any provision in the gas purchase contract are gross receipts and are apportioned to the legal domicile of the payor. Any revenues realized by a producer as a result of an amended provision affecting the price of the gas sold will be recognized as receipts from the sales of gas and apportioned to Texas if delivery is in Texas.

(7) Those revenues realized by a producer of gas from a judgment, compromise, or settlement among several claims, where there was a pricing dispute and any other issue associated with a gas sales/purchase contract, that is less than the full amount sought by the producer shall be prorated based upon the documented amounts due under the contract for each issue according to the records of the producer.

(A) Those revenues attributed to pricing disputes or otherwise attributed to sales of gas shall be apportioned in accordance with paragraphs (1) and (2) of this subsection. For example, a settlement of $100,000 for a pricing dispute of $25,000 and an amount of $225,000 for failure to pay for gas not taken, would result in receipts of $10,000 from gas sales (100,000 X 25,000/250,000) and receipts from other business of $90,000 (100,000 X 225,000/250,000).

(B) For purposes of this subsection, records of the producer shall include, but are not limited to:

(i) **the contracts and settlement agreements;**

(ii) **accounting entries, including entries reflecting receivables and payables;**

(iii) **court pleadings; and**

(iv) **worksheets, including calculations reflecting settlement amounts. Whenever it is necessary to determine receipts from sales of gas under this subsection, the greatest weight shall be given to the records in the order they are listed in this subparagraph.**

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610175
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 463-4028

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 15. Drivers License Rules

Application Requirements - Original, Renewal, Duplicate, Identification Certificates

37 TAC §§15.23, 15.25, 15.29

The Texas Department of Public Safety proposes amendments to §§15.23, 15.25, and 15.29, concerning Application Requirements - Original, Renewal, Duplicate, Identification Certificates. Amendment to §15.23 adds language to paragraphs (1) and (2) indicating that three full names will be used where they exist unless the applicant does not wish to use her maiden name. Amendment to §15.25 formats existing language as subsection (a) and adds new subsection (b) promulgating the use of an alternate address. Amendment to §15.29 changes form DL-41A to DE-964.

Tom Haas, Chief of Finance, has determined that for each year of 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. There will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Haas 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 flexibility to applicants on how they prefer their name to appear on the driver's license

or identification card, allows for the use of an alternate address, and clarifies which form is to be used by applicants under the age of 18. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated economic cost to small or large businesses.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendments are proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department.

Texas Government Code, §411.006(4) is affected by this proposal.

§15.23. Names.

The applicant's full name is required on all applications for driver's license and identification certificates.

(1) A married woman may choose the surname she wishes to use, either her maiden name or she may adopt the surname of her husband or the surname of a previous husband. If she elects not to adopt her husband's surname, she will simply list her name as if unmarried on the application. If she chooses to adopt her husband's surname, the application should list married name, first name, and middle name, or the maiden name may be used in lieu of middle name at the option of the applicant. A married woman's middle name may be used as her first name if desired. Example: Mary Ellen Smith marries Brown; she may list her name as Brown, Mary Ellen or Brown, Mary Smith, or Brown, Ellen Smith. **In all cases, three full names will be used, unless the applicant does not wish to use the maiden name.**

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

(2) Foreign language names will be spelled as the applicant usually spells his name using English and/or his native tongue–thus: Perez, Juan R. (only) or Perez, John R. (only). Latin American males and single females will list surname (of father), given name, and middle name. Married Latin American females **may list their names the same way as described in paragraph (1) of this section** [will list surname (of husband), given name, and maiden surname].

(3) (No change.)

§15.25. Address.

(a) Address Requirements. The address requirements for driver's licenses and identification certificates are:

(1) The best residence address obtainable must be given. A business address is not acceptable; unless the applicant is a traveling salesman or other transient, his business address may be used.

(2) The complete street address including apartment numbers and such terms as street, circle, drive, or court should be used whenever possible. In rural areas, route number and box number should be given. If there is no mail delivery at the address shown, post office box number or other mailing address may be shown with the street address. This address is required for a Commercial Driver's License (CDL) and a non CDL.

(3) The application form also provides space for a mailing address. If an applicant has a mailing address other than the residence address, this address may include post offices boxes, business addresses, or other mailing locations. A mailing address is required on a CDL. This address may be used with a residence address on a nonCDL data card.

(4) The city, state, and zip code must be shown as part of the address on all applications for driver's licenses and identification certificates. The zip code may be a five or nine digit number until such time as the nine digit number is required by the department or postal authorities.

(5) A general delivery address must not be used except in very small communities when no street or route addresses are available.

(6) A post office box number is not acceptable if a better address can be obtained. The post office box number may be listed in addition to a residence address.

(7) Apartment or residence hotel addresses may be given.

(8) Applicant's near relative's address may be accepted if residence of the applicant is not permanent and if mail can be forwarded to the applicant.

(9) To insure delivery "In care of" should be used as a part of any address where mail is to be delivered to the address of another person.

(10) Out-of-state residence addresses may be used on nonCDL licenses if they are better or more permanent than an in-state license.

(11) Military personnel should give complete address such as: John Henry Smith, Co. B, 25th Inf., Camp Barkeley, Abilene, Texas. If a member of the armed forces has a residence address in Texas, it should be used.

(b) Alternate Address. Texas Transportation Code, §521.052, provides that an applicant may request the department to restrict public access to their home address if the applicant:

(1) provides the department a valid, existing and accurate alternate mailing address, OTHER THAN A POST OFFICE BOX, in the city, if any, and county in this state in which the applicant presently resides;

(2) agrees to allow this alternate address to be made public;

(3) consents to receive service of process under the laws of the State of Texas at this alternate address, and

(4) pays a fee of $5.00 for establishing or changing this alternate address. If the applicant changes this alternate address, they must complete another form within 10 days of the date of the change and pay an additional $5.00 fee except on renewal.

§15.29. Driver Education Forms.

Driver education students, ages 15 through 17, must present the proper driver education form verifying that an approved driver education course has been satisfactorily completed.

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

(3) Applicants under age 18 applying for Class M license.

(A) Persons under age 18 enrolling in a Department-Approved Basic Motorcycle Operator Training Course must have successfully completed the classroom phase of driver education. The form **DE-964**[DL-41A] must be presented as evidence of completion as a prerequisite to enrolling in a Department-Approved Basic Motorcycle Operator Training Course.

(B)-(D) (No change.)

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

Issued in Austin, Texas, on July 3, 1996.

TRD-9610184
James R. Wilson
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 424-2890

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Examination Requirements

37 TAC §15.55

The Texas Department of Public Safety proposes an amendment to §15.55, concerning examination requirements. Proposed amendment adds new paragraph (2) and renumbers current paragraphs (2) - (5) as (3) - (6). The proposed amendment allows for the waiving of the skills test for minors provided they have completed the laboratory phase of driver education. Amendment further changes the Texas Driver Education Certificate (Form DL-41A) to Motorcycle Operator Training Program Certificate of Completion (Form MSB-8).

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 local or state government as a result of enforcing or administering the section. There will be no effect on local employment or the local economy.

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 a convenience to the public. There is no anticipated economic cost to individuals who are required to comply with the section as proposed. There is no anticipated economic cost to small or large businesses.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendment is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department.

Texas Government Code, §411.006(4) is affected by this proposal.

§15.55. Waiver of Knowledge and/or Skills Tests.

Knowledge and skills tests are waived for persons holding a valid out-of-state license when applying for a Texas license of the same or lower type.

(1) (No change.)

(2) The skills test will be waived for applicants that have completed the laboratory phase of driver education in Texas provided they are 16 years of age or 15 years of age if applying for a Minor's Restricted Driver's License (MRDL). The skills test will not be waived when an applicant is 19 years of age or older. The applicant must present a properly completed DE-964 form. For applicants presenting driver education certificates from out-of-state, the skills test will not be waived unless they present a valid unrestricted out-of-state driver's license.

(3)[(2)] The skills test for a motorcycle license is waived for individuals that have a valid, unrestricted Class A, B, or C Texas Driver License and have successfully completed the Department-Approved Basic Motorcycle Operator Training Course. A **Motorcycle Operator Training Program Certificate of Completion (Form MSB-8)** [Texas Driver Education Certificate (Form DL-41A)] will be used as proof of successful completion of the Department-Approved Basic Motorcycle Operator Training Course. This waiver provision applies only to a person age 16 or over who has completed the classroom phase of Driver Education and completed the Department-Approved Basic Motorcycle Operator Training Course or a person age 18 or over who has completed the Department-Approved Basic Motorcycle Operator Training Course and has a valid unrestricted Class, A, B, or C Texas Driver's License. All other applicants must take and pass a skills test for a motorcycle license. Unrestricted Class A, B, and C license means a license that allows a person to operate a motor vehicle without having a restriction of a "Licensed Operator Age 18 or Over in the Front Seat." All motorcycle applicants are required to complete and pass the Class M rules tests.

(4)[(3)] For applicants with expired or no license, the complete examination will be given, including the skills test.

(5)[(4)] If the same or lower class of license is applied for, the applicant must pass only the vision tests. The knowledge and skills tests will be waived for all applicants who present a valid out-of-state license. If an advance in grade is applied for, the applicant must pass the vision tests and appropriate knowledge tests and skills test.

(6)[(5)] The term "knowledge test" means written, computerized, or automated tests. The term "skills test" means driving or road test.

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

Issued in Austin, Texas, on July 3, 1996.

TRD-9610181
James R. Wilson
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 424-2890

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Driver Improvement

37 TAC §15.81, §15.83

The Texas Department of Public Safety proposes amendments to §15.81 and §15.83, concerning driver improvement action. Amendment to §15.81 deletes paragraphs (13), (14), and (15), reformats current paragraphs (16) and (17) as (13) and (14) and adds new paragraph (15). Subsection (d) is deleted from §15.81 and subsection (e) is reformatted as subsection (d) relating to educational program suspensions. Amendment to §15.83 formats existing language as subsection (a) and adds subsections (b)-(e) clarifying driver license denials and reflecting the reference to Texas Transportation Code.

Tom Haas, Chief of Finance, has determined that for each year of 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. There will be no fiscal implications for state or local government.

Mr. Haas 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 enhanced traffic safety and improved service to the public by lessening the confusion of department personnel attempting to reconcile rules that don't exist. There is no anticipated economic cost to small or large businesses. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendments are proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department.

Texas Government Code, §411.006(4) is affected by this proposal.

§15.81. Criteria for Driver Improvement Action.

(a) When a licensee's traffic record indicates corrective action is needed to protect the motoring public, such action is based upon a predetermined criteria established by the department.

(1)-(7) (No change.)

(8) A reliable report of driving in violation of a restriction **or endorsement** on driver's license. Investigation or petition for administrative hearing or both.

(9)-(12) (No change.)

[(13) Fails to complete required rehabilitation training. Deny reinstatement or reissuance of license or file petition for administrative hearing.

[(14) Second or subsequent discretionary action or a specific term or condition of probation under authority of Section 22. Required attendance at a rehabilitation training school.

[(15)Reported by the Department of Human Resources as an applicant for or recipient of aid to blind. Mandatory revocation of license.] **(13)**[(16)] False statement or other violation of **Texas Transportation Code, §521.451** [Section 32]. - Investigation or file complaint or both.

(14)[(17)] Record requiring attention but not clearly within a category for definite action - Most appropriate of preventive and corrective actions authorized as determined after thorough analysis of case.

(15) Applicant uses telescopic aid to pass vision exam. Successfully complete a comprehensive road test before licensure.

(b)-(c) (No change.)

[(d) Rehabilitation Training Schools.

[(1) To reeducate and retrain drivers whose licenses have been suspended or revoked or are subject to suspension or revocation in the proper, lawful, and safe operation of a motor vehicle.

[(2) To motivate drivers whose licenses have been suspended or revoked or are subject to suspension or revocation toward safer driving habits and performance.

[(3) The department will return the driver's license to a licensee:

[(A) when the rehabilitation school certificate of completion is received showing completion of the school; or

[(B) when rehabilitation school certificate of completion is received showing waiver of attendance and justification therefor.

[(4) The Department will deny reissuance of a license to a suspendee cited to attend, upon receipt of rehabilitation school certificate, that subject did not attend the school, or that the subject did not complete the school and no waiver was granted.]

(d)[(e)] Educational Program Suspension

(1) The Department of Public Safety will suspend a person's driver's license, permit, or operating privilege for a period of 365 days when it receives notice that the individual has been required or permitted to attend a subsequent educational program and the court did not order a period of suspension. Effective date of suspension will be seven days from the date of the Department's Suspension Order.

(2) Proof of Financial Responsibility will be required for a period as required by the Safety Responsibility Act. Proof is required from the date of suspension.

§15.83. Driver License Denials.

(a) If an applicant for a Texas license is found to have been convicted in any state on a charge which carries an automatic suspension of license, he/she will be denied a license for the remaining period of the suspension that would have been effective had the applicant been properly licensed at the time of such conviction.

(b) Applicants found to be ineligible for license under the provisions of Texas Transportation Code, §§521.201, 521.202, 521.203, and 521.204, will be denied a license.

(c) All denials invoked as provided by subsection (b) of this section, must be supported by adequate evidence obtained

through examinations, signed documents, or hearings to substantiate legal basis for such action.

(d) Acting under the authorization of Texas Transportation Code, §521.042(d), the department will not issue or renew a license when the applicant's record is found upon examination to be such as to make him subject to suspension or revocation under the law.

(e) Applicant or licensee denied license will be notified of denial and reasons therefor.

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

Issued in Austin, Texas, on July 3, 1996.

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James R. Wilson
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Chapter 16. Commercial Driver's License Application Requirements and Examinations

37 TAC §§16.34, 16.35, 16.41, 16.46, 16.51, 16.55

The Texas Department of Public Safety proposes amendments to §§16.34, 16.35, 16.41, 16.46, 16.51, and new §16.55, concerning application requirements and examinations. Amendments to §16.34 and §16.35 add language stating that an applicant must be employed in an exempt status or legally operating a commercial motor vehicle in order to receive a waiver and are necessary in order for the department to be in compliance with federal regulations. Amendment to §16.41 clarifies what is a foreign jurisdiction for the purpose of issuing a non-resident CDL. Amendment to §16.46 adds new subsections (c) and (d) clarifying who can be granted a waiver from the skills tests and is necessary in order to be in compliance with federal regulations. Amendment to §16.51 allows the department to accept test results from third parties. New §16.55 defines what the CDL-40 form is and its use.

Tom Haas, Chief of Finance, has determined that for each year of 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. There will be no fiscal implications for state or local government.

Mr. Haas 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 to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by permitting only qualified individuals to hold licenses to drive these vehicles and ensuring that applicants are properly tested and approved. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated economic cost to small or large businesses.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendments and new section are proposed pursuant to Texas Transportation Code, §522.005, which provides the Texas Department of Public Safety with the authority to adopt rules necessary to carry out Texas Transportation Code, Chapter 522 and the Commercial Motor Vehicle Safety Act of 1986.

The proposed rules affect Texas Transportation Code, Chapter 522.

§16.34. CDL-3 Substitute for Commercial Driver's License (CDL) Driving Skills Test.

(a)-(b) (No change.)

(c) To be accepted, the applicant must be employed in an exempt status or legally operating a commercial motor vehicle (CMV).

(d)[(c)] This waiver may only be claimed one time. This waiver certification may only be completed when converting from a non-commercial driver's license to a CDL or when applying for an original Texas CDL when coming from another state. Any later transaction including advance in grade, removal of restrictions, or addition of an endorsement (other than the issuance of a duplicate license) will necessitate a skills test if required by law or regulation.

(e)[(d)] the CDL-3 form must be accompanied by a CDL-3A form.

§16.35. CDL-3A Certification of Employment.

This certification must accompany the form CDL-3 as evidence that the applicant is employed as a commercial motor vehicle (CMV) operator **in an exempt status or legally operating a CMV** at the time of application. The signatures on this form must be original signatures. A notarized letter from the employer on letterhead stationery, will be accepted in lieu of the CDL-3A form. The letter must contain the elements in the form CDL-3A. If the applicant has been employed by more than one employer during the last two years, the applicant may present more than one CDL-3A to certify employment as a CMV operator **in an exempt status or legally operating a CMV** for the two-year period required.

§16.41. Nonresident Commercial Driver Licenses.

(a) A nonresident commercial driver's license (CDL) may be issued to an individual who resides in a foreign jurisdiction. Foreign jurisdiction means any jurisdiction other than a state of the United States **, Mexico or Canadian Provinces**.[Mexico is a foreign jurisdiction.]

(b)-(c) (No change.)

§16.46. Waivers from Skills Test.

(a) An applicant may be exempted from the skills test if:

(1) (No change.)

(2) For the two years preceding application:

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

(C) has not had a conviction for any disqualifying offense, such as Driving While Intoxicated, Driving Under the Influence of Drugs, Failure to **Give Information** [Stop] and Render Aid, **failure to comply with any offense as cited in Texas**

Transportation Code, Chapter 550, Subchapter B [Leaving the Scene of an Accident], Blood or Breath Test Refusal, a felony involving the use of a commercial motor vehicle (CMV), or use of a CMV in the commission of a felony involving manufacturing, distributing, or dispensing a controlled substance; and

(D) has not been convicted for a serious traffic violation, **as defined by Texas Transportation Code, §522.003(25) and §16.93 of this title (relating to Serious Traffic Violations and Habitual Violators)[,which means speeding 15 miles per hour or more over the speed limit, reckless driving, following too closely, unsafe lane change, or any violation of a state or local law relating to motor vehicle traffic control arising in connection with any traffic accident in which the applicant was at fault]. These convictions may result from the operation of any vehicle; and**

(3) (No change.)

(b) Waivers for the skills test only apply to original applicants for CDL. Those who subsequently apply for an advance in grade **, removal of restriction, or addition of endorsement** after receiving a CDL will not be given a second waiver of **any**[the] required skills tests.

(c) Waivers for the skills test apply only to CMV operators with an exempt status and those legally operating CMVs such as the operation of CMVs on non-public roads in large company lots such as power or chemical companies.

(d) Applicants who hold a CDL from another state will not be required to take any knowledge or skills tests when making an application for an original Texas CDL of the same class and with the same restrictions or endorsements unless it has been over two years since the Hazmat test was taken. Applicants must surrender a valid CDL license, a valid CDL temporary permit, or other acceptable proof that the person has a valid license from another state in order to have the tests waived.

§16.51. Testing of Residents.

(a) (No change.)

(b) **The department did not adopt third party testing in the State of Texas. However, because some states did adopt third party testing the department decided that we would accept third party testing results from other states provided certain conditions were met:**[The department will neither approve nor accept CDL tests administered by other states to a person domiciled in Texas when that person applies for a CDL and has not already been issued a CDL from another state.]

(1) Third party tester must be approved by their respective state.

(2) Test results must be reported to Texas on the state's form signed by a state official that identified the driver and the third party tester's results form.

(c) The purpose for requiring third party testers to submit the driver's test results to state licensing authorities first and then the state placing that information on the state's form is to ensure that third party testers have been approved and remain approved by the state.

§16.55. CDL-40 Supplemental Examination.

This form will be used for additional CDL examination results when all available spaces on the CDL-1 have been used or if adding endorsement(s), advancing in class, removing/adding restrictions, applying for a Farm Related Service Industry (FRSI) CDL, or Hazardous Material endorsement renewal for current Texas CDL holders. (For FRSI applicants include a CDL-1F).

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

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Chapter 31. Standards for an Approved Motorcycle Operator Training Course

37 TAC §§31.2, 31.3, 31.5

The Texas Department of Public Safety proposes amendments to §§31.2, 31.3, and 31.5, concerning standards for an approved motorcycle training course. Amendments to §31.2 and §31.3 note the recodification of Texas Civil Statutes to Texas Transportation Code and Texas Penal Code. Amendment to §31.5 changes form DL-41A to MSB-8.

Tom Haas, Chief of Finance, has determined that for each year of 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. There will be no fiscal implications for state or local government.

Mr. Haas 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 to ensure the public is aware of the correct motorcycle course completion certificate being issued and that they are aware of the recodification of Texas Civil Statutes. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated economic cost to small or large businesses.

Comments on the proposal may be submitted to John C. West, Jr., Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0001, (512) 424-2890.

The amendments are proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department; and Texas Transportation Code, §662.009.

Texas Government Code, §411.006(4) and Texas Transportation Code, §662.009 are affected by this proposal.

§31.2. Program Sponsor.

(a) (No change.)

(b) Approval as a sponsor may be suspended if the sponsor, an instructor under contract with the sponsor, or a member of

the sponsoring organization with supervisory or executive duties involving the training program:

(1)-(6) (No change.)

(7) knowingly allows an instructor to give, or a student to receive, classroom or riding instruction if either exhibits any evidence of or effects from an alcoholic beverage, controlled substance, or drug as defined in Texas **Penal Code, §49.01**[Civil Statutes, Article 67011-1].

(c)-(h) (No change.)

§31.3. Motorcycle Instructor.

(a) No individual may instruct or offer instruction in motorcycle operation to the public for tuition, consideration, or fee without authorization from the department. To qualify for authorization, an instructor must be approved by the department. Approval will be denied unless an instructor applicant meets the following requirements. The applicant must agree to teach the training courses in accordance with the department's rules, policies, procedures, and approved curricula and must:

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

(5) meet the current driving record evaluation standards established by the Texas Education Agency for school bus drivers pursuant to Texas **Transportation Code, §521.022**[Civil Statutes, Article 6687b, §5(a)];

(6)-(7) (No change.)

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

(f) Motorcycle instructors approved by the department may not:

(1) give instructions or allow a student to receive instruction in motorcycle safety if either the instructor or student is using or exhibits any evidence of effect from an alcoholic beverage, controlled substance, or drug as defined in Texas **Penal Code, §49.01**[Civil Statutes, Article 67011-1; or

(2) (No change.)

§31.5. Verification of Course Completion by a Minor.

(a) The sponsor will issue a **Motorcycle Operator Training Program Certificate of Completion MSB-8**[Texas Driver Education Certificate (form DL-41A)] to all students who have successfully completed the Department-Approved Basic Motorcycle Operator Training Course. The **MSB-8**[DL-41A] is issued to verify that a student age 15 or over, has met the educational and training requirements for a motorcycle driver's license. The **MSB-8**[DL-41A] is also issued to verify that a student has successfully completed the training requirements to qualify for a motorcycle driver's license skills test waiver, providing the student already has an unrestricted Class A, B, or C driver's license. A Department of Public Safety serialized completion card will be issued by the course sponsor to every student completing the approved advanced motorcycle operator training course.

(b) The department will accept an original signature or the written, stamped, or typed name or signature of the chief school official on form **MSB-8**[DL-41A]. The signature of the instructor on the form must be an original signature. If the chief school official is also the instructor, that person must sign both spaces on the form.

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

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part IX. Texas Department of Aging

Chapter 260. Area Agency on Agency Administrative Requirements

40 TAC §260.1

The Texas Department on Aging proposes an amendment to §260.1, concerning the Area Agency on Aging Administrative Requirements. The proposed amendments establish new procedures and policies for contractors/area agencies to better document and demonstrate accountability and compliance for the administration and management of Older Americans Act programs in the State of Texas.

Frank Pennington, director of program and fiscal accountability, 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 or administering the rule.

Mr. Pennington also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated will be a better accountability of federal and state resources for the delivery of Older Americans Act programs.

Comments on the proposed amendments may be submitted to Frank Pennington, director of program and fiscal accountability, Texas Department on Aging, P.O. Box 12786, Austin, Texas 78711.

The rule is proposed under the Human Resources Code, Chapter 101, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

The Human Resources Code, Chapter 101, relating to the operation of the Texas Department on Aging, is affected by this proposed action.

§260.1. Area Agency on Agency Administrative Requirements.

(a) Background. The area agency on aging contractor shall develop and maintain an organized and efficient administrative system which can document and demonstrate accountability and compliance.

(b)[(a)] Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Definitions relating to targeted

populations are as outlined in the Older Americans Act, as amended, and the Americans with Disabilities Act of 1990, as amended, or as defined below.

(1) Access–All methods used to make information and assistance available to potential inquirers and accessible to specialized populations.

(2) Accessible–Without physical, cultural, language, geographical, financial, or psychological barriers.

(3) Activities of Daily Living (ADLs)–Tasks that are essential to independent living such as bathing, dressing/undressing, eating, toileting, continence, transfer in/out of bed or chair, and indoor mobility.

(4) Advocacy–Actions by or on the behalf of individuals and/or groups to ensure that they receive the benefits and services to which they may be entitled, and to ensure that their rights guaranteed by law are protected and enforced.

(5) American Indian or Alaskan Native–A person having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

(6) Asian American/Pacific Islander–A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands, Samoa and the Hawaiian Islands.

(7) Alzheimer's Disease–A progressive, degenerative disease that attacks the brain and results in impaired memory, thinking, and behavior.

(8) Benefits Counseling–Legal awareness or legal assistance services that assist seniors in claiming the various kinds of benefits to which they may be entitled. Activities may include legal or other assistance in completion of insurance or application documents, and assistance with problems with Social Security, medicaid, pensions or other benefits.

(9) Black–A person of African-American, not of Hispanic origin.

(10) Broker–Arranger of services.

(11) Case Management–An ongoing process (also known as service management), which includes assessment, service plan development, arranging of comprehensive and unified services, follow-up, ongoing monitoring of an individual's or family's status and the services delivered, and periodic review, with any necessary revision of the service plan.

(12) Case management unit of service–One unit of service equals one hour. A unit is defined as that time which is spent by the caseworker, or qualified designee, engaged in working on an eligible client case. A unit does not include travel time, staff training, program publicity, or direct client services other than case management. Travel time, staff training and program publicity are allowable and reimbursable expenses.

(13) Certified volunteer–An individual who has been selected by a regional program to serve as an advocate for long-term care facility residents and participate in the ombudsman program. Certified volunteers shall successfully complete an internship, or equivalent experience, as determined by the office, and complete required training prior to being certified and prior to engaging in independent complaint resolution. A certified volunteer shall be a representative of the office.

(14) Classification system–A system which is used to categorize available human services in a standard manner to simplify retrieval of service information, increase the reliability of planning data, make evaluation processes consistent, and facilitate comparisons of data.

(15) Clients or recipients of services–Persons who reside in settings defined as a long-term care facility in this subsection, and their families.

(16) Contractor–The performing agency in a contract with the department. The word contractor when used in department rules, procedures, or governing documents specified in §245.3, relating to governing documents, is synonymous with grantee.

(17)[(16)] Current board member-A person presently a member of the governing board of a **contractor**[grantee agency] sponsoring an area agency on aging.

(18)[(17)] Current aging advisory committee member–A person presently a member of the advisory committee for an area agency on aging.

(19)[(18)] Current employee–A person presently employed by a **contractor**[grantee agency] sponsoring an area agency on Aging.

(20)[(19)] Department–The Texas Department on Aging, the single state agency for Older Americans Act programs.

(21)[(20)] Developmental disability–A severe, chronic disability attributable to a mental or physical impairment, or combination of both that:

(A) is manifested before age 22;

(B) is likely to continue indefinitely;

(C) results in substantial limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and

(D) results in the need for individually planned and coordinated services lifelong or over an extended period of time.

(22)[(21)] Education and training–Providing the experience and/or knowledge for clients to acquire skills, in a formal or informal, individual or group, setting. In the Options program, this service is directed to older persons and their caregivers to help them improve their abilities in responding to their health care needs and limitations in overall functioning capacity.

(23)[(22)] Emergency Response System (ERS)–Services provided to the homebound, frail elderly using an automatic monitoring system to link them to emergency medical services when life and/or safety are in jeopardy. These ERS services include the installation of the individual monitoring unit, training associated with the use of the system, periodic checking to assure that the unit is functioning properly, equipment maintenance calls, response to an emergency call by a medical professional, paraprofessional or volunteer, and follow-up with the client.

(24)[(23)] Follow up–Contacting by telephone, correspondence or in person the inquirers and/or the agency to which referred, to verify that linkage has been established between the inquirer and the agency to which referred.

(25)[(24)] Former board member–A former member of the governing board of a **contractor**[grantee agency] sponsoring an area agency on aging whose last date of service was within the immediately preceding two years.

(26)[(25)] Former aging advisory committee member–A former member of an aging advisory committee whose last date of service was within the immediately preceding two years.

(27)[(26)] Former employee–A former **contractor**[grantee] or area agency on aging employee whose last date of service was within the immediately preceding two years.

(28)[(27)] Frail–An older person who:

(A) is unable to perform at least two activities of daily living without substantial human assistance, including verbal reminding, physical cuing, or supervision; **or**[and]

(B) requires substantial supervision due to a cognitive or other mental impairment and behaves in a manner that poses a serious health or safety hazard to himself or others.

(29)[28)] Friendly visitor–A volunteer who does not participate in complaint resolution. Friendly visitors receive orientation and may receive local training but do not receive certification.

(30)[(29)] Grantee[/Contractor]–**The performing agency in a contract with the department. The word grantee when used in department rules, procedures, or governing documents specified in §245.3, relating to governing documents, is synonymous with contractor.** [An eligible entity awarded funds by the Texas Board on Aging to provide services funded by the Department.]

(31)[(30)] Hispanic [Origin]–A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

(32)[(31)] Home delivered meals-Hot, cold, frozen, dried, canned or supplemental food (with a satisfactory storage life) which provides a minimum of one-third of the daily recommended dietary allowances (RDAs) as established by the Food and Nutrition Board of the National Academy of Sciences-National Research Council, and which is delivered to an eligible person in his/her place of residence.

(33)[(32)] Homemaker services–Those tasks provided by trained and supervised homemakers involving the performance of housekeeping/home management, meal preparation and/or escort tasks, provided to individuals who need assistance with these activities in their place of residence. The objective is to help the recipient sustain independent living in a safe and healthful environment.

(34)[(33)] Indirect–Having to do with a relative when considering conflicts-of interest.

(35)[(34)] Information and assistance–Services which inform, guide, direct and link individuals to appropriate human service resources. This may include individual client screening and/or assessment, which is a process of gathering and analyzing all pertinent information to identify an individual's strengths and needs for the purpose of determining a plan to assist the individual in the achievement of objectives and goals. (Used interchangeably with the term information and referral).

(36)[(35)] Information giving–The process of providing basic or detailed information about resources to an inquirer by a staff person.

(37)[(36)] Information and referral service–See information and assistance.

(38)[(37)] Instrumental activities of daily living (IADLs)–Tasks which may not need to be done every day (like ADLs), but which are nevertheless important for living independently: meal preparation, housework, laundry, shopping, taking medicines, getting around outside, transportation, money management, and telephone use.

(39)[(38)] Inquirer–Any person or organization seeking assistance from the system.

(40)[(39)] In service–A planned educational effort conducted or coordinated by professional staff or certified volunteers.

(41)[(40)] Legal assistance–Advice and representation by an attorney (including assistance by a paralegal or law student under the supervision of an attorney), or counseling or representation by a non-lawyer where permitted by law, to older individuals with economic and social needs. Legal assistance activities include the following:

(A) Advice/Counseling–a recommendation made to a client regarding a course of conduct, or how to proceed in a matter, given either on a brief or one-time basis, or on an ongoing basis, and given either in person or by telephone.

(B) Document preparation–personal assistance given to a client which helps him in the preparation of necessary documents relating to public entitlements, health care/long-term care, individual rights, planning/protection options, and housing and consumer issues.

(C) Representation–advocacy on behalf of a client in protesting or complaining against a procedure, or seeking special considerations, appealing an administrative decision, or representation by an attorney of a client or class of clients in either the state or federal court systems.

(42)[(41)] Legal awareness–The dissemination of accurate, timely and relevant information, eligibility criteria, requirements and procedures, to older Texans about public entitlements, health/long-term care, individual rights, planning/protection options, and housing and consumer issues.

(43)[(42)] Long-term care facility–A facility that is licensed or regulated or that is required to be licensed or regulated by the Texas Department of Human Services.

(44)[(43)] Low income–A level of income (as defined by the federal Office of Management and Budget), below which a person or persons is considered to be living in poverty.

(45)[(44)] Major life activities-functions such as:

(A) Self care–daily activities which enable a person to meet basic life needs for food, hygiene and appearance;

(B) Receptive and expressive language-communication involving verbal and/or non-verbal behavior

enabling the individual to both understand others and to express ideas/information to others;

(C) Learning–ability to acquire new behaviors, perceptions and information, and to apply experiences in new situations;

(D) Mobility–ability to use fine and gross motor skills. Ability to move one's person from one place to another with or without mechanical aids;

(E) Self direction-management and taking control over one's social and personal life. Ability to make decisions affecting and protecting one's own interests;

(F) Capacity for independent living–ability to live without extraordinary assistance from other persons, especially to maintain normal societal roles;

(G) Economic self sufficiency–absence of dependence on family or public assistance for financial support;

(H) Cognitive functioning-general cognitive competence; and

(I) Emotional adjustment–self-esteem, self-confidence, and emotionally stability.

(46)[(45)] Minority–A person in one or more of the following four racial/ethnic groups: Black (African American, not of Hispanic origin), Hispanic, Asian/Pacific Islander, and Native American.

(47)[(46)] Office–The Office of the State Long-Term Care Ombudsman, a division of the Texas Department on Aging.

(48)[(47)] Ombudsman intern–A volunteer who has been admitted to the regional training program as a potential certified volunteer ombudsman.

(49)[(48)] Outreach–Methods that seek to increase the availability and utilization of services by ensuring that a particular individual or group is aware of available services and encouraged to participate.

(50)[(49)] Personal assistance–Assisting another person with tasks which that individual would typically do if they were able. This covers hands-on assistance in all activities of daily living.

(51)[(50)] Professional–Refers to an individual who has obtained a four year bachelors degree in aging related areas or human services, but may include an individual who does not have a four year degree, but who has qualifying experience as a substitute for a degree. Such substitution shall be consistent with the employing entity's personnel policies.

(52)[(51)] Referral giving–Active participation in linking the inquirer with needed services after assessing the inquirer's needs and suggesting appropriate resources.

(53)[(52)] Regional program–A provider and its implementation of these standards on a sub-state level. Regional programs are area agencies on aging or other entities, as defined by the Board on Aging, Texas Department on Aging.

(54)[(53)] Related disorders (dementia)–The loss of intellectual functions (such as thinking, remembering, and reasoning), not caused by Alzheimer's Disease, of sufficient severity to interfere with an older person's daily functioning, including as listed in definition for Major life activities.

(55)[(54)] Relative–A current or former board member's or current or former advisory committee member's or current or former employee's spouse, father, mother, sister, brother, son or stepson, daughter or stepdaughter, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

(56)[(55)] Residential repair–Services consist of repairs or modifications of client occupied dwellings which are essential for the health and safety of the occupants. This also includes providing limited housing counseling and moving expenses where repairs or modifications will not attain reasonable standards of health and safety.

(57)[(56)] Resource file–An organized, cross-indexed file of information on services and programs in the area covered by the information and assistance service.

(58)[(57)] Respite care-

(A) In home respite care-an array of services provided to dependent older persons who need supervision. Services are provided in the client's home environment on a short-term, temporary basis while the primary caregiver is unavailable or needs relief. In addition to supervision, services may include meal preparation, housekeeping, assistance with personal care and/or social and recreational activities.

(B) Institutional/facility based respite care–an array of services provided in a congregate or residential setting (hospital, nursing home, adult day care center) to dependent older persons who need supervision. Services are offered on a short-term, temporary basis while the primary care giver is unavailable or needs relief. In addition to supervision, services may include, when appropriate, meals, social/recreational activities, personal care, monitoring of health status, medical procedures, and/or transportation.

(59)[(58)] Rural–Any county outside an identified metropolitan statistical area (MSA).

(60)[(59)] Service authorization–A process which includes determining eligibility for service(s), and using direct purchase of service (DPS) procedures to obtain and initiate one or more services.

(61)[(60)] Staff ombudsman–The professional staff person at the regional level who directs ombudsman program activities. The staff ombudsman shall be appointed by the regional program and so designated by the Executive Director, Texas Department on Aging, and under state law shall be granted access to long term care facility resident records. The staff ombudsman shall be a representative of the office.

(62)[(61)] State ombudsman–The person designated by the Executive Director, Texas Department on Aging, as Chief Administrator of the Office of the State Long-Term Care Ombudsman. The state ombudsman is accountable to the Executive Director, Texas Department on Aging, for program and personnel matters.

(63) Subcontractor–the performing agency in a contract with the contractor/area agency. The word subrecipient when used in department rules, procedures, or governing documents specified in §254.3, relating to governing documents, is synonymous with subcontractor.

(64)[(62)] Substantial financial interest–Ownership or control by a former employee (or relative) or a former board member (or relative) or former advisory committee member (or relative) of

10% or more of the contracting firm or its stock or an investment of $2,500 or more in the organization, whichever is less; or receipt of a 25% or more increase in overall annual benefits, including salary or wages, upon employment by a contractor who receives 25% of its funds from aging contracts of a former employee who held one of the positions listed under the definition of "substantial involvement in the development of the contract," as compared to the employee's **contractor**[grantee] salary and benefits.

(65)[(63)] Substantial involvement in the development of the contract–Direct or indirect participation by a former employee or a former board member of former advisory committee member in the development of program policy which influenced the type of services provided by the contracting organization. The following positions are assumed to have had such participation: board member, executive director, aging division director, and aging contract specialists.

(66)[(64)] Targeting–The focusing of service provision efforts on those populations identified in the Older Americans Act of 1965, Section 306(a)(5)(B)(i), as amended.

(67)[(65)] Units of service for legal assistance and legal awareness–One unit of legal assistance shall equal one hour. One unit of legal awareness shall equal one contact.

(c)[(b)] Structure.

(1) Area agencies shall develop and maintain an organizational structure which shall effectively administer Older Americans Act Programs and responsibilities and achieve those outcomes prescribed in the Older Americans Act, Section 306.

(2) The organizational structure shall be reflected through job descriptions, staffing plans, and organizational charts and be included in the area plan submitted in accordance with submission requirements established by the Department.

(d)[(c)] Titles. Each individual selected to perform the duties of the full time director shall be identified on the staffing pattern and in job descriptions as either director, area agency on aging, or as manager, area agency on aging.

(e)[(d)] Compensation. Area Agency on Aging Directors and Managers shall be budgeted based on time spent performing the duties of administration and management, and the time spent in direct service delivery as indicated in the approved area plan, and will be subject to approval on an individual basis by the Department.

(f) Records. The area agency contractor's provisions for development and maintenance of records shall include the following:

(1) The area agency contractor shall establish written procedures to adequately assure proper development, maintenance and retention of all financial records, supporting documents, statistical records, and all other records relating to its performance.

(2) All of the records identified in subsection (f)(1) of this section shall be kept at the area agency site and shall be maintained for a minimum period of five years following the end of the contractor's fiscal year and until any pending litigation, claim or audit findings, issuance of proposed disallowed costs, or other disputes have been resolved. Multi-site area agencies may maintain all records at a designated central location.

(3) The area agency contractor shall require that subcontractor/service providers adhere to subsection (f)(1) and (2) of this section, as applicable. It is not required that subcontractor service provider's records be kept at the area agency on aging.

(4) The area agency contractor shall give the Department, the Comptroller General of the United States, and the State of Texas through any authorized representatives, the access to and right to examine all records, books, papers, contracts, client records, unless specifically prohibited by law, or other documents related to this contract. Such examination may require access to papers, billings, vouchers, or other documents not directly related to the area agency if the purpose of such access is to review charges to any indirect costs pool which distributes any amount of common costs to various contractor programs. Such right of access shall continue as long as such records, or any of them, are in existence.

(5) The area agency contractor shall require that all service providers adhere to subsection (f)(4) of this section.

(g) Area Agency on Aging Accountability. To demonstrate area agency contractor accountability:

(1) area agency contractors shall meet programmatic and financial performance targets (units, persons, unit costs) as outlined in its approved area plan and the requirements established by the department within the five percent variance allowed;

(2) all reports, budgets, budget amendments, and other required submissions to the Department shall be complete and accurate and have sufficient documentation to verify such accuracy upon review by the Department during any review, whether conducted at the site of the area agency contractor or through desk review, when such documentation is required to be submitted;

(3) an area agency contractor shall require that subcontractor service providers meet service requirements established by the department and shall monitor for such compliance. The area agency contractor shall maintain documentation to demonstrate such compliance;

(4) an area agency contractor shall maintain a timely reporting rate, on an annual basis, of 100% for financial status reports, program performance reports, Ombudsman, the Area Plan Performance Report, and all other required reporting obligations as prescribed by the department, unless it has received written extension, in accordance with subsection (g)(6) of this section, for a period not to exceed three working days following due date.

(5) area agency contractors shall file their area plan and any required amendments, all monitoring responses, budget and budget amendments on time, unless it has received written extension, in accordance with subsection (g)(6) of this section, for a period not to exceed ten working days following due date;

(6) all requests for extension shall be received by the department in writing not less than two working days prior to the due date of the reports, as identified in subsection (g)(4) and (5) of this section.

(A) All requests shall provide the following information:

(i) identification of the report for which extension is being requested;

(ii) justification for the need for extension;

(iii) the proposed date of receipt by the department of the submission, in accordance with the limitations set forth in subsection (g)(4) and (5) of this section.

(B) each report identified shall be considered a separate request for purposes of this section; No more than two report extensions shall be approved during any federal fiscal year.

(h)[(e)] Monitoring.

(1) Area **agency contractors**[agencies] shall conduct not less than one **annual** on-site fiscal and program monitoring of service providers[during the legislative biennium]. Fiscal and program monitoring shall be conducted concurrently if possible.

(2) Prior to conducting monitoring of service providers, area agency contractors will conduct risk assessments of both direct and contracted services using the process furnished by the department.

(3)[(2)] Desk reviews of subcontractors shall be conducted by the area agency on aging **contractor** on all service providers **monthly** during the fiscal year[an on-site visit is not conducted].

[(3) Should the biannual monitoring reveal that the service provider is at "high risk" as defined in §270.2 of this title (relating to definitions), the area agency will conduct annual follow up monitoring until the high risk environment has been corrected.]

(4) Monitoring shall be accomplished by area agency on aging contractors using programmatic and fiscal monitoring work papers developed and furnished by the Texas Department on Aging. Area agencies may expand these work papers to provide for special or unique monitoring requirements of specific programs.

(5)[(4)] An annual customer satisfaction survey of program participants/clients shall be conducted by all service providers **using the standard survey instrument furnished by the Department**. The results of this survey will be a part of the area agency's annual monitoring by the Department.

(i)[(f)] Targeting Service Delivery.

(1) Purpose. These rules set policies for targeting Older Americans Act services to ensure that those most in need receive services and to reduce individual and social barriers to economic and personal independence for older persons.

(2) Scope. These rules shall apply to all area **agency**[agencies] on aging contractors.

(A) All area **agency on aging contractors** [agencies] shall comply with the provisions on targeting contained in the Older Americans Act, as amended.

(B) All area **agency on aging contractors** shall comply with the provisions of the Americans with Disabilities Act of 1990, as amended.

(C) All area **agency on aging contractors** [agencies] shall comply with the provisions of Section 504, Rehabilitation Act of 1973, as amended.

(3) Administrative requirements.

(A) Each area agency **contractor** shall identify the targeted populations and the extent of their need for in-home services or services available in senior centers and develop outreach strategies in its area plan for meeting those needs.

(B) Each area agency **contractor** shall include its specific strategies for meeting the needs of the targeted population in its request for proposals for services and its provider contracts must include those strategies as a provision of the contract.

(C) When funding is insufficient to serve everyone seeking services, greatest unmet needs in the targeted populations shall be the principle criteria for prioritization.

(D) Each area agency **contractor** shall include a strategy in its area plan which outlines how language translation services (including sign language translators) will be made available to older persons with limited English speaking ability when needed in order to obtain services.

(E) The effectiveness of the area **agency contractor's**[agency's] outreach efforts to targeted populations shall be evaluated in accordance with the Department's procedures as specified in this section.

(j)[(g)] **Responsibilities for Imposing Penalties and** Sanctions.

[(1) The Department shall take appropriate action to secure the continuing administrative compliance of the grantee, in accordance with §254.13(b) of this title (relating to Grantee Responsibilities). Sanctions shall be imposed for the following:

(A) for failure to comply with routine and standard administrative or operational requirements; or

(B) for failure to comply with federal and state statutes and regulations. The Department shall impose sanction/s on a contractor/grantee using the procedures cited in §254.13(c) of this title, (relating to Department Responsibilities).

(2)] It is the responsibility of the area agency **contractor** to develop **and follow** policies and procedures for imposing **penalties and/or** sanctions upon contractors/subcontractors for non-performance of the contract agreement or non-compliance with service delivery requirements.

(k)[(h)] Uniform logo for area **agency**[agencies] on aging **contractors**. Each area agency on aging **contractor** shall use the logo designed by the Department to assure a uniform, statewide symbol for area agencies on aging designation for public information purposes. The following logo shall be used.
Figure 1-40 TAC §260.1**(k)**[(h)]

(1) The logo shall be used for at least the following:

(A) public service announcements;

(B) pamphlets;

(C) brochures;

(D) signs;

(E) newsletters;

(F) business cards;

(G) stationery;

(H) displays;

(I) reports;

(J) other means of public communication media whenever possible.

(2) Failure to physically demonstrate adherence to this policy shall be considered non-compliance with this rule.

(l)[(i)] Uniform telephone listings. The telephone number of each area agency on aging **contractor**, the area agency on aging's information and assistance toll-free or collect number, and the area agency on aging's nursing home ombudsman toll-free or collect number shall appear in each telephone directory that is published by the provider of local telephone service for residents in any geographical area that lies in whole or in part in the planning and service area served by the area agency on aging.

(1) The listings shall appear in the unclassified sections and government sections under the listing "SENIOR CITIZENS SERVICES," "AGING," "SOCIAL SERVICES," or other appropriate sections of the phone book if these listings are not available.

(2) The listings shall appear in the classified section of the telephone directories of the major metropolitan area of the area agency on aging, and to the extent possible, in other areas of the area agency on aging's service area.

(3) The listing in the unclassified section and classified section shall begin with the words "Area Agency on Aging" to position it at or near the top of each heading. The listing shall appear in boldface type, as follows: Area Agency on Aging of (name of area):

(A) Business Office-area code and telephone number;

(B) Information and Assistance-toll-free or collect number;

(C) Nursing Home Ombudsman-toll-free or collect number.

(4) These listings shall be completed by no later than the next printing cycle of the telephone directory of each provider of local telephone service.

(5) These listings shall be used in all other service directories, public service announcements, pamphlets, brochures, reports, newsletters, stationery, and other means of public communication media whenever possible.

(m)[(j)] Listing of the Texas Department on Aging as primary funding source by Area **Agency**[Agencies] on Aging **Contractors**. All area **agency**[agencies] on aging **contractors** designated under Title III of the Older Americans Act, as amended, shall cite the Texas Department on Aging as its primary funding source.

(1) The phrase "Funded by the Texas Department on Aging" shall appear in all news releases, public service announcements, pamphlets, displays, signs, brochures, reports, stationery, and other means of public communication media.

(2) Use of this phrase in all public communication media is effective upon adoption of this rule. Existing stocks of information items may be expended, and once expended, reorders will fall under this requirement.

(n) Identification of Area Agency on Aging Facilities. Language will be prominently displayed on a sign outside the location utilized as an area agency on aging indicating the name of the area agency on aging to assure clearly visible access to persons wishing to visit the physical location of the area agency on aging.

(1) This sign will adhere to local ordinances concerning signs.

(2) The sign will also conform to the uniform logo requirements for Area Agencies on Aging prescribed in subsection (k) of this section, relating to use of logos.

(3) The sign will also conform to the citation requirements of the Texas Department on Aging as the primary funding source as prescribed in subsection (m) of this section, relating to identification of funding sources.

(4) Failure to demonstrate the adherence to this policy with physical evidence will be considered noncompliance with this rule.

(o)[(k)] Compliance with Interagency Agreements. The area agency **contractor** shall comply with the terms of all applicable interagency agreements, including, but not limited to, those agreements that are legislatively mandated, **or** entered in to by the Department on behalf of area agency **contractors**[grantees] for the purpose of expanding and/or enhancing service delivery.

(p)[(l)] Emergency Management.

(1) Area **agency contractors** [agencies] shall consult with the Texas Department on Aging, Office of Emergency Management, Department of Public Safety, the Federal Emergency Management Agency (FEMA), the Administration on Aging, **contractors,**[grantees,] state, county and local government entities, service providers and other activities which have an interest or role in meeting the needs of the elderly in planning for, during, and after natural, civil defense, and/or man-made disasters. To accomplish this, area agencies shall:

(A) appoint an emergency management coordinator;

(B) participate in planning activities with district disaster committees, other human service agencies and other entities and organizations which are charged to meet the needs of disaster victims in emergency situations;

(C) identify the "at risk" elderly in the planning and service area;

(D) require by contract stipulation that service providers develop plans for emergency management;

(E) review annually service providers' policies, procedures and capabilities to meet the needs of the elderly in their service areas prior to, during and after emergencies;

(F) provide training to subcontractor staff regarding emergency management activities;

(G) provide information to the Department regarding the impact of emergencies on the elderly population in their PSA;

(H) provide authorized services to the elderly victims of the disaster;

(I) collect pertinent data necessary to submit reimbursement requests for services provided during emergencies as relating to services authorized during emergencies;

(J) participate in initial meetings of the FEMA onsite teams to assist in establishing recovery operations.

(2) Emergency management services. Administration on Aging Regional Office VI, Identical Memorandum Number 47-85, Disaster Response System-Region VI, dated July 30, 1985, authorizes the following services to manage emergency needs of the elderly:

(A) expansion of information and assistance services on a 24-hour emergency basis, including escort;

(B) special outreach in order to encourage elderly disaster victims to make application at FEMA disaster application centers (DACs) as soon as they are established;

(C) special transportation for elderly victims to DACs, doctors, clinics, shopping and such essential travel in the event vehicles are not available. Since FEMA funds may be available to fund this service, the area agency should consult with the on-site federal coordinating officer prior to expending OAA funds for this service;

(D) assistance by case managers acting as disaster assistance advocates to older persons in the disaster application centers in the benefits application process, including followup to assure older victims receive approved grants and services and are protected from unscrupulous repair contractors;

(E) licensed appraiser services to assist elderly disaster victims in arriving at realistic estimates of losses incurred in the disaster;

(F) handyman and chore services, including clean-up, since FEMA may not be able to provide these services in sufficient volume through voluntary agencies or religious organizations;

(G) legal services only when the regular legal service program must be expanded for insurance and disaster assistance grant settlement;

(H) assistance to move elderly disaster victims from temporary housing back to their own places of residence;

(I) other Older Americans Act services when assessments indicate that disaster related needs are unresolved by federal, state or voluntary disaster assistance programs.

(3) Reimbursement procedures. Reimbursement for the services specified in paragraph (2) of this subsection (relating to services which may be provided during disaster recovery) are authorized by the Older Americans Act, Section 310. Requests for reimbursement shall be forwarded to the Department within 30 working days of the date that disaster recovery operations are completed. Reimbursement requests will be developed as follows.

(A) Services to be documented for reimbursement will be sorted into the categories listed in paragraph (2)(A)-(I) of this subsection (relating to services which may be reimbursed).

(B) A narrative of each of the services, which details the number of units provided and the number of elderly served, will be written as a cover page to each set of reimbursement documentation material.

(C) Billing documentation, such as paid bills and invoices, will be attached to the narrative of each category of service provided.

(D) Other information which details the cause and the scope of the disaster shall be attached.

(E) If available from the FEMA on-site office, the certificate of non-duplication of services shall be attached.

(F) Upon receipt by the Department, the request for reimbursement will be reviewed. Areas requiring additional information or clarification will be identified and resolved with the AAA and service providers.

[(m) Identification of Area Agency on Aging Facilities. Language will be prominently displayed on a sign outside the location utilized as an area agency on aging indicating the name of the area agency on aging to assure clearly visible access to persons wishing to visit the physical location of the area agency on aging.

(1) This sign will adhere to local ordinances concerning signs.

(2) The sign will also conform to the uniform logo requirements for Area Agencies on Aging prescribed in subsection (h)(1) of this section, relating to use of logos.

(3) The sign will also conform to the citation requirements of the Texas Department on Aging as the primary funding source as prescribed in subsection (j) of this section (relating to identification of funding sources).

(4) Failure to physically demonstrate adherence to this policy will be considered noncompliance with this rule.]

(q)[(n)] Conflicts-of-interest Requirements. Area **agency**[agencies] on aging[(AAA)] **contractors** and their governing boards shall seek to avoid conflicts-of-interest, in fact and perception, and provide proper notification when potential conflicts-of-interest do occur.

(1) An area agency on aging [grantee/]contractor shall ensure that neither a current employee, nor any current board member, nor any aging advisory committee member, nor any representative of the office of the state long-term care ombudsman, paid or volunteer, holds a substantial financial interest, directly or indirectly, in the profits of any entity from which services or goods are contracted or otherwise procured by the area agency **contractor,**[or any long-term care facility,] nor any long-term care facility, nor derives personal profit, directly or indirectly, from any entity which would conflict in any manner or degree with the performance of responsibilities of the employee, board member, or advisory committee member, or any representative of the office of state long-term care ombudsman, paid or volunteer.

(A) No current employee, current board member, or advisory committee member who exercises any functions or responsibilities in the review or award of any contract for the procurement of services or goods on behalf of the area agency **contractor**, shall:

(i) participate in any decision relating to the contract or procurement of services or goods in which he has a direct or indirect substantial personal financial interest;

(ii) have a substantial financial interest, directly or indirectly, in the contract or procurement of services or goods or the proceeds thereof. Nothing in this subsection shall prohibit public officials of units of local government from serving on a **contractor's**[grantee's] board or aging advisory committee, notwithstanding the fact that such unit of local government is receiving or may receive

funds for the provision of services or goods under the terms of the contract or procurement.

(B) No representative of the office of the state long-term care ombudsman, paid or volunteer, directly or indirectly, shall:

(i) have direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(ii) have a family member residing in a long-term care facility which the representative is assigned or **provides**[provider] advocacy;

(iii) **have** ownership or direct investment interest in a long-term care service;

(iv) **be** employed by or **participate**[participate s] in the management of a long-term care facility;

(v) **receive**[receives] or **have** [has] the right to receive, directly or indirectly, remuneration under a compensation arrangement with an owner or operator of a long-term care facility.

(C) For a period of two years from the date a person ceases his employment, board member duties, or committee member duties with an area agency on aging or its **contractor**[grantee], the **contractor**[grantee] will not award a contract to a private entity in which any former board member's former committee member's or former employee's relative is an officer, director, employee, or owner, in part or whole, if the former employee, former board or committee member, or former board or committee member's or former employee's relative has a substantial financial interest in the contract or had a substantial involvement in the development of the contract.

(2) Board members and area agency on aging advisory committee members who may have conflicts-of-interest, in fact or perception, on any agenda item of a meeting shall refrain from comment on the item.

(A) The member shall announce the potential conflicts-of-interest and shall abstain from voting on any such agenda item.

(B) The actions of conflicts-of-interest notice and voting abstention shall be recorded in the minutes of the meeting.

(3) Area agencies on aging shall include a requirement in all Requests for Proposal (RFP) for services to the elderly and requests for vendor enrollment that any potential conflicts-of-interest be identified in the RFP response.

(A) The notification of potential conflict-of-interest shall include:

(i) the person for which a potential conflict-of-interest exists,

(ii) the relationship to any current or former board member, current or former aging advisory committee member, or current or former employee, and

(iii) the nature of the potential conflict-of-interest.

(B) The person for which the potential **conflict(s)**[conflicts]-of-interest exists shall certify that he will abide by all rules established in this subsection.

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

Issued in Austin, Texas, on July 17, 1996.

TRD-9610278
Mary Sapp
Executive Director
Texas Department on Aging
Earliest possible date of adoption: August 26, 1996
For further information, please call: (512) 444-2727

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Rates

16 TAC §23.22

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption the proposed repeal §23.22, which appeared in the January 19, 1996, issue of the *Texas Register* (21 TexReg 481).

Issued in Austin, Texas, on July 19, 1996.

TRD–9610122
Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
Effective date: August 16, 1996
For further information, please call: (512) 458–0100

♦ ♦ ♦

16 TAC §23.23

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption the proposed amendment to §23.23, which appeared in the January 19, 1996, issue of the *Texas Register* (21 TexReg 482).

Issued in Austin, Texas, on July 19, 1996.

TRD–9610121
Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
Effective date: August 16, 1996
For further information, please call: (512) 458–0100

♦ ♦ ♦

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 16. ECONOMIC REGULATION

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TRD–9610122
Paula Mueller
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Effective date: August 16, 1996
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Issued in Austin, Texas, on July 19, 1996.

TRD–9610121
Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
Effective date: August 16, 1996
For further information, please call: (512) 458–0100

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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 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 73. Statutory Documents

The Office of the Secretary of State adopts amendments to §73.2, concerning Labor Organizations, §73.11, concerning Session Laws, and §73.34, concerning Service of Process, without changes to the proposed text as published in the June 11, 1996, issue of the *Texas Register* (21 TexReg 5214). The amendments are adopted as non-substantive revisions, necessary to update information contained in the rules.

No comments were received regarding adoption of the amendments.

Subchapter A. Labor Organizers

1 TAC §73.2

The amendment is adopted under the authority of the Texas Labor Code Annotated §101.110 (Vernon 1996), which requires the Secretary of State to accept filings made pursuant to the 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.

Issued in Austin, Texas, on July 12, 1996.

TRD-9609946
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Effective date: August 2, 1996
Proposed publication date: June 11, 1996
For further information please call (512) 475-0775

♦ ♦ ♦

Subchapter B. Session Laws

1 TAC §73.11

The amendment is adopted under the authority of the Texas Labor Code Annotated §101.110 (Vernon 1996), which requires the Secretary of State to accept filings made pursuant to the 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.

Issued in Austin, Texas, on July 12, 1996.

TRD-9609947
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Effective date: August 2, 1996
Proposed publication date: June 11, 1996
For further information please call (512) 475-0775

♦ ♦ ♦

Subchapter C. Fees

1 TAC §73.34

The amendment is adopted under the authority of the Texas Labor Code Annotated §101.110 (Vernon 1996), which requires the Secretary of State to accept filings made pursuant to the 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.

Issued in Austin, Texas, on July 12, 1996.

TRD-9609948
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Effective date: August 2, 1996
Proposed publication date: June 11, 1996
For further information please call (512) 475-0775

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Part V. General Services Commission

Chapter 117. Centralized Services Division

Mail and Messenger Services

1 TAC §117.31

The General Services Commission adopts an amendment to §117.31, concerning mail and messenger services, without changes to the proposed text as published in the June 11, 1996, issue of the *Texas Register* (21 TexReg 5220).

There will be greater efficiency in processing mail for state agencies thus avoiding delays in needed mailing in the event

of a temporary deficit in postage meter accounts maintained by the commission.

The amendment to §117.31 will provide flexibility for the commission to continue metering mail for customer state agencies in the event of temporary deficits in postage meter accounts for individual state agencies.

No comments were received regarding the adoption of the amendment to §117.31.

The amendment is adopted under Texas Government Code, §2176, which provides the General Services Commission with authority to promulgate rules consistent with the Code.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610147
David Ross Brown
Assistant General Counsel
General Services Commission
Effective date: August 5, 1996
Proposal publication date: June 11, 1996
For further information, please call: (512) 463-3960

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Part XIII. Texas Incentive and Productivity Commission

Chapter 273. State Employee Incentive Program

1 TAC §§237.1, 273.7, 273.19, 273.27

The Texas Incentive and Productivity Commission adopts amendments to §§273.1, 273.7 273.19, and 273.27 concerning the State Employee Incentive Program. Section 273.7, is adopted with a non-substantive change by adding a (#) sign prior to a number. The proposed changes to §273.17 were not adopted and have been withdrawn. Sections 273.1, 273.19, and 273.27 are adopted without changes to the proposed text as published in the April 26, 1996, issue of the *Texas Register* and will not be republished.

Section 273.1 adds three definitions and amends three definitions to more accurately define terms used in the administration of the program. Section 273.7 updates the term and clarifies the process used for the Savings Measurement Account. Section 273.17 Subsections (c) and (d) proposed that employees be only awarded once for their suggestion and that any implementing agency be required to give savings information to the Commission. After further discussion and review of comments against proposed changes, the commission decided not to adopt the changes. Section 273.19 Subsection (a) extends the timeframe from 60 days to 90 days for the Commission to act on a suggestion. Subsection (c) adds a deadline for agencies to provide information on savings calculations within 60 days of the completion of the implementation year. Section 273.27 is re-ordered so that the rule text is more consistent with the steps in the award process. Subsection (a) defines what is included in an award. Subsection (c) defines what consists of a cash award. Subsections (d) and (e) are re-ordered. Subsection (f) updates the title of the Comptroller's Accounting Policy Statement and deletes outdated language. Subsection (g) adds language that will instruct agencies on how to process the award if that person is a former employee. Subsection (h) provides a 90-day timeframe for agencies to make transfers and award payments upon certification.

Adoption of these rules will facilitate participation in the State Employee Incentive Program by clarifying and updating rules of the program; by making the timeframes for board action more flexible and therefore, more efficient use of agency time; and by requiring payment within a limited timeframe to ensure more accurate accounting records for all parties involved.

Written comments were received by a state employee against §273.17 that concern giving only one award payment to employees for a suggestion that may affect several agencies. Comments included concerns that a suggestion may initially result in a small savings/revenue for the first agency that certifies, and the award would therefore be potentially smaller than it would be under current provisions. The commission was persuaded that the reduction in potential employee awards, and also on the funds received by the commission, would adversely affect the administration of the program.

The amendments are adopted under Chapter 2108.004, Section (b), of the Government Code, which authorizes the Texas Incentive and Productivity Commission to promulgate rules for its program.

§273.7. Agency's Role.

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

(e) Establishment of SEIP Savings Measurement Account (SSMA). Upon implementation of an approved employee suggestion, an agency shall establish a SEIP Savings Measurement Account (SSMA) and transfer into this account the share of the projected net first-year savings/revenues attributable to the suggestion during that fiscal year. Savings/revenue attributable to implementation of subsequent approved employee suggestions may be transferred into the agency's initial SEIP Savings Measurement Account or may be transferred into a newly established SEIP Savings Measurement Account. If a new fiscal year begins prior to the agency's certification of savings, at the beginning of the fiscal year the agency shall transfer into the SEIP Savings Measurement Account(s) the share of the projected net savings/revenues attributable to the suggestion(s) during the prior fiscal year. In the event that the certified savings/revenue amount differs from the balance in a SEIP Savings Measurement Account, the agency shall use the procedures outlined in the General Appropriations Act and Comptroller's Accounting Policy Statement #22.

(f) (No change.)

(g) Allocation of net annual savings. Net annual savings realized from employee suggestions adopted by a state agency must be allocated by the state agency as provided in Section 2108.037 of the Act, the General Appropriations Act, and Comptroller's Accounting Policy Statement #22. Necessary amounts for withholding of employee income and Social Security taxes will be deducted from the cash award and the originating agency will pay the employer share of the Social Security taxes.

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

Issued in Austin, Texas on July 17, 1996.

TRD-9610259
M. Elaine Powell
Executive Director
Texas Incentive and Productivity Commission
Effective Date: August 7, 1996
Proposal publication date: April 26, 1996
For further information, please call: (512) 475-2393

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Chapter 275. Productivity Bonus Program

1 TAC §§275.1, 275.5, 275.6, 275.11, 275.13, 275.15, 275.17, 275.19, 275.21

The Texas Incentive and Productivity Commission adopts amendments to §§275.1, 275.5, 275.6, 275.11, 275.13, 275.15, 275.17, 275.19 and 275.21 concerning the Productivity Bonus Program. These sections were published in the April 26, 1996, issue of the *Texas Register.* Sections 275.5, 275.13, 275.15, 275.17, 275.19 and 275.21 were adopted without changes to the proposed text. These sections will not be republished. Sections 275.1, 275.6, and 275.11 were adopted with non-substantive changes.

Section 275.1 clarifies the definition of four terms to more accurately define terms used in the administration of the program. A non-substantive change was made to define "Act" to correct the title of the Act. Section 275.5 amends the rules to be consistent with the actual practices of program administration. Because of the timeframes involved, agencies have generally implemented a portion of their proposed plan before submitting it to the Commission for consideration. Section 275.6 updates the term for the Savings Measurement Account and the number of the Comptroller's Accounting Policy Statement. A non-substantive change was made to this section delete the text "net first year," which is irrelevant. Section 275.11 Subsection (d) is amended so that the language is parallel with the language in Subsection (c) regarding legitimate savings criteria. When the proposed changes were filed, the Texas Register listed Subsection (d) (1)-(8) as no change when a ";" was proposed after the text in (d)(1). The ";" is re-inserted. Section 275.13 Subsection (a) amends the timeframe for the agencies to submit bonus applications. Subsections (b) and (c) are moved to the new §275.16. Subsection (d) is deleted because it is redundant to the proposed revisions. Section 275.15 Subsections (a) and (e) are revised to be consistent with the changes proposed in Section 275.13. Section 275.17 is amended to clarify the amount awarded to employees using the more straightforward calculations of 18.75% of the total amount certified. It also clarifies that if the commission and agency determine that there would be a negligible amount in bonus distribution, which could constitute a negligible cost reduction, then the agency may be authorized to not distribute bonuses. Sections 275.19 and 275.21 are amended to clarify the actual accounts used for distributing the allocations of savings.

Adoption of these rules will facilitate participation in the Productivity Bonus Program by updating terms used in the rules; clarifying and processes for submitting applications and paying awards; and by authorizing the Commission to have greater flexibility in reviewing an agency's application for bonuses.

No written comments were received.

The amendments are adopted under Chapter 2108.004, Section (b), of the Government Code, which authorizes the Texas Incentive and Productivity Commission to promulgate rules for its program.

§275.1. Definitions for the Productivity Bonus Program Act.

The following words and terms, when used in this chapter, shall pertain only to the Productivity Bonus Program and shall have the following meanings, unless the context clearly indicates otherwise.

Act-Texas Government Code Chapter 2108, Employee Incentive and Agency Productivity, and the General Appropriations Act.

Productivity Bonus Account-An account created by the state treasurer for each state agency or division within the productivity bonus fund. For agencies participating in the Productivity Bonus Program, the Productivity Savings Measurement Account (PSMA) functions in place of the Productivity Bonus Account.

Productivity Bonus Fund or Fund 0578-a fund created for the purposes of holding savings of agencies participating in the Productivity Bonus Program; making transfers according to the allocations specified in §2108.106 and §2108.107, Texas Government Code and Accounting Policy Statement #22; and receiving the Commission's allocations of funds. Note: Fund 0578 was consolidated into General Revenue under HB 3058 in the 74th Legislature.

Productivity Savings Measurement Account (PSMA)-an account in appropriation (95108) into which cash, in an amount equal to the projected savings resulting from approved productivity plans, is transferred from the agency's appropriation(s) where the savings will occur.

§275.6. Establishment of a Productivity Savings Measurement Account.

Upon implementation of an approved productivity plan, an agency shall establish a Productivity Savings Measurement Account (PSMA) for that plan and transfer into this account the share of the projected savings attributable to the plan during that fiscal year. Savings attributable to implementation of subsequent approved productivity plans may be transferred into the agency's initial Productivity Savings Measurement Account, or may be transferred into a newly established Productivity Savings Measurement Account.

§275.11. Qualifications for Award

(a)-(c) (No change.)

(d) Cost of operation. The Commission shall not consider as legitimate any savings to the agency's or division's cost of operation that are the result of:

(1) a lowering of the quality of the services rendered;

(2)-(8) (No change.)

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

Issued in Austin, Texas on July 17, 1996.

TRD-9610258
M. Elaine Powell
Executive Director
Texas Incentive and Productivity Commission
Effective Date: August 7, 1996
Proposal publication date: April 26, 1996
For further information, please call: (512) 475-2393

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 11. Surface Mining and Reclamation Division

Subchapter D. Coal Mining

16 TAC §11.221

The Railroad Commission of Texas adopts an amendment to §11.221, concerning road system performance standards, without change to the proposed text as published in the May 31, 1996, issue of the *Texas Register* (21 TexReg 4878).

The text of §11.221 incorporates the rules on road construction performance standards by reference. The text of the adopted rules that is incorporated into §11.221 by reference may be obtained from the Surface Mining and Reclamation Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas.

The Texas Mining and Reclamation Association and Texas Utilities Services commented in support of the proposed amendments. No other comments were received.

The amendment is adopted pursuant to §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

Texas Natural Resources Code, §134.013 is affected by this amendment..

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610244
Mary Ross McDonald
Assistant Director
Office of General Counsel, Gas Services Division
Effective date: August 6, 1996
Proposal publication date: May 31, 1996
For further information, please call: (512) 463-7008

♦ ♦ ♦

Chapter 15. Alternative Fuels Research and Education Division

16 TAC §§15.105, 15.110, 15.160

The Railroad Commission of Texas adopts amendments to §§15.105, 15.110, and 15.160, relating to the Alternative Fuels Research and Education Division's consumer rebate program for water heaters fueled by propane, without changes to the proposed text published in the May 24, 1996, issue of the *Texas Register* (21 TexReg 4508). The commission adopts these rules to continue the program in effect past August 21, 1996, and to reflect recent organizational changes at the commission.

Deleting the definition of "program year" in §15.105 and the last sentence of §15.110 will continue the water heater rebate program in effect past August 21, 1996. Changing "director of the LP-Gas Division" to "assistant director of the LP-Gas Section, Gas Services Division" reflects the commission's recent organizational changes that incorporated the former LP-Gas Division as a section within the new Gas Services Division.

The commission received one comment on the proposed amendments after the 30-day comment period had expired. Houston Lighting and Power opposed continuation of the program on the grounds that (1) a rebate incentive is not necessary, since an economic incentive of $140 a year already exists to use a propane water heater instead of an electric water heater; (2) while propane may be environmentally beneficial, its use does not, by definition, result in the displacement of environmentally unfriendly fuels; and (3) public policy should not establish a bias toward a particular energy source, in this case propane.

The commission disagrees. For many consumers, initial cost is as important as life-cycle or total operating cost in selecting a water heater. A rebate incentive at the time of initial installation may serve a valid marketing purpose for these consumers, particularly consumers who reside in areas of the state served by electric utilities that offer competing initial- cost incentives, such as free water heaters. Further, while all uses of propane may not provide environmental benefits at all times, the commission believes that the use of propane as a primary fuel is beneficial. In addition, propane water heaters that replace natural gas or other propane water heaters are not eligible for this rebate. Finally, the commission believes that sound public policy should direct all fuels towards their highest and best uses, and that the Texas Legislature exhibited sound public policy judgment in authorizing a propane water heater rebate program that saves consumers money, conserves energy, increases energy efficiency and benefits the environment.

The commission received no comments from groups or associations.

The amendments are adopted under Texas Natural Resources Code, §113.2435, which authorizes the commission to adopt rules relating to the establishment of consumer rebate programs for purchasers of appliances and equipment fueled by LPG or other environmentally beneficial fuels for the purpose of achieving energy conservation and efficiency and improving air quality in this state; and Texas Natural Resources Code, §113.243(c)(6), which authorizes the commission to use money in the Alternative Fuels Research and Education Fund to pay the direct and indirect costs of such 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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610241
Mary Ross McDonald
Assistant Director
Office of General Counsel, Gas Services Division
Effective date: August 6, 1996
Proposal publication date: May 24, 1996
For further information, please call: (512) 463-7008

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Media Rebate Program

16 TAC §15.205

The Railroad Commission of Texas adopts an amendment to §15.205, relating to definitions of terms in the Alternative Fuels Research and Education Division's media rebate program, without changes to the proposed text published in the May 24, 1996, issue of the *Texas Register* (21 TexReg 4509). The commission proposes this action to broaden certain eligibility requirements. Changing the definition of "eligible media outlet" extends the eligibility for rebates to new classes of advertising, *e.g.,* schoolbook covers.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Natural Resources Code, §113.241, which authorizes the commission to adopt rules relating to educating the public regarding the use of LPG and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; Texas Natural Resources Code, §113.243(c)(2), which authorizes the commission to implement marketing and advertising programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; and Texas Natural Resources Code, §113.243(c)(6), which authorizes the commission to use money in the Alternative Fuels Research and Education Fund to implement programs necessary to promote the use of LPG or other environmentally beneficial alternative fuels.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610242
Mary Ross McDonald
Assistant Director
Office of General Counsel, Gas Services Division
Effective date: August 6, 1996
Proposal publication date: May 24, 1996
For further information, please call: (512) 463-7008

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Highway Signage Rebate Program

16 TAC §15.305

The Railroad Commission of Texas adopts an amendment to §15.305, relating to definitions used in the Alternative Fuels Research and Education Division's highway signage rebate program, without changes to the proposed text published in the May 24, 1996, issue of the *Texas Register* (21 TexReg 4509). The commission proposes this action to broaden certain eligibility requirements. Changing the definition of "eligible installation" extends eligibility to highway signs installed on land leased by eligible propane and/or natural gas outlets.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Natural Resources Code, §113.241, which authorizes the commission to adopt rules relating to educating the public regarding the use of LPG and other environmentally beneficial alternative fuels that are or have the potential to be effective in improving the quality of air in this state; Texas Natural Resources Code, §113.243(c)(2), which authorizes the commission to implement marketing and advertising programs relating to alternative fuels to make alternative fuels more understandable and readily available to consumers; and Texas Natural Resources Code, §113.243(c)(6), which authorizes the commission to use money in the Alternative Fuels Research and Education Fund to implement programs necessary to promote the use of LPG or other environmentally beneficial alternative fuels.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610243
Mary Ross McDonald
Assistant Director
Office of General Counsel, Gas Services Division
Effective date: August 6, 1996
Proposal publication date: May 24, 1996
For further information, please call: (512) 463-7008

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Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Certification

16 TAC §23.31

The Public Utility Commission of Texas adopts an amendment to §23.31, relating to Certification Criteria with changes to the text as published in the April 23, 1996, issue of the *Texas Register* (21 TexReg 3491). The amendment adds subsection (k) to the rule to conform commission rules to the rules of the Coastal Coordination Council (CCC) related to the Coastal Management Program.

The amendment is intended to ensure that CCNs for facilities within the coastal management program boundary will be consistent with the goals and policies of the CCC, or have no adverse affect on coastal natural resource areas. Specifically, the amendment establishes thresholds which will limit the review of CCNs to those that affect highly sensitive environmental ar-

eas; ensures that the Commission maintains a record of actions subject to the CMP and provides the CCC with a copy of the record; and, provides for notice that the application is subject to the Coastal Management Plan and that the secretary of the Coastal Coordination Council will be placed on the service list.

The commission conducted a public hearing on the amendment on June 26, 1996, under Texas Government Code, §2001.029, however no oral comment was presented.

Written comments on the amendment were filed by the Texas General Land Office (GLO); Houston Lighting & Power Company (HL&P); and, Central and South West Corporation (CSW).

Both CSW and HL&P generally supported the amendment. CSW concurred in specific comments filed by HL&P recommending a minor correction to the text of the rule changing 31 TAC §501.14(a) at the end of subsection (k)(1) to 31 TAC §501.3(b). The commission agrees with the parties' recommendation and has corrected the reference in the rule.

The GLO recommended that the commission remove references to the "coastal facility designation line" in paragraphs(1) and (2) of the amendment because the reference is "basically duplicative" of the reference to 31 TAC §503.1. The commission believes that the reference to the coastal facility designation line is appropriate and that it is not exactly the same as the reference cited by 31 TAC §503.1; therefore, the commission declines to adopt the GLO's recommendation.

The GLO also recommended that the commission add the text "special hazard areas as defined in 31 TAC §502.3(b)(11)" to the thresholds for transmission facilities in paragraph (2)(B) of the amendment; and that the word "Plan" be changed to "Program" in paragraph (4). The commission agrees with the recommended changes and modifies the amendment as suggested.

The amendment is adopted under the Public Utility Regulatory Act of 1995, §1.101, Senate Bill 319, 74th Legislative, Regular Session 1995, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure, and specifically, Texas Natural Resource Code Annotated §§33.205 (Vernon Sup. 1996), which requires that all actions taken or authorized by the Commission which adversely affect coastal natural resource areas be consistent with the goals and policies of the CCC and subject to their review.

Cross Index to Statutes: PURA §§1.101, Texas Natural Resource Code Annotated §§33.205 (Vernon Supplement 1996).

§23.31. Certification Criteria.

(a)-(j) (No change.)

(k) Coastal Management Program.

(1) Consistency requirement. If a utility's request for a certificate of convenience and necessity includes transmission or generation facilities located, either in whole or in part, within the coastal management program boundary as defined in 31 TAC §503.1, the utility shall state in its initial application that: "This application includes facilities located within the coastal management program boundary as defined in 31 TAC §503.1." In addition, the utility shall indicate in its application whether any part of the proposed facilities are seaward of the Coastal Facilities Designation Line as defined in 31 TAC §19.2(a)(21) and identify the type (or types) of Coastal Natural Resource Area (or Areas) using the designations in 31 TAC §501.3(b), that will be impacted by any part of the proposed facilities. The commission may grant a certificate for the construction of generating or transmission facilities within the coastal boundary as defined in 31 TAC §503.1 only when it finds that the proposed facilities are consistent with the applicable goals and policies of the Coastal Management Program specified in 31 TAC §501.14(a), or that the proposed facilities will not have any direct and significant impacts on any of the applicable coastal natural resource areas specified in 31 TAC §501.3(b).

(2) Thresholds for review. If the proposed facilities exceed the thresholds for referral to the Coastal Coordination Council established in this subsection, then, in its order approving the certificate of convenience and necessity, the commission shall describe the proposed facilities and their probable impact on the applicable coastal resources specified in 31 TAC 501.14(a) in the findings of fact and conclusions of law. These findings should also identify the goals and policies applied and an explanation of the basis for the Commission's determination that the proposed facilities are consistent with the goals and policies of the Coastal Management Program or why the action does not adversely affect any applicable coastal natural resource specified in 31 TAC 501.14(a).

(A) Generating facilities. In accordance with 31 TAC §505.26, certificates for generating facilities subject to paragraph (1) of this subsection may be referred to the Coastal Coordination Council for review pursuant to 31 TAC §505.32 if any part of the generating facilities certificated are located seaward of the Coastal Facility Designation Line as defined in 31 TAC §19.2(a)(21) and within:

(i) coastal historic areas as defined in 31 TAC §501.3(b)(2);

(ii) coastal preserve as defined in 31 TAC §501.3(b)(3);

(iii) coastal shore areas as defined in 31 TAC §501.3(b)(4);

(iv) coastal wetlands as defined in 31 TAC §501.3(b)(5);

(v) critical dune areas as defined in 31 TAC §501.3(b)(6);

(vi) critical erosion areas as defined in 31 TAC §501.3(b)(7);

(vii) Gulf beaches as defined in 31 TAC §501.3(b)(8);

(viii) hard substrate reefs as defined in 31 TAC §501.3(b)(9);

(ix) oyster reefs as defined in 31 TAC §501.3(b)(10);

(x) submerged lands as defined in 31 TAC §501.3(b)(12);

(xi) submerged aquatic vegetation as defined in 31 TAC §501.3(b)(13); or

(xii) tidal sand and mud flats as defined in 31 TAC §501.3(b)(14).

(B) Transmission facilities. In accordance with 31 TAC §505.26, certificates for transmission facilities subject to paragraph (1) of this subsection may be referred to the Coastal Coordination Council for review pursuant to 31 TAC §505.32 if any part of the transmission facilities certificated are located within Coastal Barrier Resource System Units or Otherwise Protected Areas seaward of the Coastal Facility Designation Line as defined in 31 TAC §19.2(a)(21) and within:

(i) coastal wetlands as defined in 31 TAC §501.3(b)(5);

(ii) critical dune areas as defined in 31 TAC §501.3(b)(6);

(iii) Gulf beaches as defined in 31 TAC §501.3(b)(8);

(iv) hard substrate reefs as defined in 31 TAC §501.3(b)(9);

(v) oyster reefs as defined in 31 TAC §501.3(b)(10);

(vi) special hazard areas as defined in 31 TAC §501.3(b)(11);

(vii) submerged aquatic vegetation as defined in 31 TAC §501.3(b)(13);or

(viii) tidal sand and mud flats as defined in 31 TAC §501.3(b)(14).

(3) Register of certificates subject to the Coastal Management Program. The executive director of the commission or the executive director's designee shall maintain a record of all certificates subject to the Coastal Management Program and provide a copy of the record to the Coastal Coordination Council on a quarterly basis.

(4) Notice.

(A) Notice of receipt. When publishing notice of receipt of an application identified by the applicant as subject to the Coastal Management Program, the Secretary of the Commission shall include the following statement: "This application includes facilities subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies."

(B) Notice to the Coastal Coordination Council. The Secretary of the Commission shall place the secretary of the Coastal Coordination Council on the service list for any proceeding involving an application subject to the Coastal Management 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.

Issued in Austin, Texas, on July 16, 1996.

TRD-9610239
Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas
Effective date: August 6, 1996
Proposal publication date: April 23, 1996
For further information, please call: (512) 458-0100

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter G.G. Insurance Tax

34 TAC §3.830

The Comptroller of Public Accounts adopts new §3.830, concerning the premium tax credit for examination expenses and valuation fees, without changes to the proposed text as published in the January 23, 1996, issue of the *Texas Register* (21 TexReg 574).

The new section defines which examination expenses and/or valuation fees are allowed to offset the premium tax liability due. The new section also clarifies the proper application of these credits to the premium tax due.

Two comments were received regarding adoption of the new rule.

One comment received expressed concern that the proposed rule would restrict allowed examination and valuation credits to only those expenses, assessments and fees which are specifically enumerated by definition in the rule. The commenter went on to state that such a restriction appears to be inconsistent with statutory credit provisions in the Texas Insurance Code. The rule does restrict allowed examination expense and valuation fee credits. However, such restriction conforms to the statutory credit provisions in the Texas Insurance Code.

One comment received expressed concern that the proposed rule does not allow foreign insurers to take a credit for examination expenses which are allowed to domestic insurers. Subsection (b)(2) allows foreign insurers to claim the same examination expenses allowed to Texas domestic insurers.

The new section is adopted 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 new section implements the Insurance Code, Article 1.16; Article 1.28; Article 4.10, §13; Article 4.11, §8; Article 20A.17; and Article 4.07, §B.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610173
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: August 6, 1996
Proposal publication date: January 23, 1996
For further information, please call: (512) 463-4028

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Chapter 34. Comptroller of Public Accounts

Subchapter I. Validation Procedures

34 TAC §9.4011

The Comptroller of Public Accounts adopts an amendment to §9.4011, concerning the qualification and appraisal of land used to produce timber, with changes to the proposed text as published in the March 5, 1996, issue of the *Texas Register* (21 TexReg 1737). As required by the Property Tax Code, §23.73, the amendment has been reviewed and approved by a committee composed of the following officials' designees: the governor, the comptroller, the attorney general, the agriculture commissioner and the Commissioner of the General Land Office.

This amendment is adopted to state more clearly the requirements for appraising and qualifying for productivity appraisal land used to produce timber.

The amendment clarifies for chief appraisers and owners of forest land the requirements for appraising and qualifying for productivity appraisal land used to produce timber. Land values calculated using productivity appraisal are used to assess property taxes on qualified land.

Comments were received regarding the amendment. Among the groups and associations in favor of the amendment are: Deep East Texas County Commissioners and County Judges Association; Texas Forestry Association; San Jacinto County Forest Landowners Association; Temple-Inland Forest Products Corporation; Louisiana Pacific Corporation; Champion International Corporation; Polk County Commissioners Court; Bowie-Red River Timber Growers Association; Texas Forest Service; Jasper-Newton Counties Forest Landowners Association; Texas Agricultural Extension Service, Texas A&M University System; Montgomery County Forest Land Owners Association and the Four-County Forest Landowners Association.

Among the groups and associations against the amendment are: Azimuth Forestry Services, Inc., the Farm Credit Bank of Texas and the Four County Forest Landowners Association.

Several of those commenting proposed to change the appraisal methodology set forth in the proposed amendment. The comptroller could not make these methodological changes because Tax Code, §23.71, specifies the method of appraising qualified land used to produce timber.

Some of those commenting asked the comptroller to require chief appraisers to stop using current soil maps and use Natural Resources Conservation Service detailed soil surveys to determine the site index (or soil class) in which qualified land should be placed. The comptroller changed the amendment so that these surveys could be used where soil-type maps based on appropriate data were not available or if the chief appraiser chose to develop new maps based on this data.

Others commenting suggested changes in the proposed data sources used to calculate average price, average potential growth, and to determine soil and forest type-all elements of the statutory method of productivity appraisal. The comptroller could not make these changes because Tax Code, §23.71, requires chief appraisers to use specified sources to determine these elements of the appraisal.

Some comments concerned the requirement that chief appraisers use data gathered according to regional lines established by the United States Forest Service. The comments ranged from those suggesting no regional division line to those suggesting use of different division lines. The comptroller did not make these changes because the Forest Service has not developed criteria to re-define timber regions in east Texas. The comptroller, however, changed the proposed amendment to clearly permit chief appraisers to use updated regional division lines, should the data be revised.

One of those commenting requested that the comptroller replace the conversion factors used in the manual with new conversion factors. Because new conversion factors are not currently available, the comptroller changed the proposed amendment to specify that the new conversion factors were to be used when developed and approved by the comptroller.

Many of those commenting asked the comptroller to permit chief appraisers to calculate management costs using factors different from those illustrated in the rule. These changes were not necessary and the comptroller did not make them because the amendment as proposed permits chief appraisers to determine timber management costs by using any cost factors they determine are typical in the area.

Several of those commenting suggested that the Texas Forest Services' prices are inadequate for timber appraisal purposes. The comptroller could not make changes because the Texas Forest Services' prices are the only available source of prices among the data sources permitted by the law. The committee of statewide elected officials that approved the amendment, however, suggests that the Texas Forest Service review its price survey practices to determine if the price survey is adequate for use in appraising timber land for productivity appraisal. If the price survey is not adequate for this purpose, the committee of statewide elected officials suggests that because the law specifies it as a source for timber appraisal, the Texas Forest Service should establish a price survey adequate for this purpose.

The comptroller made changes to the amendment involving formatting and internal cross references.

The amendment is adopted under the Tax Code, §23.73 and §23.75, which requires the comptroller to set forth the method of qualifying and appraising for productivity appraisal land used to produce timber.

The amendment implements the Tax Code, Chapter 23, Subchapter E.

§9.4011. Appraisal of Timberlands.

(a) Adoption of the Manual for the Appraisal of Timberland. The Comptroller of Public Accounts adopts Manual for the Appraisal of Timberland. This document is published in booklet format by and is available from the Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

(b) Introductory comments concerning the timber manual.

(1) In 1978, voters approved a constitutional amendment, Article VIII, §1-d-1, permitting appraisal based on the productive ca-

pacity or "productivity value" of timberland. The new constitutional amendment took effect in 1979. In enacting the Property Tax Code that year, the 66th Legislature, 1979, adopted Property Tax Code, §§23.71-79, implementing §1-d-1 for land qualified for timber productivity appraisal.

(2) The Property Tax Code assigns most qualified timber appraisal responsibilities to the chief appraiser. However, the Property Tax Code, §23.73 and §23.75, direct the comptroller to develop a manual for appraising qualified timber and an application form and distribute them to appraisal districts. Property Tax Code, §23.73, also directs the comptroller to develop procedures for verifying that land qualifies for timber use appraisal.

(3) This manual sets out both the eligibility requirements for timberland to qualify for productivity appraisal and the methodology for appraising qualified timberland. Appraisal districts are required by law to follow the procedures and methodology set out in this manual.

(c) The qualification of timberland for productivity appraisal.

(1) In this manual, the word "timber" refers to standing trees that are grown to produce commercial wood products, such as sawtimber, pulpwood, poles, and chips. "Timberland" refers to forest land that is capable of producing commercial wood crops.

(2) Timberland in Texas varies in many ways. A pine plantation may have trees just over a year old, while another pine plantation may have much older and taller trees. Hardwoods may be the only timber on one tract, while other tracts may have pine trees or a mixture of hardwoods and pine. In addition, soil productivity–a key determinant of timber growth–often varies dramatically from one timber tract to another, even within the same county.

(3) The degree of intensity with which timber producers manage the land also differs. Some owners practice custodial care, which means the owner does nothing to manage the land, while other owners manage their land intensively. Timber plantations are usually managed intensively. However, some plantation land may require little management for a few years, then need sophisticated, intensive management for several years. For example, a timber plantation that is between thinning activities and prescribed burning may need little management, but final harvest and preparation for replanting require intensive management.

(4) These variations among timber tracts and timber growing operations make determining eligibility for timber productivity appraisal a challenge for a chief appraiser. The chief appraiser must be familiar with timber activities in the immediate area and the forest region of which the appraisal district is a part.

(5) A valuable source of information about timber activity and timberland use in the area is the "agricultural appraisal advisory board." The Property Tax Code, §6.12, requires the chief appraiser to appoint, with the advice and consent of the appraisal district's board of directors, an agricultural appraisal advisory board consisting of three or more members as determined by the board of directors. The law requires that one of the members must be a representative of the county agricultural stabilization and conservation service. The other members must own land in the district that qualifies for productivity appraisal and must have been residents of the district for at least five years. The function of this board is to advise the chief appraiser on the valuation and use of land qualified for productivity appraisal, including agricultural land and timberland.

(6) If chief appraisers plan to seek the advisory board's advice on timber characteristics and timber management activities within their respective appraisal districts, they should appoint individuals who are knowledgeable about the area's timber.

(7) The Texas Constitution permits timber productivity appraisal only if the property and its owner meet specific requirements defining timber use. Land will not qualify simply because it has timber standing on it. In addition, timberland that is used principally for aesthetic or recreational purposes will not qualify.

(8) The Property Tax Code, §23.72, sets the standards for determining whether land qualifies: "Land qualifies for appraisal . . . if it is currently and actively devoted principally to production of timber or forest products to the degree of intensity generally accepted in the area with intent to produce income and has been devoted principally to production of timber or forest products or to agricultural use that would qualify the land for appraisal . . . for five of the preceding seven years."

(9) To qualify land for timber productivity appraisal, a property owner must show the chief appraiser that the land meets the Property Tax Code, §23.72, standard. To do so, the property owner must apply for the appraisal and give the chief appraiser the information necessary to determine if the land qualifies. The owner also must notify the chief appraiser of any changes in the land's status.

(10) To qualify for timber productivity appraisal, landowners must meet each of the following six eligibility requirements.

(A) The land must be currently and actively devoted to timber production.

(B) The land must be used principally for timber production.

(C) The land must be devoted to timber production to the degree of intensity generally accepted for the area.

(D) The owner must have an intent to produce income.

(E) The land must have been dedicated principally to agriculture or timber production for any five of the preceding seven years.

(F) The property owner must file a timely and valid application form.

(11) Timber appraisal applies only to land and its potential for growing timber. It does not apply to improvements on land or to minerals. If the land is qualified for timber productivity appraisal, the timber standing on it may not be taxed separately.

(A) Improvements. Buildings and structures such as barns, sheds, or other outbuildings must be appraised separately at market value. Fences, however, are appurtenances and are not appraised separately. Land beneath out-buildings and other improvements related to timber use qualifies for the special appraisal because the owner uses it in the timber producing operation.

(B) Minerals. Oil, gas, or any hard mineral must be appraised separately at market value.

(C) Harvested timber. Harvested timber in the owner's hands on January 1 is personal property and taxed separately from the land.

(12) Some man-made alterations of, or additions to, timberland are appraised as part of the land. These appurtenances to the land-canals, water wells, roads, stock tanks, and other similar reshaping of the soil-are included in the value of the land and are not separately appraised.

(13) Under the Property Tax Code, §23.72, land must be "currently and actively devoted to timber use" to qualify for timber productivity appraisal. Unlike other types of property, the land may not have visible physical characteristics of qualification on January 1, but may still qualify. If timber use is not evident on January 1, the chief appraiser should investigate further to see if the owner can show that the land will be devoted to active timber production for the calendar year for which he or she is applying, by reason of other indications or evidence of current and active devotion.

(14) Determining if the owner is currently and actively devoting land to timber production is often a difficult and complicated task. Consider the following situations.

(A) The chief appraiser may not be able to see signs of activity when a timber operation is young, even though the owner may have spent a great deal of time, money, and effort to start the operation and is currently and actively devoting the land to timber use.

(B) A chief appraiser may not be able to see any management activity at the time of inspection if the owner has not harvested for some time.

(C) The chief appraiser may not be able to find evidence of active devotion if the size of the tract means that management activities take place away from the roads that give the chief appraiser access to the land.

(15) However, the absence of visible physical timber activities on the land does not mean that the land is not currently and actively devoted to timber production. The chief appraiser should look for other indications of current and active devotion. The following are some indications of current, active devotion.

(A) Timber activity records. Is the owner able to produce records showing timber management activity? Some records that show timber management activity are documents showing the timber has been harvested, canceled checks for services, contracts of sale, and land leases.

(B) Forest management plan. The owner operates under a current, written forest management plan. A forest management plan must be developed for the present time. An outdated plan is of no use as a management document. The plan also should be in writing and signed by the individual who prepared it. However, the existence of a current management plan does not always mean the owner is following the plan. The owner should be able to show that he or she is using or intends to use the plan for timber production. Knowledgeable timberland owners may prepare their own plans. If the owner of a marginal tract cannot afford a privately developed forest management plan, is on a waiting list to have a plan developed by a public agency, or lacks the expertise to develop his or her own plan, the chief appraiser should look for other evidence of current and active devotion.

(C) Timber cost-sharing programs. The owner receives Texas Reforestation Foundation (TRe), Forestry Incentive Program (FIP), Agricultural Conservation Program (ACP) or Stewardship Incentive Program (SIP) cost sharing funds for reforestation and timber stand improvement. The Texas Forest Service coordinates the federal FIP, ACP and SIP programs. TRe is a privately funded cost-sharing program.

(D) Efforts to sell timber. The owner has letters or other documents showing efforts to sell the timber.

(E) Salvage activity. The owner has documentation showing that he or she has attempted to salvage damaged or dead timber that continues to have value.

(F) Registered tree farm. A registered tree farm is privately owned, protected, and managed timberland. Timberland must meet several qualifications for certification as a registered tree farm: private ownership, management for growth and repeated timber crop harvests, adequate protection from fire, insects, disease, and destructive grazing. In addition, the owner's harvesting practices must assure prompt reforestation with desirable trees. A registered tree farm is inspected by professional foresters before it may qualify for the program. Each registered tree farm is reinspected periodically. Most registered tree farms are easily recognized by the green diamond-shaped "TREE FARM" marker placed in front of the property.

(G) Memberships in associations. The owner is a member of the Texas Forestry Association or a county or local timber growers association.

(H) Assistance programs. Does the owner participate in a forest industry landowner assistance program? Many firms in the forest products and the pulp and paper industry have entered into agreements with private timberland owners to manage their timber in exchange for first chance to buy the timber when it is ready to harvest.

(I) Participation in forestry extension activities. The Texas Agricultural Extension Service offers periodic programs for timberland owners. These programs cover timber management practices. The Service also offers a correspondence course to show timber owners how to prepare a timber management plan.

(J) Consulting foresters. Has the owner contracted with or hired a private consulting forester to help manage his or her timber? What were the results of this collaboration? Is the owner operating on the written advice of a consulting forester?

(16) Land that is currently and actively devoted to timber production will not qualify for productivity appraisal unless timber production is the land's primary use. If the owner uses the land for more than one purpose, the principal use must be growing timber. Although the distinction between "currently and active devotion" and "primary use" may be subtle, there is a difference between the two criteria.

(17) While timber production must be the primary use of the land, other compatible uses do not prevent land from qualifying if timber production remains the primary use. For example, an owner may use land principally to grow timber and lease it for hunting. However, if hunting activities are the primary use of the land, and the timber is used to create an environment for wildlife production, then the land would not qualify.

(18) The chief appraiser must determine all the uses to which the owner puts the land and decide which use is the primary one. If any use is incompatible with timber production, or if it

replaces timber production as the primary use of land, the land is not principally devoted to timberland use and cannot qualify for productivity appraisal.

(19) There are situations where timber production may not be the land's primary use. The primary use test is particularly important for timberland because the kind of intensive management required to grow agricultural crops is not necessary to grow timber. This less visible management activity can make determining the land's primary use a difficult job.

(20) The following situations are intended to illustrate situations in which timber production may not be the land's primary use, although the land appears to be currently and actively devoted to timber production. In these or comparable situations, the chief appraiser should use the situation as a trigger for further, careful investigation of the application.

(A) Presence of deer-proof fences on the property. Although this is not always the case, the existence of deer-proof fences around the property may indicate that the property is being used for wildlife production. The chief appraiser must then determine if the owner's principal use is timber production, hunting or wildlife production.

(B) Presence of stock or wildlife ponds on the property. Ponds are not normally necessary for the conduct of timber management activities or timber harvesting. The existence of ponds may trigger further investigation of the land's primary use.

(C) Land being readied or held for development. Some timber harvests may indicate that the land is being prepared for housing development rather than used principally to grow timber. (These are commonly referred to as "real estate cuts.") Another possible indication that land is being used principally for development is a sign offering the land for development or one indicating it is zoned for industrial or residential use.

(D) Presence of homes, vacation facilities, retreats, and recreational facilities on the property. The existence of dwellings and recreational facilities, such as retreats, camps, lodges, and similar facilities, may indicate that the timberland is being used to provide an aesthetic environment for these facilities. If this is indeed the case, timber production is not the land's primary use and the land would not qualify for productivity appraisal.

(21) A chief appraiser may establish a policy to follow reasonable and carefully developed guidelines for determining primary use. Establishing guidelines requires the chief appraiser to become familiar with timber activity in the area. The chief appraiser may also rely on the expertise of the agricultural appraisal advisory board in establishing primary use guidelines.

(22) Guidelines, however, should serve only as a trigger for more investigation-they should not be arbitrarily or automatically applied. For example, a chief appraiser whose guidelines require a management plan should not automatically deny timber appraisal to an owner who does not have a plan. A property owner with no forest management plan may actually be managing the land more actively and intensely than other owners who have management plans. This land should qualify for productivity appraisal if its use meets all other eligibility qualification requirements. Instead, the chief appraiser should use the lack of a plan as a trigger to investigate the application more closely.

(23) Guidelines that are applied arbitrarily or by rote can produce incorrect results. An application for timber productivity appraisal should not be denied outright because the chief appraiser discovers deer-proof fences, wildlife ponds, dwellings or recreational facilities on the property. The presence of these structures is an indication, not proof, that timber production may not be the land's primary use. In these situations, the chief appraiser should carefully investigate the land's primary use.

(24) To qualify for productivity appraisal, timberland must be used to the degree of intensity generally accepted for prudent timber growers in the area. The degree of intensity test is intended to exclude from productivity appraisal land on which token timber activity occurs simply to get tax relief.

(25) The law doesn't set degree of intensity standards. The chief appraiser must develop standards after carefully investigating the area's typical timber operations performed by prudent landowners. After thoroughly studying the area, the chief appraiser should set minimum degree of intensity standards. The chief appraiser may also rely on the expertise of the agricultural appraisal advisory board in determining the typical degree of intensity for the prudent timber grower.

(26) To set degree of intensity standards, the chief appraiser should analyze the major types of timber operations in the area. This analysis should break down the typical steps in producing timber and attempt to specify how much time, labor, equipment, etc., is typical for each type of timber operation. The sources listed in subsection (f) of this section may help the chief appraiser determine how much of these items are typically used.

(27) Degree of intensity standards will vary from one timber growing area and operation to another. In general, there are three different levels of management intensity: custodial, minimal, and intensive.

(28) Custodial management is "hands-off" management. The only activities the owner conducts are payment of property taxes and occasional visits to the site. However, it is highly unlikely that a timber property that shows no indication of management activity for two or more decades is being actively devoted to timber production.

(29) Minimal management may fall anywhere between custodial management and intensive management. The owner may undertake some activities, such as periodic thinning, regular site visits, or maintenance of an access road.

(30) Intensive management can involve many activities, including careful soil preparation for replanting, regular thinning and/or prescribed burning to reduce competing vegetation, removal of undesirable trees, following a program to check for and control insects and disease, prompt actions to control insects and disease, and building and maintaining all-weather roads to the site.

(31) Large timber plantations owned by corporations may receive intensive management; small operations owned by individuals may receive custodial management. The chief appraiser's degree of intensity standards should recognize these different levels of management activity and differences among timber operations.

(32) In most cases, property owners must prove that they are following the common production steps for their type of operation and using typical amounts of labor, management, and investment. However, a timber growing operation is not disqualified

simply because it differs from the typical operation in some respects. Appraisers should not, for example, disqualify a custodial timber operation because many comparably sized operations are more management intensive. Nor should an owner who is clearly meeting the degree of intensity test be disqualified because the operation has some element of the degree of intensity test missing. The total effort finally determines whether a given timber growing operation qualifies, not the level of each separate "input."

(33) The degree of intensity test applies to the year of the appraisal only-it does not apply to the historical use (time period) requirement. Land used principally for timber for five of the preceding seven years may qualify although it was not used to the typical degree of intensity during those years.

(34) The chief appraiser should not apply minimum degree of intensity standards arbitrarily-they are a trigger for a more careful review of the application. For example, if the minimum standards require regular thinning of competing vegetation, the application should not be denied simply because the land is not thinned regularly. The chief appraiser should instead carefully review the application and inspect the property to determine if the land qualifies.

(35) The owner must use the land with an intent to produce income. Like the degree of intensity test, this test excludes those owners who aren't producing timber and who are trying to use productivity appraisal to avoid paying property taxes on the land's market value. In Texas Attorney General Letter Opinion LO-88-89, the attorney general stated that land used solely for cutting wood to build fences for ranch operations does not qualify for timber appraisal. Whether the owner has an intent to produce income is a fact question for the chief appraiser to decide.

(36) To qualify, the owner is not required to prove that the land has produced income in the current year. Timberland does not produce income regularly because the time between harvests is long. At the time of qualification, however, the owner must show evidence of an intent to produce income.

(37) Land that does not produce income (in this context, income means net income) during the time in which a prudent manager would have produced income may not qualify. Further, an owner probably has no real intent to produce income if he or she has had no expenses directly related to the timber operation within the last two decades.

(38) The chief appraiser may use expense receipts, canceled checks, or current accounts of expenses, labor, and revenues to determine if the owner has expenses directly related to timber production. An owner seeking to produce income usually will keep these types of records.

(39) Some examples of evidence of intent to produce income are:

(A) receipt of revenues through sale of timber;

(B) letters or other documents showing that the owner has attempted to sell the timber;

(C) a contract of sale;

(D) receipts, canceled checks, and other evidence that the owner has had expenses or income related to the timberland's use;

(E) investments in improvements to enhance the value of the existing timber;

(F) purchase of easements to allow loggers access to land-locked tracts;

(G) investments in substantial amounts of reforestation or smaller amounts if other parts of the tract are already in commercial timber;

(H) attempts to salvage timber that has value but that is damaged or dead;

(I) using a consulting forester to help manage the land;

(J) hiring someone to conduct a timber sale; and

(K) seeking recommendations of a public forester before making a timber sale.

(40) Land used primarily for either timber or agricultural production during any five of the previous seven years may qualify for timber productivity appraisal. A landowner may point to a history of agricultural use that would qualify the land for productivity appraisal in meeting this requirement.

(41) As long as either timber or agriculture was the principal use in the preceding years, the land qualifies although that use may not have met the degree of intensity requirement in all or some of those years. This historical use requirement attaches to the land. It is not a requirement for the landowner to show a history of timber production activities.

(42) The Property Tax Code, §23.75(b), requires the comptroller to prescribe the application form for timber productivity appraisal. The comptroller's application form has been adopted by §9.402 of this title (relating to Special Use Application Forms) and is available from the comptroller's Property Tax Division.

(43) The appraisal district may copy the comptroller's form and offer it to local property owners. An appraisal district may use a form that substantially complies with the comptroller's form-that is it has the same language in the same order as the comptroller form if the district has written approval from the comptroller.

(44) The comptroller will not approve an appraisal district form unless the form has the same elements and asks for the same information as the comptroller form. The comptroller will not approve a form that asks for any information not required by the agency's form.

(45) These rules do not permit appraisal districts to add additional questions to the initial application. If, however, the initial application is valid but does not contain all the information the district needs to rule on an application, the chief appraiser may require the applicant to give additional information. This procedure is described later in this section.

(46) Where the district offers its own form, the applicant may choose between the comptroller application form and the district's form. An applicant may not be denied the appraisal because he or she chooses to use the comptroller form. The applicant must completely provide all information requested by the comptroller form-an incomplete application is not valid.

(47) Property owners must file applications with the chief appraiser in the appraisal district where the land is located. Taxpayers

whose land is appraised by more than one appraisal district must file an application in each district.

(48) The law requires chief appraisers to share appraisal information on properties within overlapping areas. Chief appraisers are also required to coordinate appraisal records and appraisal activities relating to properties in overlapping areas by written agreement. Appraisal districts must send a comptroller prescribed advisory notice to affected property owners informing them that required reports and other documents must be filed with or sent to each appraisal district. This advisory notice must also inform affected property owners that they should consider sending any other document relating to the property to each appraisal district.

(49) A property owner may file a single application form covering all tracts within an appraisal district. Owners need not file a separate form for each tract as long as they provide sufficient information to show that all tracts qualify under the law.

(50) The chief appraiser should encourage owners to file a single form if they are managing several tracts as a unit. The chief appraiser must view the entire timber growing operation as a unit-not with respect to the activities on each individual parcel. The single application form notifies the appraisal district of the operation's unity.

(51) An application must be postmarked or filed no later than midnight, April 30. For good cause and only on the property owner's request, the chief appraiser may extend the filing deadline in individual cases for not more than 60 days. The property owner must request an extension before the filing deadline.

(52) The Property Tax Code does not define "good cause." However, it is commonly something the applicant cannot control. Illness or injury or an inability to transact normal business for a period that effectively prevents filing on time is usually good cause. Travel out of town on business or vacation or simply forgetting about the filing deadline is not good cause.

(53) A property owner who misses the deadline may file a late application until the appraisal review board approves records for that year (usually about July 20). However, there is a penalty for late application. An application filed after April 30 is subject to a penalty equal to 10% of the difference between the tax if imposed at market value and the tax imposed at the timber productivity value. If the chief appraiser extended the deadline for that property owner, this penalty does not apply.

(54) Chief appraisers must note imposition of the penalty in the appraisal records. They also must send the property owner written notice of the penalty and explain the reasons. The tax assessor adds the penalty amount to the tax bill and collects the penalty along with the annual tax payment.

(55) A lien attaches to the property until the penalty is paid. If the penalty remains unpaid on February 1 of the following year (or a later delinquency date if tax bills are mailed late), penalty and interest on the penalty amount accrue as if it were a delinquent tax.

(56) If a person does not file a valid application before the appraisal review board approves the appraisal roll, the land is ineligible for productivity appraisal in that tax year.

(57) Once the application is filed and approved, the land continues to receive productivity appraisal every year without a new application unless the ownership changes, the land's eligibility changes, or the chief appraiser requires a new application. The chief appraiser may require a new application if he or she has good cause to believe that the land's eligibility for productivity has ended. If the chief appraiser requires a new application, the property owner must meet the deadlines that apply to a new applicant. To better inform the taxpayer, the chief appraiser may wish to state in writing the reason for a new application.

(58) If the land's eligibility ends or its ownership changes, the property owner must notify the appraisal office in writing before the next May 1. New owners are not eligible for timberland productivity appraisal unless they apply. If the owner fails to do so, one or more penalties will apply.

(59) If the land remains under the same ownership and the owner fails to inform the appraisal district that the land is no longer eligible for productivity appraisal, either because the land is no longer in timber use or because the degree of intensity has fallen below that typical for the area, the property owner must pay a penalty equal to 10% of the difference between the taxes imposed under the timber use and the taxes that would have been imposed under the new use. This penalty applies for each year the property received the incorrect appraisal, but for no more than five years.

(60) If the property erroneously receives productivity appraisal because a new owner failed to file an application or because an owner's use of the land no longer qualifies, the chief appraiser must calculate the difference between the land's market value and its productivity value. The owner must pay taxes and penalties on the difference between these values for the time that the land erroneously received productivity appraisal, plus a 10% penalty on these taxes. This additional tax and penalty may not cover a time period exceeding five years. In the year the chief appraiser discovers the change, the chief appraiser should add this value to the appraisal roll as property omitted in a prior year.

(61) For example, if a timber producer reduces the scale of the operation and timber is no longer the land's principal use, the land will not be eligible for productivity appraisal. If the landowner fails to notify the appraisal district and, therefore, receives productivity appraisal, the land is back assessed. For each year in question (not to exceed five years), the owner must pay the difference between the taxes based on productivity appraisal and the taxes based on market value, plus a 10% penalty on that difference. Because the land has not been taken completely out of timber use, it is not subject to rollback taxes. (Rollback procedures are discussed in detail in subsection (d) of this section.)

(62) When a penalty is imposed, the chief appraiser must notify the property owner. This notice must explain the procedures for protesting the penalty. The chief appraiser notes the imposition of the penalty in the appraisal records, and the tax assessor adds the amount of the penalty to the property's annual tax bill.

(63) The chief appraiser must review each application and decide whether to:

(A) approve it and grant productivity appraisal;

(B) disapprove it and ask for more information; or

(C) deny the application.

(64) The chief appraiser must determine the validity of all timely filed applications before turning all appraisal records over

to the district's appraisal review board. The deadline is May 15 or as soon afterward as is practicable.

(65) The chief appraiser usually gives the appraisal records to the appraisal review board (ARB) by May 15. Property owners who were denied productivity appraisal may file a protest with the ARB. In addition, taxing unit officials who believe productivity appraisal was erroneously granted to any property owner may seek to remove that grant by filing a challenge with the ARB.

(66) The chief appraiser must rule on all late-filed applications before the appraisal review board approves the records for the year. The chief appraiser must notify the applicant in writing within five days of an application's denial. This notice must explain the procedures for protest.

(67) The chief appraiser may request additional information. If the initial application form is valid but the chief appraiser does not have all the information needed to determine if the land qualifies, the chief appraiser may request additional information. The chief appraiser may request only additional information that is necessary to determine if the land qualifies for productivity appraisal.

(68) In determining whether an application is valid, the chief appraiser should take care to consider the application as a whole. If the chief appraiser determines that the omission of a piece of information on the original application was a mistake, the chief appraiser may, at his or her discretion, either:

(A) extend the filing deadline for 60 days; or

(B) send a form requesting additional information.

(69) Information contained in income statements and income tax returns, land lease rates, and lease agreements is not necessary to determine whether the land qualifies-other less invasive evidence of qualification exists. If the chief appraiser asks an owner for this type of information, the request should clearly state that the owner is not required to give the information to qualify for productivity appraisal.

(70) The applicant must provide additional information within 30 days after the date of the request or the application will be denied.

(71) If there is good cause, the chief appraiser may extend the deadline to allow additional information. An extension cannot exceed 15 days.

(72) If a chief appraiser denies an application, a notice of the denial must be delivered to the applicant within five days. The notice must explain the procedures for protesting to the appraisal review board. To better inform the taxpayer, the chief appraiser may wish to explain the reasons for denying the application.

(73) Even if land meets all the preceding conditions, some situations may block approval of an application. Land within the boundaries of a city often will not qualify. Land located within an incorporated city or town must meet all the criteria for productivity appraisal and, in addition, must meet one of the following:

(A) the city must not provide the land with general services comparable to those provided in other parts of the municipality having similar features and population; or

(B) the land must have been devoted principally to production of timber or forest products continuously for the preceding five years.

(74) Property Tax Code, §23.77(2) and (3), provide that some kinds of foreign ownership make the land ineligible for productivity appraisal. Under the law, if the property owner is a non-resident alien (a non-United States citizen who does not reside in the United States), the land can't qualify. Similarly, the law states that a corporation can't qualify its land if a non-resident alien, foreign government, or both control the corporation.

(75) The Texas Supreme Court has held, however, that Property Tax Code, §23.56(3), barring foreign corporate and governmental ownership from qualifying land for agricultural appraisal, unconstitutionally violates the Texas Constitution's guarantee of equal protection. Although the Court's opinion did not address the ineligibility of non-resident aliens (Property Tax Code, §23.56(2)), its reasons for holding subsection (3) of that statute unconstitutional also applies to the non-resident's eligibility for timber productivity appraisal. The *HL Farms* case did not address timber appraisal, but the law making productivity appraisal unavailable to foreign owners is identical to the agricultural appraisal law. Property Tax Code, §23.77(2) and (3), is identical to Property Tax Code, §23.56(2) and (3). Because of the similarity between the agricultural appraisal and the timber appraisal sections, a court is likely to hold that *HL Farms* applies to timberland. Therefore, a chief appraiser should seek the advice of an attorney if the appraiser is confronted with an application for timber appraisal submitted by a foreign owner.

(76) When the Texas Legislature adopted timber productivity appraisal, the law was written to create a minimum taxable value on timberland. Property Tax Code, §23.78, provides that the minimum taxable value of qualified timberland is the market value assigned to the land by the taxing unit in 1978. The purpose of this section was to ensure that a taxing unit with a large amount of timberland would not suffer a serious decrease in its tax base after implementation of productivity appraisal. This means that timberland qualified for productivity appraisal will not be taxed on its productivity value if that value is less than the 1978 value.

(77) The Tax Code requires a unit's tax assessor to compare the total productivity value for the parcel with the unit's 1978 value for the parcel. If the total productivity value is less than the total 1978 value, the unit's assessor must substitute the 1978 value for the entire parcel.

(78) If the nature of the parcel has changed, the assessor must use historical value to reconstruct what the entire parcel's value would have been in 1978. For example, if a parcel includes more land in the current year than it did in 1978, the assessor may not substitute a 1978 per acre average for the new acreage. Instead, a unit's assessor must use historical data to determine what the 1978 value for the entire tract would have been for the unit.

(79) A unit that did not exist in 1978, or that did not levy an ad valorem tax in 1978, may not substitute a 1978 value for the land's productivity value. The law permits only substitution of the 1978 value "for the unit." A unit that did not exist or that had no property tax in 1978 has no market value to substitute for the productivity value.

(80) The tax assessor must determine or reconstruct a 1978 value for each unit for which the assessor collects taxes. Each

unit's 1978 value must be applied separately from that of other units. The law does not provide for an average 1978 value that is applied for all units that had a 1978 value. Nor does it provide for a historical reconstruction that combines the taxing units having a value in 1978.

(81) An owner may waive his right to productivity appraisal. By barring the land from receiving productivity appraisal, the waiver insures that a taxing unit may depend on a certain level of tax revenue. This certainty may be critical to the survival of small taxing units or those that are in debt.

(82) A waiver is effective for 25 years. Land may not qualify for productivity appraisal for the duration of the waiver. A change in ownership does not revoke the waiver. An owner may file a waiver on land that does not qualify for productivity appraisal. A waiver may be filed with some or all the units that tax the property.

(83) A waiver filed before May 1 becomes effective when it is filed. For good cause, the chief appraiser may extend the May 1 deadline for 60 days. These waivers become effective the year following the filing year.

(84) To revoke a waiver, the owner must file an application for revocation with the governing body of each taxing unit where the waiver is effective. The unit's governing body must vote to approve the revocation and make a finding the unit's debt obligations will not be affected.

(d) Rollback procedures that relate to timberland.

(1) State law imposes an additional tax on qualified timberland each time it is taken out of timber use and is no longer eligible for productivity appraisal. For the purposes of this manual, this additional tax plus accrued interest is referred to as a "rollback."

(2) The rollback recaptures the taxes the owner would have paid if his or her property had been taxed at market value each year of the preceding five-year period plus accrued interest. The rollback has two parts:

(A) back taxes; and

(B) accrued interest on those back taxes. The tax portion of the rollback equals the difference between the total taxes the owner actually paid in the five years preceding the change in use and the total taxes the owner would have paid on the property's market value. The interest portion of the rollback is calculated from the dates on which the differences would have been due. A rollback is applicable only if the land was receiving productivity appraisal before its change of use.

(3) A property owner may take land out of timber use either by ending timber operations or by diverting the property to a non-timber use. This "change of use" is the only event that triggers a rollback on timberland. If the property owner diverts only part of a timber property to a non-timber use, the rollback applies only to the changed portion.

(4) Technically, the tax is an additional tax imposed by law on the date the cessation of timber production or change of use occurs. The rollback tax bill has its own delinquency date different from the delinquency dates of other tax bills.

(5) A change of use is a physical change. The owner must stop using the land to produce timber. For example, a timber grower who has been receiving timber use appraisal may decide to stop timber operations entirely. The grower has the timber cut, does not plant new trees and shows no intention of replanting. Because the owner has stopped all timber activity, productivity appraisal will be lost and the land will incur a rollback tax.

(6) Reduced intensity of use at the owner's option will cause a loss of productivity appraisal. For example, if the owner decided to use the land primarily for recreational purposes and timber is no longer the land's principal use, the land would no longer be eligible for productivity appraisal. However, as long as the land is used for some kind of timber production, a rollback will not be triggered.

(7) Reduced intensity resulting from acts of nature and financial hardships also will not prompt a loss of timber productivity appraisal. For example, severe fires, droughts or freezes may extend the normal time land can remain out of timber production. In such cases, the land remains eligible for productivity appraisal until the owner clearly shows an intent to give up timber operations permanently.

(8) This principle also applies when damage is done to part of a tract. If a fire destroys 500 acres of a 3,000 acre forest–forcing the owner to temporarily cease timber operations on the 500 acres–the owner should continue to receive productivity appraisal on the destroyed part of the tract. In years of severe drought, many timber growing operations fail. Because the owner invested money in the failed operation, planting may be delayed because money to start an new operation may not be available. Here as well, the land should continue to qualify until the owner clearly shows that timber production will no longer take place on the land.

(9) Filing documents to plat land does not trigger imposition of a rollback. Only evidence that the actual use of the land has changed triggers the rollback. Plat documents provide some evidence of an intent to change use, but a physical change must occur, such as ceasing timber operations or installing utilities. Even in that case, the change of use may affect only part of the platted land. If the owner ceases timber operations on part of the platted land, only that part of the land is subject to rollback taxes.

(10) An owner who is required to reapply for productivity appraisal but who fails to do so may lose his or her eligibility, but will not suffer a rollback. Rollback requires an affirmative change of use. Failure to reapply alone does not signal an affirmative use change.

(11) Some changes to a different type of use do not trigger imposition of a rollback. Changing from timber use to an agricultural use that qualifies land for 1-d or 1-d-1 appraisal does not trigger a rollback. Property condemned or sold for right of way is not subject to a rollback even if its use changes. Filing a waiver of timber use appraisal with the appraisal district will not trigger a rollback if the use does not change.

(12) Chief appraisers must use great care in determining when a change of use triggers a rollback. The imposition of a rollback is a serious economic penalty that should not be imposed when circumstances beyond a property owner's control cause an abnormally long but temporary suspension of timber production. Chief appraisers must keep in mind that change of use issues are often unclear and require a delicate balance between fair applications of the law and good decisions based on the facts of each situation.

(13) The chief appraiser determines if and when the change of use occurs and must send the owner written notice of the

determination. The notice must explain the owner's right to protest the determination.

(14) The owner may protest the change of use decision by filing a protest with the appraisal review board within 30 days after the notice is mailed. The appraisal review board must hear a timely protest even if appraisal records have been approved for the year.

(15) There are a number of ways for a chief appraiser to determine if a change of use has occurred. He or she may learn of a change of use from the owner's written notification, other filed transactions (such as a sale, issuance of a building permit), field observations, or word of mouth.

(16) The rollback covers the five calendar years preceding the year in which the change in use occurred. For example, if the use changed in 1995, the rollback covers 1994, 1993, 1992, 1991, and 1990. The preceding years are based on the use from January through December and not on the tax collection periods.

(17) The tax portion of the rollback is the difference between the taxes paid under productivity appraisal and the taxes that would have been paid on the market value of the land each year. For example:
Figure 1: 34 TAC 9.4011(d)(17).

(18) The assessor for each taxing unit must add 7.0% annual interest on these amounts from the date these taxes would have become due each year. The due date for each year is the date tax bills were mailed that year, which is normally October 1. Discounts for early payment do not apply to rollback taxes-discounts apply only to ordinary property taxes. The assessor must compute interest from the date the difference would have become due (normally October 1) to the date the change of use occurs.

(19) Assuming that the use changed November 1, 1995, and that the assessor mailed tax bills on October 1 each year, the interest is calculated as follows:
Figure 2: 34 TAC 9.4011(d)(19).

(20) The five-year rollback period may cover one or more years when the property did not qualify for timber use appraisal. If the property used in the example in paragraph (19) of this subsection had been taxed on market value in 1993, the rollback tax would have been computed for 1994, 1992, 1991, and 1990.

(21) The rollback is due when the rollback tax bill is mailed. It becomes delinquent if not paid before the February 1 that is at least 20 days after the tax bill is mailed. For example, if the rollback tax bill is mailed on January 9, 1996, it becomes delinquent on the February 1, 1996, because there are 20 days between February 1 and January 9. However, if the bill is mailed January 30, 1996, it becomes delinquent February 1, 1997. On the delinquency date, the entire amount begins to draw penalty and interest at the same rate as other delinquent taxes.

(22) A tax lien attaches to the land on the date the use changes. The lien is imposed on behalf of all taxing units that levy taxes on the timberland. The lien covers payment of the additional tax, interest, and any penalties.

(23) The sale of timber property does not trigger a rollback tax. If land is sold and also changes use at the same time, the buyer and seller may dispute liability. Under the law, the person who has title to the property on the date the use changes is personally liable for the rollback, but the lien may be foreclosed against the land regardless of who is liable for taxes. Tax certificates on land that receives productivity appraisal must note the appraisal and state that the land may be subject to additional taxes.

(24) Organizations that are exempt from ordinary property taxes are not exempt from the rollback. If qualified timberland is sold to an exempt organization and the organization continues timber use on the land, it continues to be exempt from property taxes. However, if the organization takes the property out of timber use, the rollback is triggered. In most cases, the tax lien can be enforced against the property.

(25) Where the state or a political subdivision buys the land and changes the use, the rollback will be triggered but the lien cannot be foreclosed. The rollback cannot be collected unless the governmental entity chooses to pay it. However, the lien against the land continues and could be enforced against a later buyer.

(26) If land changes from a qualifying use to a non-qualifying use after the appraisal review board has approved the appraisal records, the land is assessed for the difference between the property's market value and its timber use value for the current year's taxes. This assessment is in addition to the rollback taxes and interest due.

(27) The tax-assessor sends a supplemental bill for current taxes on the added value. This amount becomes delinquent on the same date as the original tax bill for the property. If those original taxes have been paid, the supplemental bill becomes delinquent on February 1 of the year following the date the bill is mailed or the first day of the next following month that allows the property owner 21 days to pay the tax, whichever is later.

(28) A property owner who willingly ceases timber production on land that is receiving timber use appraisal or diverts his timberland to non-timber use must notify the appraisal district in writing of this change in use before May 1 after the change. If the property owner fails to notify the appraisal district of this change in use, the chief appraiser must impose a penalty on the property equal to 10% of the difference between the taxes levied on the property in each year it was erroneously allowed appraisal and the taxes that should have been levied. This penalty is in addition to the rollback and is similar to the penalty for property left off the roll (omitted property). The chief appraiser must notify the landowner in writing of the imposition of a penalty and explain the procedures for protesting the penalty.

(29) The period for back assessing taxes for erroneously granted productivity appraisals is limited to five years. Landowners may incur other liabilities in addition to the penalty for failure to notify. For example, if qualified timberland was taken out of timber use in January, 1990, but the chief appraiser did not learn of this until 1995, the landowner would owe the following:

(A) the rollback taxes and interest, computed on the five years covering the 1985-89 period;

(B) regular delinquent penalty and interest under the Property Tax Code, §33.01, for the rollback tax bill that became delinquent February 1, 1991;

(C) additional "omitted" taxes equal to the difference between the taxes actually paid (or assessed) and the taxes due for the tax years 1990-1994 as omitted property value, required by Property Tax Code, §23.75(j) and §25.21;

(D) interest at 1.0% per month for each year of the 1990-1994 period on the additional "omitted" taxes as required by Property Tax Code, §26.09(d); and

(E) a "no notice" penalty equal to 10% of the additional "omitted" taxes due for the 1990-1994 period as required by Property Tax Code, §23.75(h).

(30) Therefore, taxpayers should take great care to notify their chief appraisers as soon as they permanently cease timber operations. Otherwise, they may face heavy liabilities for failure to notify.

(e) The appraisal process for timberland.

(1) The productivity value of an acre of timberland equals the average annual net income a prudent manager could earn from growing timber over the five-year period preceding the appraisal's effective year, divided by a statutory capitalization rate. *Net income* has two parts: *gross income* and *production cost.*

(2) Gross income is calculated by computing potential average annual timber growth per acre and multiplying this amount by timber's average annual market price for that year. This computation is performed for each year of the five-year period.

(3) The average annual cost of producing timber in each of the five years is subtracted from gross income to find net income for the year.

(4) Average annual net income is computed by averaging net income for each year of the five-year period. This five-year average annual net income is then divided by the statutory capitalization rate to produce the productivity value of timberland. Timberland's productivity value is determined in ten basic steps:

(A) classify timberland into three forest types;

(B) classify timberland into four soil types;

(C) estimate average annual timber growth;

(D) convert timber growth into units for estimating gross income;

(E) estimate average annual timber prices;

(F) estimate average annual potential gross income of timber growth;

(G) estimate average annual costs of producing timber;

(H) estimate net income of timber growth;

(I) capitalize net income by statutory rate to develop per acre timber values; and

(J) apply timber values to timber acreage within the district.

(5) The law requires chief appraisers to estimate timber productivity values for three forest types and four soil types, and apply these values to the different classes of timber within their respective districts. (At most, an appraisal district may have 12 classes of timber–four soil types for each of three forest types. Some districts may not have 12 classes of timber. For example, a district that contained only pine forest might have four classes of timber: pine soil class 1, pine soil class 2, pine soil class 3 and pine soil class 4.)

(6) Figure 6: 34 TAC 9.4011(g) through Figure 36: 34 TAC 9.4011(g) illustrate this methodology, and the text frequently refers to these Figures.

(7) The Property Tax Code, §23.71, requires chief appraisers to use "the land's potential average annual growth" in computing timber's gross income. In this context, the word "potential" does not mean actual–it means "possible." Consequently, the gross income of an acre of timberland is equal to the value of an average year's worth of possible growth. Chief appraisers must apply the value of a year's worth of possible growth to all timber in each forest and soil type category, irrespective of the size of trees on any one tract.

(8) The result of defining gross income as the value of potential growth often confuses many timber growers, because trees of dramatically different ages and sizes may have the same values. Assume, for example, two tracts of timber, both planted in loblolly pine and both having the same soil type and other characteristics. One tract has pine seedlings six inches high from a recent replanting; the other has pine trees 80 feet high and ready for harvest. If the chief appraiser is following the law's requirements on timber appraisal, both tracts should have the same appraised values per acre.

(9) The law uses the land's potential income because the tax is a property tax. If individual tracts were appraised on their individual incomes, the tax would be an unconstitutional income tax.

(10) The Property Tax Code, §23.71, requires chief appraisers to use information from five different sources to determine forest types, soil types, average growth and timber prices. These are:

(A) United States Department of Agriculture (USDA) Forest Service;

(B) United States Department of Interior Geological Survey;

(C) United States Department of Agriculture (USDA) Natural Resources Conservation Service (formerly the Soil Conservation Service);

(D) Texas Forest Service; and

(E) Texas colleges and universities.

(11) These sources are mandatory and are described in subsection (f) of this section. The one exception to this requirement is discussed below in paragraph (18) of this subsection.

(12) As noted earlier in subsection (c) of this section, the Property Tax Code, §6.12, requires chief appraisers to appoint an "agricultural appraisal advisory board." The function of this advisory board is to advise the chief appraiser on the use and valuation of timberland and agricultural land within the district. However, the board's advice on the appraisal of timberland does not take precedence over the law's requirements on data sources or the appraisal methodology set out in this subsection.

(13) Before using data from any of these mandatory sources, chief appraisers should check with the relevant agency for updates. For example, the USDA Forest Service may periodically revise its published Texas timber survey numbers. The agency makes these revisions available to the Texas Forest Service. Chief appraisers should check with the Texas Forest Service for revisions to the Texas timber survey numbers before they use the survey data. In addition, chief appraisers should not use data from any of these sources in

any manner different from that shown in this manual without first checking with the relevant agency to be sure they are using the data properly.

(14) Texas has two timber regions: northeast and southeast. Figure 6: 34 TAC 9.4011(g) contains a map of east Texas counties showing the boundaries of the northeast and southeast timber regions. Chief appraisers must use regional data that correspond to their county's location when using USDA Forest Service survey data and Texas Forest Service price data. Although the USDA Forest Service reports its Texas survey data at the county level, this agency cautions that the county data are not reliable because of large sampling errors. In its 1992 survey of Texas timber, the USDA Forest Service used sampling methods designed to achieve reasonable sampling errors and reliable estimates at the state level. Future USDA Forest Service surveys of Texas timber may be designed to produce growth estimates that are reliable at the county level. If USDA Forest Service states that its data are reliable at the county level, the comptroller will work with appraisal districts and taxpayers to develop standards for use of county level growth data. The Texas Forest Service reports forest product price data at the region level but not at the county level.

(15) The comptroller may revise this map if updated data become available. Chief appraisers will be notified if an updated map becomes available.

(16) The Property Tax Code, §23.71, requires chief appraisers to estimate timber productivity values for three forest types and four soil types. Chief appraisers should begin the appraisal process by classifying the timberland within their districts according to forest type. There are three basic forest types in Texas: pine, hardwood and mixed. These are as follows.

(A) Pine (and other softwood) timberland includes all forested areas in which the trees are predominately green throughout the year and do not lose their leaves. These trees are called evergreens. Forested areas where pine and other softwoods make up more than two-thirds of the trees free to grow are in this category.

(B) Hardwood timberland includes all forested areas with a predominance of deciduous trees. These trees lose their leaves at the end of the frost-free season. Stands where hardwoods are more than two-thirds of the trees free to grow are in this category. Trees *free to grow* are those that are not covered by brush or other trees that prevent them from getting the sunlight necessary to grow.

(C) Mixed timberland includes all forested areas where both evergreen and deciduous trees are growing and neither predominates. An area is classified as mixed when evergreen and deciduous trees each make up more than one-third of the trees.

(17) The Texas Agricultural Experiment Station at Texas A&M University in College Station has developed maps of forest types for Texas timber counties. These maps are available upon request for a nominal fee to cover reproduction costs.

(18) In addition, chief appraisers may use aerial photographs, forest type maps and soil class maps from any governmental source that is recognized as competent to determine soil type, soil capability, general topography, weather, location and any other pertinent factors necessary to classify commercial timberland by forest type and soil type. If the chief appraiser elects to use maps from a data source not listed in subsection (f) of this section, the chief appraiser should exercise great care to be certain that the maps are the most current and reliable maps available and that the data source of the maps is a competent governmental source.

(19) The law requires chief appraisers to classify all timber-producing areas in their districts into four soil types. The chief appraiser should use data from the USDA Natural Resources Conservation Service (NRCS) soil surveys to develop soil type maps for his or her district. The NRCS does not publish soil type maps that the chief appraiser may use in appraising timberland. However, the Texas Agricultural Experiment Station at Texas A&M University has used the soil surveys to develop soil type maps for timberland within most timber-producing counties in Texas. These maps are available upon request for a nominal fee to cover reproduction costs. Before using soil type maps, chief appraisers should be certain that the data used to develop the maps are appropriate for classifying soil for timber appraisal purposes.

(20) Where soil maps based on appropriate NRCS data are not available, or if the chief appraiser chooses to develop his or her own soil-type map, the chief appraiser may use NRCS detailed soil surveys, if available, to develop soil-type maps. These detailed soil surveys show the site index (discussed later in this section) for each specific soil. A soil-type map can be derived using this information.

(21) The NRCS's soil classification system is based on the concept of site index. Site index is a measure of the productive capacity of a forest site based on the average height of the tallest trees on the site at an arbitrarily chosen age. For example, if the average height of the five tallest loblolly pine trees in a fully stocked stand at the age of 50 years is 75 feet, the site index for loblolly pine trees on that forest site is 75. The NRCS publishes site index information in its soil surveys of Texas counties.

(22) The NRCS soil surveys provide site index information for all land capable of growing commercial trees within each county. The NRCS site index data must be grouped into types that are generally comparable to the USDA Forest Service site classes, and this information should then be used to generate soil type maps. This is necessary because the USDA Forest Service reports timber growth data by site class, which is also a measure of soil productivity. However, the USDA Forest Service growth data by site class cannot be mapped since they were derived from a sample of selected sites in Texas.

(23) The USDA Forest Service classifies all commercial timberland into five site classes based on the land's potential capacity to grow commercial wood crops. Site class is a measure of timber growth in cubic feet per year. The USDA Forest Service determines site class by measuring the height of the three tallest trees at a particular site, and then selecting the tree providing the highest estimate of site class. The USDA Forest Service has defined these five site classes as follows:

(A) land capable of producing more than 165 cubic feet per acre per year;

(B) land capable of producing 120-165 cubic feet per acre per year;

(C) land capable of producing 85-120 cubic feet per acre per year,

(D) land capable of producing 50-85 cubic feet per acre per year; and

(E) land capable of producing less than 50 cubic feet per acre year.

(24) To comply with the law's requirement to use four soil types, chief appraisers must reduce these five site classes to four. The over 165 cubic feet site class should be combined with the 120-165 cubic feet site class to produce the mandatory four soil types, because this produces a classification scheme that works well with NRCS site index data discussed below. The site index data compiled by the Natural Resources Conservation Service show virtually no trees with a site index of 110 and above, which is the equivalent of site class 165 and above. Consequently, if the top two USDA Forest Service site classes were kept separate and the two lower site classes were combined, there would be no NRCS data for the "over 165 site class" in most of Texas. As explained below, the NRCS data are necessary to develop soil type maps. In this manual, this combined site class is called the over 120 cubic feet site class.

(25) As noted earlier, the NRCS site index data must be grouped into ranges that are roughly comparable with USDA Forest Service's soil types. This grouping produces the following ranges: Figure 3: 34 TAC 9.4011(e)(25).

(26) Chief appraisers must use growth data from private timberland that is the most current and reliable data available from one of the sources required by law. (See subsection (f) of this section for a discussion of these sources.) At the time this manual was written, the most current and reliable growth data available was the 1992 survey of Texas timber conducted by the USDA Forest Service. When the USDA Forest Service revises the published data, it makes the revisions available to the Texas Forest Service for distribution upon request. Before using any of the Texas survey data, chief appraisers should check with either the USDA Forest Service, Southern Forest Experiment Station, Forest Inventory and Analysis Unit in Starkville, Mississippi, or the Texas Forest Service in College Station for revisions. Figure 7: 34 TAC 9.4011(g) contains summary growth data for private timberland from the 1992 Texas survey. These data, which were prepared by the Texas Forest Service, show the average annual growth of Texas timber during the 1986-1992 period. The Texas Forest Service, located in College Station, maintains Texas Forest survey data collected by the USDA Forest Service. This growth is expressed in terms of four forest products for each of three forest types and four site classes for each Texas timber region. Chief appraisers should use the data in Figure 7: 34 TAC 9.4011(g) to calculate the average annual growth per acre for each forest type expressed in terms of forest products.

(27) The forest products are pine sawtimber, pine pulpwood, hardwood sawtimber and hardwood pulpwood, and the forest types are pine, mixed and hardwood. To avoid confusion, it is important to remember that pine forests–defined in subsection (e)(15)(A) of this section to be at least two-thirds evergreen trees–may produce both pine and hardwood forest products. Likewise, hardwood forests–defined to be at least two-thirds deciduous trees–may product both pine and hardwood products.

(28) Figures 8-10: 34 TAC 9.4011(g) shows these calculations for northeast Texas region; Figures 11-13: 34 TAC 9.4011(g) shows comparable calculations for southeast Texas. All calculations are based on the data in Figure 7: 34 TAC 9.4011(g). Figures 8-10: 34 TAC 9.4011(g) shows the steps necessary to compute growth for an average acre of pine in northeast Texas. For pine sawtimber, for example (the forest product shown in the upper left-hand box), the chief appraiser should multiply the number of plots in each site class by the per acre growth for that site class. A "plot" is an area defined by the USDA Forest Service for its survey work. Multiplying 95 (number of plots) by 478.13 (average growth per acre in board feet) in site class "120+" produces 45,422.35, which is the estimated total growth for this site class. The result of each calculation for the four different site classes is added and this sum is divided by the total number of plots for all four site classes. The resulting number, 357.31 board feet, is the average annual amount of pine sawtimber grown on the average acre of pine in northeast Texas.

(29) The computations necessary to calculate the average annual growth of the other forest products–pine pulpwood, hardwood sawtimber and hardwood pulpwood–are identical to those for pine sawtimber. Figure 8: 34 TAC 9.4011(g) shows that the average acre of pine forest in northeast Texas grows annually 357.31 board feet of pine sawtimber, 20.37 board feet of hardwood sawtimber, 28.54 cubic feet of pine pulpwood and 4.86 cubic feet of hardwood pulpwood.

(30) The chief appraiser should use these same procedures to compute the average annual growth of an average acre of both mixed and hardwood forests in the rest of northeast Texas. Identical calculations should be used for all forest types in southeast Texas. Complete calculations for all forest types are shown in Figures 8-13: 34 TAC 9.4011(g) for northeast and southeast Texas. The results of the detailed calculations illustrated in Figures 8-13: 34 TAC 9.4011(g) are summarized in Figure 14: 34 TAC 9.4011(g).

(31) As shown in Figures 7-14: 34 TAC 9.4011(g), the USDA Forest Service measures sawtimber growth estimates in the International 1/4 inch log rule and measures pulpwood growth estimates in cubic feet. (A "log rule" is a scale for measuring the amount of sawtimber that can be produced from a tree. There are dozens of recognized log rules in use in the United States, and each is based on various assumptions about tree taper, lumber shrinkage, cutting methods, and waste. The two log rules that are of interest to the chief appraiser are the International one-fourth inch –used by the USDA Forest Service – and the Doyle log rule, used by the Texas Forest Service.) The Texas Forest Service collects timber sales data bi-monthly from timber buyers and sellers; however, buyers and sellers report sawtimber transactions in the Doyle log rule and pulpwood transactions in cords. Consequently, the next step in the appraisal process is conversion of the growth estimates to the same scales in which forest product selling prices are reported.

(32) The chief appraiser must use a log rule conversion table to develop factors to convert sawtimber growth from one log rule to another. Figures 15 and 16: 34 TAC 9.4011(g) contain factors for converting board feet from the International 1/4 inch log rule to the Doyle log rule for northeast Texas and southeast Texas, respectively. The individual conversion factors shown in the fifth column of these tables are for Texas timber. Chief appraisers should use these log rule conversion factors until subsequent log rule conversion factors are developed based on reliable and scientific data from sources listed in subsection (f) of this section and the factors are approved by the comptroller.

(33) The first two columns in Figure 15: 34 TAC 9.4011(g) are from the 1992 USDA Forest Service survey and show timber volumes by tree diameter class in northeast Texas. The fourth column, titled percent of total volume, shows volume for each diameter class as a percent of total volume. At the top of Figure 15: 34 TAC 9.4011(g), for example, the reported volume

for pine in diameter class 9-10.9 inches is 1,708.5 million board feet. The 1,708.5 million board feet is divided by total volume, 11,947.8 million board feet, to produce the percentage figure of 0.1430. The fifth column, titled conversion factor, is for Texas timber. The percentage and conversion factor for each diameter class are multiplied to produce the weighted contribution shown in the sixth column. Finally, these weighted contributions are added to produce the weighted conversion factor for pine in northeast Texas, which is 0.58817. The computations for the other conversion factors are identical. The timber volume data shown in both tables are for privately-owned timberland.

(34) After calculating the weighted conversion factors for sawtimber as illustrated in Figures 15 and 16: 34 TAC 9.4011(g), chief appraisers should apply these conversion factors to the sawtimber growth estimates summarized in Figures 14: 34 TAC 9.4011(g). The results of these computations are shown in Figures 17 and 18: 34 TAC 9.4011(g). In northeast Texas, for example (Figure 17: 34 TAC 9.4011(g)), the chief appraiser should multiply 357.31 board feet of pine sawtimber in the International 1/4 inch log rule (from Figure 14: 34 TAC 9.4011(g)) by the weighted conversion factor of 0.58817 to get 210.16 board feet of pine sawtimber in the Doyle log rule. To convert the 210.16 board feet to thousand board feet, the chief appraiser should divide 210.16 by 1,000 to get 0.210. The computations for hardwood sawtimber are identical.

(35) In addition, the pulpwood growth volumes shown in Figure 14: 34 TAC 9.4011(g) must be converted from cubic feet into cords because pulpwood prices are reported in cords. The chief appraiser should use the pulpwood conversion factors provided by the Texas Forest Service in its bi-monthly publication, Texas Timber Price Trends. In the September-October, 1994 edition of Texas Timber Price Trends, the suggested conversion factors for pine pulpwood and hardwood pulpwood are 81 and 80, respectively. The results of these calculations also are presented in Figures 17 and 18: 34 TAC 9.4011(g).

(36) Figure 19: 34 TAC 9.4011(g) summarizes the annual average growth of an acre of timberland by forest type and forest product in both northeast and southeast Texas. Sawtimber growth is shown as thousand board feet (MBF) in the Doyle log rule, while pulpwood growth is shown as cords. As shown in this table, for example, the average annual growth of an acre of pine forest in northeast Texas is:

(A) 0.210 MBF (thousand board feet) of pine sawtimber;

(B) 0.013 MBF of hardwood sawtimber;

(C) 0.35 cords of pine pulpwood; and

(D) 0.06 cords of hardwood pulpwood.

(37) To determine the average annual gross income from an acre of timber, the chief appraiser should multiply timber growth by its average annual price, or stumpage price. Stumpage price is the terminology used to indicate the price of uncut, marketable timber. Before doing this, however, the chief appraiser must calculate the average annual stumpage price of each of the four forest products for each year of the five-year period preceding the year of appraisal.

(38) A readily available source of stumpage price data is the Texas Forest Service, located in College Station, Texas. The Texas Forest Service is also an official source of data for timber appraisal. This agency collects timber prices in its bi-monthly surveys of forest industries, consulting foresters, government agencies and large landowners and publishes selected summaries of price data in its publication Texas Timber Price Trends. The Texas Forest Service also provides summaries of average annual stumpage prices of various forest products by region for various years. It does not provide data at the county level. This publication reports selected price data for pine and hardwood sawtimber sales, pine and hardwood pulpwood sales and other miscellaneous sales. Unpublished annual summaries of price data at the regional level are available upon request.

(39) The Texas Forest Service reports both unweighted average annual prices and weighted average annual prices for various forest products for both northeast and southeast Texas. These price reports are available upon request from the Texas Forest Service. Chief appraisers should compute a simple average of these two reported prices and use this simple average in their timber appraisals.

(40) Figures 20 and 21: 34 TAC 9.4011(g) show how to calculate average annual stumpage prices for four forest products for each year of the 1990-1994 period. In northeast Texas, for example (Figure 20: 34 TAC 9.4011(g)), the average price for pine sawtimber in 1990 was $169.53 per thousand board feet (MBF); in 1991, $182.17 per MBF; in 1992, $241.52 per MBF, etc.

(41) Chief appraisers should calculate the average annual potential gross income of timber growth using three steps. The steps in this calculation are:

(A) compute average annual gross income;

(B) calculate soil productivity multipliers; and

(C) use soil productivity multipliers to adjust average annual gross income to potential gross income.

(42) First, the chief appraiser should multiply the growth of each of the four timber products (from Figure 19: 34 TAC 9.4011(g)) by its respective price (from Figures 20 and 21: 34 TAC 9.4011(g)) for each year of the five-year period. Figures 22 and 23: 34 TAC 9.4011(g), show these calculations for northeast and southeast Texas, respectively. As shown in Figure 22: 34 TAC 9.4011(g), for example, the average annual gross income for an acre of pine forest in northeast Texas was $44.11 in 1990 and $91.93 in 1994. These numbers were computed by multiplying each forest product growth estimate by its respective price and then summing the products. Although the Property Tax Code, §23.51(4), allows the chief appraiser to include "any income received from hunting or recreational leases" in the computation of net income of qualified agricultural land, nothing in the Code's sections (23.71-23.79) governing timber appraisal allows inclusion of lease income in the computation of net income of qualified timberland.

(43) Next, the chief appraiser must adjust these gross income estimates to reflect different soil productivities. To do this, the chief appraiser should develop productivity multipliers to adjust the average gross income. Productivity multipliers must be computed from statutory data sources that are current and reliable. (As noted earlier, subsection (f) of this section contains a listing of official data sources.) At the time this manual was written, USDA Forest Service data were the only current and reliable data available for developing soil productivity multipliers.

(44) The USDA Forest Service data needed to compute productivity multipliers are:

(A) the most recent forest survey data for Texas; and

(B) data contained in the Boyce study, conducted by the USDA Forest Service.

(45) The Boyce study, named after one of its authors, determined in 1975 the average annual maximum potential amount of timber that could be produced on an acre of loblolly pine east of the Mississippi River in each of four soil productivity classes. The soil productivity classes used in the Boyce study correspond to the soil classification scheme developed in paragraphs (19)-(25) of this subsection. Combining that soil classification scheme with the Boyce study productivity classes produces the following:
Figure 4: 34 TAC §9.4011(e)(45).

(46) The concepts of site quality class and site index range were discussed earlier. "Potential timber growth per acre per year" are the Boyce study estimates of the maximum potential growth of an acre of loblolly pine in each soil productivity class under ideal conditions.

(47) Figures 24 and 25: 34 TAC 9.4011(g), show how to compute the average annual potential growth of an average acre. The top part of Figure 24: 34 TAC 9.4011(g) lists acres by site class for each county in northeast Texas. These data are from the 1992 USDA Forest Service survey of Texas. The bottom part of Figure 24: 34 TAC 9.4011(g) shows the results of multiplying the acreage in each site class in each county by the growth potentials developed in the Boyce study.

(48) For example, the 15,300 acres in site class 165+ in Anderson County (Figure 24: 34 TAC 9.4011(g)) are multiplied by 163 (the growth potential for that site type). The result, shown in the lower half of the table, is 2,493,900 cubic feet. This calculation is carried out for all site classes in each county. The resulting products are added to produce 606,729,100 cubic feet, which is the estimated total potential growth of timberland in northeast Texas. This total estimated potential growth is divided by the total number of acres, 4,897,100, to generate an estimate of the average annual potential timber growth of an acre of timberland in northeast Texas of 123.9 cubic feet per acre per year. As noted earlier, "average annual potential growth" is not the same as "average annual actual growth."

(49) Computations for southeast Texas are identical and are shown in Figure 25: 34 TAC 9.4011(g).

(50) Figure 26: 34 TAC 9.4011(g), shows how to calculate soil productivity multipliers for the four productivity classes for northeast and southeast Texas. Chief appraisers should compute these productivity multipliers by dividing the growth potentials from the Boyce study by the growth potential for each region. To compute the productivity multiplier for productivity class II timberland in northeast Texas, for example, the chief appraiser should divide 123 by 123.9 to generate a productivity multiplier of 0.99. The chief appraiser should compute the productivity multiplier for class II timberland in southeast Texas by dividing 123 by 122.3, which yields a multiplier of 1.01.

(51) Figures 27 and 28: 34 TAC 9.4011(g), show chief appraisers how to apply productivity multipliers to the average annual gross income estimates, which were developed in Figures 22 and 23: 34 TAC 9.4011(g). In northeast Texas in 1990, for example, the annual gross income of pine, $44.11, is multiplied by the productivity multiplier for each productivity class. This produces estimates of the average annual potential gross income of each productivity class in 1990.

(52) It is important to remember that this "potential gross income" measure is not an estimate of the actual income an individual timber grower could receive from the sale of timber in a particular year. It is a measure of the value of a year's worth of possible growth in each timber category (forest type and soil productivity class) in the region.

(53) Texas law defines timber production costs as reasonable management costs and other reasonable expenses directly attributable to producing timber. The costs of producing timber are expenses related to establishing, owning, protecting, maintaining, and improving timber. These costs may vary by forest type, soil productivity, management intensity and other factors.

(54) Timber production costs include professional services, site preparation, tree planting and seeding, timber improvement, protection against fire, insects and diseases, prescribed burning, maintenance of property boundaries, road construction and maintenance, measurements of standing timber, selling costs, property taxes, equipment use, mileage traveled to/from property for timber management, personnel supervision and administration. Since many foresters may include several activities under one general classification, chief appraisers should understand the components of a particular timber management activity to avoid duplicating or omitting costs.

(55) The cost model in Figure 37: 34 TAC 9.4011(h) lists timber management activities and a typical frequency for each activity. The chief appraiser should use this general cost model as a basis for developing a district-specific cost model that reflects typical activities for a prudent manager in the district. Chief appraisers may add or delete activities to this model so that it reflects management activities that are typical for their respective counties districts.

(56) After determining typical management activities and the frequency of each activity in the district, the chief appraiser should estimate the average annual cost of each activity. Sources of cost data are the Texas Forest Service, landowners within the district, private contractors, consulting foresters, and departments of forestry in Texas colleges and universities. The chief appraiser must develop costs that reflect typical management activities and typical frequencies for a prudent manager in the district.

(57) Chief appraisers may develop an average, per acre cost for all timberland or an average, per acre cost for each type forest type. In either case, chief appraisers must adjust these costs to reflect different management costs for each category of timber. This is done because timber on more productive land is often managed more intensively, resulting in higher costs per acre. Adjusting average annual costs per acre for soil productivity classes is analogous to adjusting average annual gross income per acre to soil productivity classes, as discussed in paragraphs (41)-(52) of this subsection.

(58) Chief appraisers who develop one average cost for all timberland must adjust this cost to reflect both forest type and soil productivities. To accomplish this, chief appraisers may use the following cost proration factors developed by the Texas Agricultural Experiment Station:
Figure 5: 34 TAC 9.4011(e)(58).

(59) Figure 29: 34 TAC 9.4011(g) shows hypothetical costs for a hypothetical county in northeast Texas and in southeast Texas. The numbers in this table were created to illustrate the timber

appraisal process, and chief appraisers should not use these numbers in their appraisals.

(60) Figures 30 and 31: 34 TAC 9.4011(g) show the results of applying these cost proration factors to the hypothetical costs shown in Figure 29: 34 TAC 9.4011(g). The chief appraiser should note that these cost proration factors are applied to an average cost for all timberland. The proration factors adjust costs for both forest type and soil productivity class.

(61) If chief appraisers develop an average cost for each forest type, they must adjust each of these costs to reflect the impact of different soil productivity classes. To accomplish that, chief appraisers may apply the relationships within soil classes above to make the adjustments. For example, assume that the chief appraiser determines that the average annual management cost of hardwood is $8.00 and that most of the hardwood in the district in soil class II. This $8.00 figure becomes the management cost for hardwood soil class II. The management cost for hardwood soil class I would be $8.00 x 1.25, or $10.00. The 1.25 factor is derived by taking the relationship from the factors for hardwood in Figure 5 of paragraph (58) of this subsection, which is 0.75/0.60 = 1.25.

(62) The management cost for hardwood soil class III would be $8.00 x 0.75, or $6.00. The 0.75 is the quotient of 0.45 divided by 0.60. The proration factor for hardwood soil class IV would be 0.30/0.60 = 0.50 and the management cost would be $8.00 x 0.50 = $4.00.

(63) To calculate the average annual net income per acre for each timber type and soil productivity class, the chief appraiser must subtract the average annual cost per acre from the average annual potential gross income per acre. This calculation must be performed for each forest type and soil productivity class. The results are the average annual net income per acre by forest type and soil productivity class. Figures 32 and 33: 34 TAC 9.4011(g) show these computations for hypothetical counties in northeast and southeast Texas, respectively.

(64) To complete the timber appraisal process, chief appraisers must develop an average net income for each forest type and soil productivity class for the prior five years of average annual net incomes, capitalize this average net income and apply these productivity values to the timber acreage in their appraisal districts. Figure 34: 34 TAC 9.4011(g) shows how to perform these calculations for hypothetical appraisal districts in both northeast and southeast Texas.

(65) The productivity value of an acre of timberland is determined by dividing the average net income per acre for each forest type and productivity class by the capitalization rate mandated by the Property Tax Code, §23.74. The law sets the capitalization rate at the interest rate specified by the Farm Credit Bank of Texas or its successor on December 31 of the preceding year, plus 2-1/2 percentage points. Chief appraisers also may contact the comptroller's property tax division to find out the current year's capitalization rate.

(66) Figure 34: 34 TAC 9.4011(g) shows the results of dividing the net income per acre by a capitalization rate of 10.75%. For example, in northeast Texas, pine forest, soil productivity class I, the chief appraiser would divide $66.30, the net income per acre, by 0.1075, the capitalization rate, to get $616.74, the productivity value of the average acre of pine forest in soil productivity class I in northeast Texas. In southeast Texas, the chief appraiser would divide $53.38 per acre by 0.1075 to get $496.56, the productivity value of the average acre of pine in soil productivity class I. The chief appraiser should perform these calculations for each forest type and each soil productivity class in the appraisal district.

(67) The chief appraiser should apply the per acre values developed in paragraphs (64) and (65) of this subsection to the respective acreages of each parcel of qualified timberland in each forest type and soil productivity class in each taxing jurisdiction. Figures 35 and 36: 34 TAC 9.4011(g) show how to do this calculation for hypothetical counties in both Northeast and Southeast Texas, respectively.

(68) In determining the forest type and soil productivity class of qualified timberland in the district, the chief appraiser should use maps from one or more of the five official sources listed in subsection (f) of this section. As noted earlier in paragraphs (16)-(18) of this subsection, chief appraisers may use aerial photographs, forest type maps and soil class maps from any governmental source that is recognized as competent to determine soil type, soil capability, general topography, weather, location and any other pertinent factors necessary to classify commercial timberland by forest type and soil type. If the chief appraiser elects to use maps for classifying timberland within his or her district from a data source not listed in subsection (f) of this section, the chief appraiser should exercise great care to be certain that the maps are the most current and reliable maps available and that the source of the maps is a competent governmental source.

(f) Data sources for the chief appraiser.

(1) Chief appraisers are solely responsible for determining timber productivity values within their respective appraisal districts. To do so, they must obtain information on forest types, soil types, timber growth and forest product prices from sources listed in the Property Tax Code. While the following sources provide information on which to base determinations, the chief appraiser bears ultimate responsibility for determining timberland productivity value.

(2) United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS). The NRCS is the federal agency charged with inventorying and classifying the nation's soils. This agency has detailed soil surveys of Texas timber-producing counties which show the potential productivity and site index of common trees in each soil series that is suitable for growing commercial trees. This information may be used to generate soil productivity maps.

(3) United States Department of Agriculture Forest Service. The USDA Forest Service is a branch of the United States Department of Agriculture. This agency collects voluminous information about average timber growth and forest characteristics in east Texas timber counties as part of its surveys of east Texas timber. The USDA Forest Service publishes the results of these surveys and makes much of the collected data available to the Texas Forest Service.

(4) United States Department of Interior Geological Survey. The United States Geological Survey periodically publishes land use/land cover maps, which classify forest types in a format useful for timberland appraisal. The agency has negatives of panchromatic (showing all colors in the visible color spectrum) aerial photographs and positive transparencies of color-infrared aerial photographs.

(5) Texas Forest Service (TFS). The Texas Forest Service (TFS) is a state agency and has branch offices throughout the state's timber region. TFS foresters help timber growers prepare management plans, giving priority to those with long-term timber production goals who are interested in using approved management practices, including cost-sharing. TFS headquarters are located in College Station, where the agency publishes a bi-monthly report of timber stumpage prices, called Texas Timber Price Trends. In addition, TFS publishes an annual report of timber harvests called Harvest Trends. This publication shows harvest information for each product and for each timber-producing county in Texas. Finally, the TFS has data about timber growth that the agency develops in cooperation with the United States Department of Agriculture Forest Service.

(6) Universities and colleges. The College of Forestry at Stephen F. Austin State University in Nacogdoches, the Department of Forest Science at Texas A&M University in College Station and other Texas colleges of forestry and universities with forest science departments often have research-based information unavailable from other sources. For example, personnel at the Texas Agricultural Experiment Station at Texas A&M University have developed forest type maps and soil productivity maps using United States Geological Survey maps and USDA Natural Resources Conservation Service data, respectively. These maps are available upon request for a nominal fee to cover reproduction costs.

(g) Appendix A contains Figures 6-22 which are referred to in this section. (A map and Tables 1-16B).
Figure 6: 34 TAC 9.4011(g).
Figure 7: 34 TAC 9.4011(g).
Figure 8: 34 TAC 9.4011(g).
Figure 9: 34 TAC 9.4011(g).
Figure 10: 34 TAC 9.4011(g).
Figure 11: 34 TAC 9.4011(g).
Figure 12: 34 TAC 9.4011(g).
Figure 13: 34 TAC 9.4011(g).
Figure 14: 34 TAC 9.4011(g).
Figure 15: 34 TAC 9.4011(g).
Figure 16: 34 TAC 9.4011(g).
Figure 17: 34 TAC 9.4011(g).
Figure 18: 34 TAC 9.4011(g).
Figure 19: 34 TAC 9.4011(g).
Figure 20: 34 TAC 9.4011(g).
Figure 21: 34 TAC 9.4011(g).
Figure 22: 34 TAC 9.4011(g).
Figure 23: 34 TAC 9.4011(g).
Figure 24: 34 TAC 9.4011(g).
Figure 25: 34 TAC 9.4011(g).
Figure 26: 34 TAC 9.4011(g).
Figure 27: 34 TAC 9.4011(g).
Figure 28: 34 TAC 9.4011(g).
Figure 29: 34 TAC 9.4011(g).
Figure 30: 34 TAC 9.4011(g).
Figure 31: 34 TAC 9.4011(g).
Figure 32: 34 TAC 9.4011(g).
Figure 33: 34 TAC 9.4011(g).
Figure 34: 34 TAC 9.4011(g).
Figure 35: 34 TAC 9.4011(g).
Figure 36: 34 TAC 9.4011(g).

(h) Appendix B contains Figure 37 (Timber Cost Model).
Figure 37: 34 TAC 9.4011 (g).

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9610174
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
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Proposal publication date: January 23, 1996
For further information, please call: (512) 463-4028

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 48. Community Care for Aged and Disabled

In-Home and Family Support Program

40 TAC §48.2707

The Texas Department of Human Services (DHS) adopts an amendment to §48.2707, without changes to the proposed text published in the June 11, 1996, issue of the *Texas Register* (21 TexReg 5255).

The justification for the amendment is to eliminate the In-Home and Family Support Program (IH/FSP) requirement that a program supervisor approve exceptions to the six- month time frame for return of receipts. This requirement is being deleted as a streamlining measure, allowing case activity to remain at the worker level when receipt time frames are exceeded.

The amendment will function by allowing more efficient processing of IH/FSP cases.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 35, which provides the department with the authority to administer public and support services for persons with disabilities programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§35.001-35.012.

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

Issued in Austin, Texas, on July 16, 1996.

TRD-9609165
Glenn Scott
General Counsel, Legal Services

Texas Department of Human Services
Effective date: August 15, 1996
Proposal publication date: June 11, 1996

For further information, please call: (512) 438–3765

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