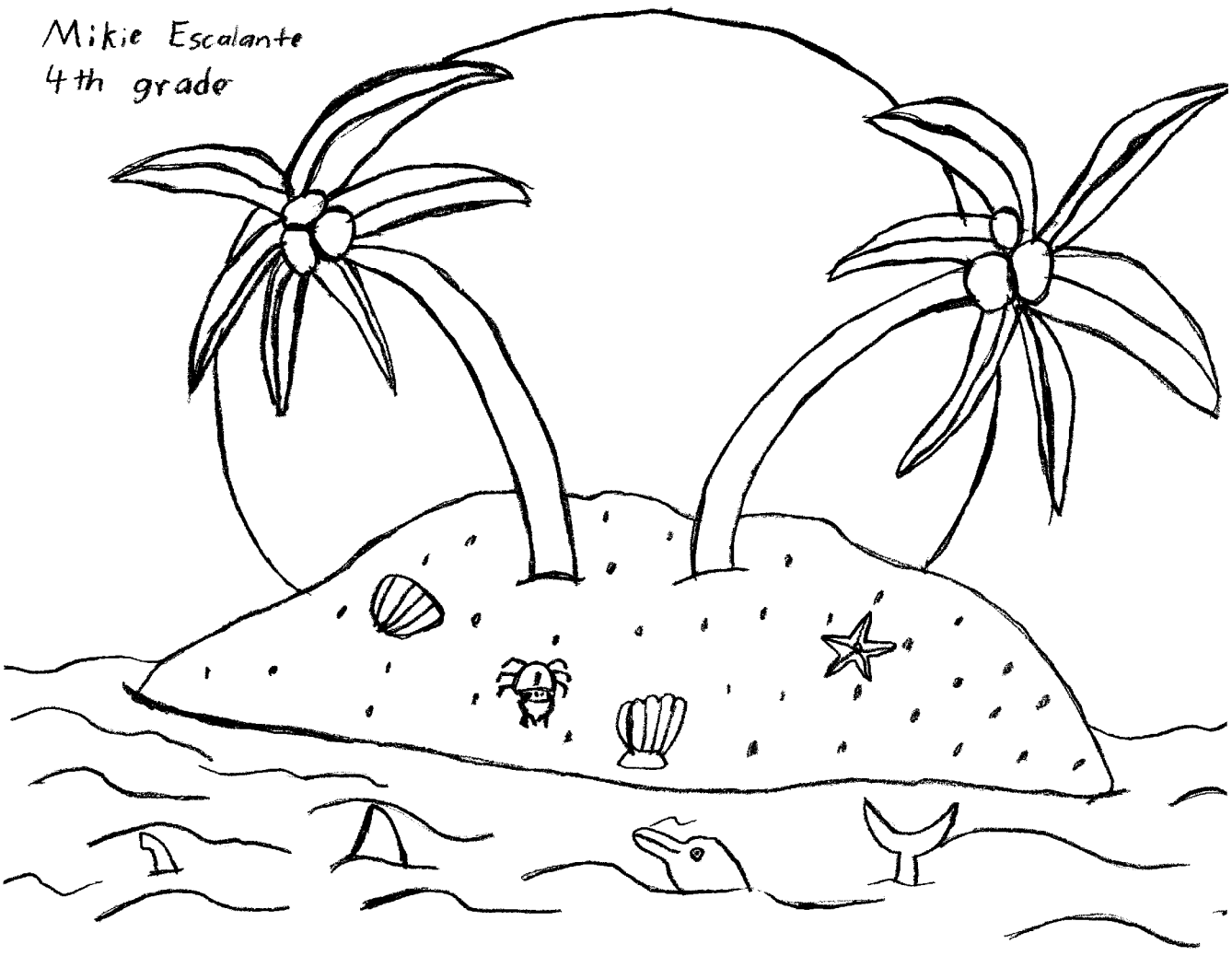
TEXAS REGISTER

Volume 29 Number 28 July 9, 2004 Pages 6463-6834



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

***Texas Register,* (ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $200. First Class mail subscriptions are available at a cost of $300 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas and additional mailing offices.

POSTMASTER: Send address changes to the ***Texas Register,*** P.O. Box 13824, Austin, TX 78711-3824.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
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IN THIS ISSUE

ADOPTED RULES

Texas Lottery Commission

Public Utility Commission of Texas

Texas Racing Commission

Railroad Commission of Texas

Texas Department of Transportation

Texas Workers' Compensation Commission

Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

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

Request for Opinions

RQ-0237-GA

Requestor:

The Honorable Harold V. Dutton Jr.

Chair, Committee on Juvenile Justice and Family Issues

Post Office Box 2910

Austin, Texas 78768-2910

Re: Status of funeral goods and services as "cash advance items" for purposes of regulation by the Texas Funeral Service Commission (Request No. 0237-GA)

Briefs requested by July 25, 2004

RQ-0238-GA

Requestor:

The Honorable James L. Keffer

Chair, Committee on Economic Development

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a municipality may extend the termination date of a tax reinvestment zone created under chapter 311 of the Tax Code (Request No. 0238-GA)

Briefs requested by July 25, 2004

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at 512/463-2110.

TRD-200404308
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 29, 2004

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Opinions

Opinion No. GA-0207

The Honorable Tim Curry

Tarrant County Criminal District Attorney

Justice Center

401 West Belknap

Fort Worth, Texas 76196-0201

Re: When a surety is entitled to a refund under Government Code §41.258, which mandates an officer taking a bail bond to require the surety to pay a cost (RQ-0153-GA)

SUMMARY

Government Code §41.258(b) requires an officer taking a bail bond to collect a cost from the surety. The officer deposits the money in the county treasury and the county later sends most of the money to the comptroller, who must deposit it in the fair defense account, which may be used only by the Task Force on Indigent Defense to implement Government Code Chapter 71, Subchapter D, and the felony prosecutor supplement fund, which is used to pay longevity pay to prosecutors. Pursuant to §41.258(f), a bail bond surety is entitled to a refund of a cost paid under §41.258(b) as of the date the prosecutor decides not to institute a criminal proceeding against the defendant or the date a grand jury votes not to indict the defendant.

Given that most of §41.258 costs are ultimately deposited in the state treasury and that the comptroller has general authority over state and county accounting, the comptroller is the proper official to determine whether §41.258 refund applications should be processed at the state or county level and whether refunds should be paid by the state or the county. In the absence of direction from the comptroller, counties may accept refund applications and provide refunds.

If a county pays a refund, it is reasonable to construe §41.258 to require refunds to come from costs collected under §41.258(b) rather than other funds in the county treasury. However, it is for the comptroller to determine as an accounting matter whether counties should deduct refunds from amounts sent to the comptroller or whether the comptroller should reimburse counties for refunds. A bail bond surety who applies for a cost refund under §41.258(b) is not entitled to interest.

Opinion No. GA-0208

The Honorable Robert E. Talton

Chair, Urban Affairs Committee

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether the Texas Department of Housing and Community Affairs' 2004 plan for allocating low-income housing tax credits is consistent with Senate Bill 264 (RQ-0161-GA)

SUMMARY

The Department of Housing and Community Affairs must first score and rank applications for low-income housing tax credits according to the nine statutory criteria prioritized in descending order in Government Code §2306.6710(b)(1), as amended in 2003 by Senate Bill 264. It may score and rank applications according to other criteria and preferences established in 26 U.S.C. §42 and Chapter 2306 by giving those other criteria and preferences less weight than the §2306.6710(b)(1) criteria. To the extent the Department's 2004 qualified allocation plan for allocating low-income housing tax credits gives other criteria and preferences greater weight, it is inconsistent with §2306.6710(b)(1) and exceeds the Department's statutory authority.

The 2004 qualified allocation plan is not required to address private activity bond application scoring and ranking and therefore is not inconsistent with §2306.359, as added by Senate Bill 264. With respect to providing notice about proposed developments to neighborhood organizations in the same and adjacent zip codes and by posting signs and mailing notices to addresses in the immediate vicinity, the 2004 qualified allocation plan is not inconsistent with §2306.6705, as amended by Senate Bill 264.

Opinion No. GA-0209

The Honorable Frank Madla

Chair, Intergovernmental Relations Committee

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether local election officials had the discretion to accept or reject signatures on local option election petitions filed prior to the effective date of the 2003 amendments to the Alcoholic Beverage Code when the signatures were withdrawn by affidavit, or when the signatures appeared on the back side of a petition signature sheet from which certain statutory elements were absent (RQ-0159-GA)

SUMMARY

Prior to 2003 changes in the Alcoholic Beverage Code, Texas recognized the common-law right of signature withdrawal, and a timely filed affidavit of signature withdrawal from a local option election petition had the effect of erasing the petitioner's original signature. Local election officials, therefore, were required to disregard withdrawn signatures and could not count them. In addition, for local option election petitions governed by the pre-amendment Alcoholic Beverage Code, local election officials had to count signatures that appeared on pages that complied with pre-amendment Chapter 251 provisions, unless the signatures had to be rejected under pre-amendment §251.10(b).

Opinion No. GA-0210

The Honorable Richard J. Miller

Bell County Attorney

Post Office Box 1127

Belton, Texas 76513

Re: Whether under Article XVI, Section 65 of the Texas Constitution a justice of the peace announced his candidacy for another office on December 31 by informing a newspaper reporter that he would be a candidate for another office (RQ-0162-GA)

SUMMARY

A justice of the peace did not automatically resign under Article XVI, Section 65 of the Texas Constitution merely by informing a newspaper reporter on December 31 that he was running for another office. Assuming that the private conversation did not result in any publication of the information on December 31, a finder of fact could reasonably conclude that there was no announcement on December 31.

For further information, please access the web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200404325
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: June 30, 2004

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EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 57. FOR-PROFIT LEGAL SERVICE CONTRACT COMPANIES

16 TAC §§57.1, 57.10, 57.21 - 57.23, 57.25, 57.70 - 57.72, 57.80, 57.90

The Texas Department of Licensing and Regulation is renewing the effectiveness of the emergency adoption of new §§57.1, 57.10, 57.21 - 57.23, 57.25, 57.70 - 57.72, 57.80, and 57.90, for a 6-day period. The text of new sections was originally published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2483).

Filed with the Office of the Secretary of State, on June 23, 2004.

TRD-200404184
William H. Kuntz. Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: June 24, 2004
Expiration date: June 29, 2004
For further information, please call: (512) 463-7348

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 111. EXECUTIVE ADMINISTRATION DIVISION

SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §111.23

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

The Texas Building and Procurement Commission proposes the repeal of 1 TAC §111.23, concerning Graduation Procedures used in the HUB Program. The rule sets out the requirements necessary for a Historically Underutilized Businesses (HUB) to be graduated. The proposed repeal is necessary because the process no longer serves its intended purpose and discourages minority and women-owned businesses from reaching their maximum growth potential.

Ms. Cindy Reed, Deputy Executive Director, has determined for the first five year period the rule is repealed there will be no fiscal implications for the state and local governments as a result of the repeal.

Ms. Reed has further determined that for each year of the first five year period the repeal is in effect, the public benefit anticipated as a result of the repeal will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule and there is no impact on local employment.

Comments on the proposals may be submitted to Cynthia de Roch, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to *cynthia.deroch@tbpc.state.tx.us.* Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The repeal is proposed under the authority of Chapter 2161.002 of the Texas Government Code.

The following code is affected by this rule: Government Code, Title 10, Chapter 2161, §§2161.061, 2161.062, 2161.066, & 2161.182.

§111.23. Graduation Procedures.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404199
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-4257

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1 TAC §111.27

The Texas Building and Procurement Commission proposes amendments to 1 TAC §111.27, concerning Historically Underutilized Businesses (HUB) Forum Programs for state agencies. The proposed amendments delete the requirements to advertise required HUB Forums in trade publications and permits advertising through existing means, including the Centralized Master Bidders List, the HUB Directory and the TBPC's website without incurring costs and without compromising the intent/purpose of administering the HUB Forums;

Provide for administering HUB Forums at a location other than the offices of the state agency when state agency offices will not accommodate HUB Forum participants; and

Provide for administering HUB Forums cooperatively with other agencies.

Ms. Cindy Reed, Deputy Executive Director, has determined, for the first five year period the rule is in effect, enforcing or administering the rule will not have foreseeable implications relating to costs or revenues of state or local governments.

Ms. Reed has further determined that for each year of the first five year period the proposed amendments are in effect, the public benefit anticipated as a result of these amendments will be a long term reduction of costs associated with advertising HUB Forums. There will be no effect on large, small or micro-businesses and there will be no impact on local employment.

Comments on the proposals may be submitted to Cynthia de Roch, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to *cynthia.deroch@tbpc.state.tx.us* . Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under the authority of Chapter 2161 of the Texas Government Code.

The following code is affected by this rule: Government Code, Title 10, Chapter 2161, §§2161.002, 2161.063, and 2161.066.

§111.27. HUB Forum Programs for State Agencies.

(a) In accordance with Texas Government Code, §2161.066, the Commission shall design a program of forums in which historically underutilized businesses are invited by state agencies to deliver technical and business presentations that demonstrate their capability to do business with the agency:

(1) to senior managers and procurement personnel at state agencies that acquire goods and services of a type supplied by the historically underutilized businesses; and

(2) to contractors/vendors with the state who may be subcontracting for goods and services of a type supplied by the historically underutilized businesses.

(b) The forums shall be held at state agency offices. Each agency with a biennial appropriation exceeding $10 million shall participate in the forums by sending senior managers and procurement personnel to attend relevant presentations. The agency will inform their contractors/vendors about presentations relevant to subcontracting opportunities for HUBs and small businesses. The commission and each agency that has a HUB coordinator shall:

(1) design its own forum program and model the program, to the extent appropriate, following the format established by the commission;

(2) sponsor presentations by HUBs at the agency; and

[~~(3) advertise the forums in appropriate trade publications to target HUBs; and~~]

(3) [~~(4)~~] identify and invite HUBs to make marketing presentations on the types of goods and services they provide.

(c) Agencies may elect to implement forums individually or cooperatively with other agencies. The agency's forum programs may include, but are not limited to, the following initiatives:

(1) providing marketing information that will direct HUBs to key staff within the agency;

(2) requesting other state agencies to assist in the preparation and planning of the forum when necessary;

(3) informing HUBs about potential contract opportunities and future awards; and

(4) preparing an annual report of each sponsored and/or cosponsored forum.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404203
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-4257

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CHAPTER 117. SUPPORT SERVICES DIVISION

SUBCHAPTER B. BUSINESS MACHINE REPAIR

1 TAC §117.41

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

The Texas Building and Procurement Commission proposes the repeal of 1 TAC §117.41, concerning the Business Machine Repair Services. The chapter establishes the procedures that TBPC is to follow regarding the repair of business machines for state agencies, the legislature, and legislative agencies. The proposed repeal is necessary because the agency no longer repairs business machines.

Dan Contreras, Deputy Executive Director, has determined for the first five year period the rule is repealed, there will be no fiscal implication for the state or local governments as a result of the repeal.

Mr. Contreras has further determined that for each year of the first five year period the repeal is in effect, the public benefit anticipated as a result of repealing of the rule will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule and there is no impact on local employment.

Comments on the proposals may be submitted to Cynthia de Roch, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to *cynthia.deroch@tbpc.state.tx.us.* Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under the authority of Chapter 2172 of the Texas Government Code, Title 10, Subtitle §2172.002.

The following code is affected by this rule: Government Code, Title 10, Subtitle D, Chapter 117.

§117.41. Business Machine Repair Services.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404200
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-4257

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SUBCHAPTER C. CENTRAL STORE

1 TAC §117.51

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

The Texas Building and Procurement Commission proposes the repeal of 1 TAC §117.51, concerning the Central Store. The chapter establishes the procedures that TBPC is to follow regarding the sale of small, desktop supply items, how the agencies are to pay for their purchases, and the monthly reports required of the Commission. The proposed repeal is necessary because the agency no longer operates the Central Store.

Dan Contreras, Deputy Executive Director, has determined for the first five year period the rule is repealed, there will be no fiscal implication for the state or local governments as a result of the repeal.

Mr. Contreras has further determined that for each year of the first five year period the repeal is in effect, the public benefit anticipated as a result of repealing of the rule will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule and there is no impact on local employment.

Comments on the proposals may be submitted to Cynthia de Roch, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to *cynthia.deroch@tbpc.state.tx.us.* Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under the authority of Chapter 2172 of the Texas Government Code, Subtitle §2172.001.

The following code is affected by this rule: Government Code, Title 10, Subtitle D, Chapter 117.

§117.51. Operation Authority.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404201
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-4257

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SUBCHAPTER D. PRINTING

1 TAC §117.61

The Texas Building and Procurement Commission proposes amendments to 1 TAC §117.61, concerning the Printing Services. The chapter establishes how TBPC is to assess and evaluate the printing assistance it offers state agencies.

Dan Contreras, Deputy Executive Director, has determined for the first five year period the amendments are in effect, there will be no fiscal implication for the state or local governments as a result of the amendments.

Mr. Contreras has further determined that for each year of the first five year period the amendments are in effect, the public benefit anticipated as a result of the amendments will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the rule and there is no impact on local employment.

Comments on the proposals may be submitted to Cynthia de Roch, General Counsel, Texas Building and Procurement Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments may also be sent via email to *cynthia.deroch@tbpc.state.tx.us.* Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed under the authority of Chapter 2172 of the Texas Government Code, Title 10, Subtitle §2172.002.

The following code is affected by this rule: Government Code, Title 10, Subtitle D, Chapter 117.

§117.61. Printing.

(a) Pursuant to Texas Government Code, Title 10, Subtitle D, §2172.003, the Commission [~~commission~~] may provide assistance to any state agency regarding their printing activities. Assistance can be provided by telephone, fax, letter, e-mail or in person.

(b) The Commission [~~commission~~] assesses and evaluates printing activities to ensure the best interests of the State of Texas are met. The Commission [~~commission~~] may make recommendations to state agencies that will increase the productivity and cost-effectiveness of their printing operations. The assessment may include but is not limited to an appraisal of equipment, customer base, sales, printing volume, costs, and personnel.

(c) The Commission [~~commission~~] adopted the Council on Competitive Government's (CCG) Cost Methodology as a baseline for evaluating and comparing cost of state agency printing operations. All state agency print [~~printing~~] shops in Travis County (except higher education) operate under a Franchise Agreement ("Agreement") with the Commission [~~commission~~], which allows state agencies currently operating a printing shop to maintain direct control with general oversight provided by the commission through Franchise Agreements. Failure to sign the Agreement will eliminate the authority for an agency to operate a print [~~printing~~] shop. The Agreement requires each printing shop to utilize the CCG Cost Methodology in determining the cost of printing.Each print [~~The commission requires that each printing~~] shop shall provide quarterly data to the Commission, which will summarize [~~commission. The commission summarizes~~] this information in quarterly and annual reports.

(d) The Commission [~~commission~~] reviews state agency requisitions for new print [~~printing~~] shop equipment, including copiers/duplicators and other printing devices used in quick copy operations. To complete the review, the state agency must provide written documentation to the commission. This documentation may include but is not limited to:

(1) a [~~A~~] summary narrative justifying the proposed purchase, rent or lease of equipment;

(2) a [~~A~~] description of the method of finance;

(3) a [~~A~~] detailing of the model(s) of printing equipment the agency currently has that it plans to replace (if applicable);

(4) a [~~A~~] detailing of the model(s) of printing equipment the agency plans to acquire;

(5) a [~~A~~] detailing of current annual costs for equipment to be replaced (if applicable);

(6) a [~~A~~] detailing of the estimated annual cost for the proposed equipment;

(7) the [~~The~~] cost benefit of proposed equipment;

(8) the [~~The~~] estimated volume of work which may be processed through the proposed equipment;

(9) a [~~A~~] summary of the equipment(s) enhanced features;

(10) the [~~The~~] number of hours per day the proposed equipment will run;

(11) the [~~The~~] number of shifts the proposed equipment will be operated on a daily basis; and

(12) miscellaneous [~~Miscellaneous~~] information that may be pertinent as a consequence of other information supplied by the agency.

(e) The Commission [~~commission~~] shall assist state agencies with expediting the production of printing and graphic arts by serving as a source of information, facilitating disputes, hosting meetings or performing other services.

(f) A roster of franchised printing shops is maintained by the commission. This roster includes printing shop equipment, facilities, special capabilities and staffing. The roster will be provided to requesting entities.

(g) The Commission [~~commission~~] will work with state agencies to ensure that printing services and supplies are purchased in the most economical manner possible. A vendor listing by commodity and services is maintained to maximize information regarding private sector suppliers. A summary vendor listing will be provided to requesting entities.

(h) The Commission [~~commission~~] will work with state agencies to coordinate the consolidation of printing shops when the agencies involved determine a consolidation is appropriate.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404205
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-4257

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR ALL PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS AND MENTAL RETARDATION

1 TAC §355.746

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.746, Subchapter F, concerning reimbursement methodology for Mental Retardation (MR) Service Coordination in its Medicaid Reimbursement Rates chapter. This proposed rule amends §355.746 to create the reimbursement methodology for Mental Retardation (MR) Service Coordination that is separate from the reimbursement methodology for Mental Health (MH) Case Management. This separation of MR Service Coordination and MH Case Management is consistent with the separation of these services in the Texas Department of Mental Health and Mental Retardation (TDMHMR) programmatic rules. The Mental Retardation Local Authority (MRLA) program was eliminated on September 1, 2003; and this rule is being modified to reflect that and to create the MR Service Coordination rules. This rule is also being amended to change the references from the general cost determination rules of Subchapter F to the cost determination process rules of Subchapter A. That reference change will achieve consistency with the rules used for other HHSC long-term care programs. Also, references to a settle-up process are being removed; under the proposed rule, the rate will no longer be adjusted after the establishment of a cost-based rate. The proposed rule replaces the references to "TDMHMR" with references to "TDMHMR or its successor agency". Those proposed reference changes recognize the impending transfer of TDMHMR's program responsibilities to other agencies pursuant to H.B. 2292, 78th Legislature (R.S.). Proposed changes are to be effective August 31, 2004.

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five-year period that the proposed amendment is in effect, there are no foreseeable fiscal implications relating to costs or revenues of state or local government.

Ed White, Director of HHSC Rate Setting and Forecasting, has determined that, for each year of the first five-year period the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the section is that the reimbursement methodology for Mental Retardation Service Coordination will: (a) reflect the structure of the TDMHMR programmatic rules by separating the MR Service Coordination and MH Case Management programs into separate reimbursement methodology rules; (b) reflect use of the cost determination process rules consistent with all HHSC long-term care programs; (c) reflect the elimination of the settle-up process after the payment rates have been established and paid to providers; and (d) recognize the impending transfer of TDMHMR's program responsibilities to agencies created by H.B. 2292, 78th Legislature (R.S.). There is no anticipated impact on small or micro-businesses to comply with the proposed amendment, as they will not be required to alter their business practices as a result of the amendments. There are no anticipated economic costs to persons required to comply with the proposed amendment. There is no anticipated impact on a local economy.

Under §2007.003(b) of the Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to this proposed rule. The changes made by this rule do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

Comments concerning the proposed amendment may be submitted in writing to Lupita Villarreal, Rate Analysis, by mail to 1100 West 49th Street, Mail Code H-400, Austin, Texas 78756-3101, by fax to 512/491-1998,or by e-mail to lupita.villarreal@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*. For further information regarding the proposal or to make the proposal available for

public review, contact local offices of DHS or Lupita Villarreal at (512) 491-1178 in HHSC's Rate Analysis Department.

The amendment is proposed under the Texas Government Code, §531.033, which provides the executive commissioner of HHSC with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed amendment affects the Texas Government Code, Chapter 531, and the Texas Human Resources Code, Chapter 32.

§355.746. Reimbursement Methodology for Mental Retardation (MR) [~~MRLA~~] Service Coordination.

(a) The Texas Department of Mental Health and Mental Retardation (TDMHMR) or its successor agency reimburses qualified authorities for service coordination provided to Medicaid-eligible individuals who are eligible for service coordination and are enrolled in the MR [~~MRLA~~] program in accordance with program rules [~~25 TAC, Chapter 409, Subchapter L (relating to Mental Retardation Local Authority (MRLA) Program)~~]. HHSC determines reimbursement for MR service coordination. Reimbursement is:

(1) uniform statewide;

(2) prospective; and

(3) cost related [~~with a year-end settlement~~].

(b) Service coordination rates are set for services provided to individuals with mental retardation or a related condition as defined in program rules established by TDMHMR or its successor agency. [~~who are enrolled in and receiving services through the MRLA Program;~~]

(c) Local authority qualifications. 42 U.S.C. §1396n(g) is invoked to limit the provision of service coordination to the state mental retardation authorities, [~~the state mental health authorities,~~] TDMHMR or its successor agency, or its designated local authorities authorized under §534.054 of the Texas Health and Safety Code, which offer a service delivery system of required services as outlined in §534.053 of the Texas Health and Safety Code.

(d) Rules and procedures. TDMHMR or its successor agency has implemented rules and procedures to ensure that service coordination is provided by persons who meet the requirements specified by TDMHMR or its successor agency and is provided in compliance with federal and state laws, rules, and regulations.

(e) Reimbursement methodology. HHSC determines reimbursement according to §355.101 [~~§355.701~~] of this title (relating to Introduction [~~General Specifications~~]). HHSC may also adjust reimbursement if new legislation, regulations, or economic factors effect costs, as described in [~~As specified in~~] §355.109 [~~§355.706~~] of this title (relating to Adjusting Reimbursement [~~Rates~~] When New Legislation, Regulations, or Economic Factors Affect Costs), [~~HHSC may also adjust reimbursements~~].

(1) Local [~~MRLA~~] authorities will be reimbursed a statewide rate comprising a modeled rate plus a statewide weighted average associated service add-on.

(A) The modeled rate is based on cost calculations that include a statewide weighted average hourly wage for persons who provide service coordination as 100 percent of their job responsibilities, a predetermined caseload size, a statewide weighted average supervisory wage rate and span of control, and a statewide weighted average benefits factor.

(B) The associated service add-on includes clerical and support costs, travel and training costs, and other allowable operating costs (e.g., rent, utilities, office supplies, administration, and depreciation) necessary to provide service coordination.

[~~(2) At the end of each reimbursement period HHSC will compare the difference between the statewide rate and each MRLA authority's service coordination costs as submitted on its cost report in accordance with subsection (g) of this section.~~]

[~~(A) If a MRLA authority's costs are less than 95 percent of the statewide rate, the MRLA authority will pay TDMHMR the difference between that MRLA authority's costs and 95 percent of the statewide rate. The MRLA authority will be notified of the amount due to TDMHMR by certified mail.~~]

[~~(i)~~ ~~The MRLA authority will have 30 days to make payment. If payment is not received from the MRLA authority within 30 days of the date that the notice was received, as specified on the certified mail receipt, HHSC will notify TDMHMR to place the MRLA authority on vendor hold.~~]

[~~(ii)~~ ~~A MRLA authority that has been placed on vendor hold may request an administrative hearing in accordance with §355.707 of this title (relating to Reviews and Administrative Hearings).~~]

[~~(B) If a MRLA authority's costs exceed the statewide rate, TDMHMR will reimburse the MRLA authority its costs up to 125 percent of the statewide rate. TDMHMR will notify the local authority by certified mail within 30 days of the date that the notice of the amount due to the local authority was received, as specified on the certified mail receipt.~~]

(2) [~~(3)~~] At such time as HHSC determines that cost data collected as described in subsection (g) of this section are reliable, statewide reimbursement rates will be developed based on the cost data submitted by Local [~~MRLA~~] authorities in the following manner:

(A) Total allowable costs for each provider for each rate will be determined from analyzing the allowable historical costs reported on the cost report.

(B) Each provider's total allowable costs are projected from the historical cost reporting period to the prospective reimbursement period using inflation factors according to §355.108 [~~§355.704~~] of this title (relating to Determination of Inflation Indices) for each covered contact.

(C) Each provider's projected cost per unit of service is calculated. The mean provider cost per contact is calculated, and the statistical outliers (those providers whose cost per contact exceeds plus or minus (+/-) two standard deviations from the mean provider cost per contact) are removed. After removal of the statistical outliers, the mean cost per contact is calculated. This mean cost per contact becomes the recommended cost per contact. [~~Following each annual reimbursement period, allowable costs will be compared to reimbursement and any resulting monetary reconciliation will be made in accordance with paragraph (2) of this subsection.~~]

(f) Reimbursable unit of service.

(1) The unit of service upon which reimbursement is made is a face-to-face contact with a Medicaid-eligible individual eligible for MR [~~MRLA~~] service coordination in accordance with program rules established by TDMHMR or its successor agency [~~25 TAC, §409.505 (relating to Eligibility Criteria)~~].

(2) Reimbursement is limited to one unit of service per Medicaid-eligible individual per month.

(g) Reporting of costs. HHSC or its designee collects from Local [~~MRLA~~] authorities statistical and cost data. The statistical data include, but are not limited to, the total number of individuals receiving service coordination, and the number of Medicaid-eligible individuals receiving service coordination. The cost data include direct costs, programmatic indirect costs, and general and administrative costs including salaries, benefits, and non-labor costs.

(1) Cost reports. Each Local [~~MRLA~~] authority must submit financial and statistical information in a cost report or survey format designated by HHSC or its designee. The cost report will capture the expenses of the Local [~~MRLA~~] authority including salaries and benefits, administration, building and equipment, utilities, supplies, travel, and indirect overhead costs related to the provision of service coordination. Only allowable cost information is used to compile the cost base.[~~, as defined in §355.741 of this title (relating to Definitions and General Specifications) and~~] Each Local authority must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 & §355.103 [~~§355.708~~] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs). Local authorities must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(A) Accounting requirements. All information submitted on the cost reports must be based upon the accrual method of accounting unless the governmental entity operates on a cash or modified accrual basis. The Local [~~MRLA~~] authority must complete the cost report according to the prescribed statement of allowable and unallowable costs [~~as referenced~~] in accordance with §355.102 & §355.103 [~~§355.702~~] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs [~~Method of Cost Determination~~]). Cost reporting should be consistent with generally accepted accounting principles (GAAP) in this subchapter. In cases in which cost reporting rules conflict with GAAP, Internal Revenue Service, or other authorities, the cost reporting rules take precedence.

(B) Reporting period. The Local [~~MRLA~~] authority must prepare the cost report according to §355.105 [~~§355.702~~] of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures [~~Method of Cost Determination~~]).

(2) Exclusions or adjustments. Local [~~MRLA~~] authorities must exclude unallowable costs from the cost report. HHSC or its designee excludes from the cost reimbursement base any unallowable costs included in the cost report and makes adjustments to expenses reported by Local [~~MRLA~~] authorities to ensure that the cost reimbursement base reflects costs that are consistent with efficiency, economy, and quality care, are necessary for the provision of service coordination services, and are consistent with federal and state Medicaid regulations as specified in §355.102 & §355.103 [~~§355.701~~] of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs [~~Definitions and General Specifications~~]). If there is doubt as to the accuracy of allowability of a significant part of the information reported, individual cost reports may be eliminated from the cost base.

(3) Desk reviews. As specified in §355.106 [~~§355.703~~] of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), HHSC or its designee reviews such cost reports or surveys. Cost reports not completed according to instructions or rules will be corrected and resubmitted by the Local [~~MRLA~~] authority within the time frame prescribed by HHSC.

(4) On-site audit of cost reports. HHSC or its designee performs a sufficient number of audits each year to ensure the fiscal integrity of the service coordination reimbursement. The number of on-site audits actually performed each year may vary.

(A) HHSC or its designee notifies MR [~~MRLA~~] authorities of disallowances and adjustments to reported expenses made during desk reviews and on-site audits of cost reports according to §355.107 [~~§355.705~~] of this title (relating to Notification of Exclusions and Adjustments).

(B) Reviews of cost report disallowances. A Local [~~MRLA~~] authority which disagrees with HHSC or its designee on cost report disallowances may request a review of the disallowances as specified in §355.110 [~~§355.707~~] of this title (relating to Informal Reviews and Formal Appeals [~~Administrative Hearings~~]).

(5) Recordkeeping requirements. Each Local [~~MRLA~~] authority must maintain records according to the requirements specified in program [~~TDMHMR~~] rules established by TDMHMR or its successor agency and the provider agreement. The Local [~~MRLA~~] authority must ensure that the records are accurate and sufficiently detailed to support the financial and statistical information reported in the cost report. If a Local [~~MRLA~~] authority does not maintain records that support the financial and statistical information submitted on the cost report, the Local [~~MRLA~~] authority will be notified by certified mail that the local authority has 90 days to correct this recordkeeping. HHSC will notify TDMHMR or its successor agency to place the Local [~~MRLA~~] authority on vendor hold if the correction is not made within 90 days from the date the Local [~~MRLA~~] authority receives notification.

(6) Access to records. The Local [~~MRLA~~] authority must allow HHSC access to any and all records necessary to verify information on the cost report.

(h) Billing and payment reviews. The provider must allow TDMHMR or its successor agency access to any and all records regarding service coordination.

(1) TDMHMR or its successor agency will conduct periodic billing and payment reviews utilizing TDMHMR's or its successor agency Billing and Payment Review Protocol.

(2) Recoupment will be taken according to the application of error calculations contained in TDMHMR's or its successor agency Billing and Payment Review Protocol.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404261
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-6576

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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER A. GENERAL RULES

7 TAC §91.101

The Credit Union Commission proposes an amendment to rule §91.101 relating to definitions and interpretations.

The Credit Union Commission has completed its review of Texas Administrative Code Title 7, Chapter 91, §91.101 relating to definitions and interpretations. The Commission believes that the reasons for initially adopting this rule continue to exist; however, it has determined from its review that certain definitions need to be modified for clarity.

The amendments clarify the definitions of Construction or development loan and Loan to Value ratio. A grammatical revision is also made to the definition of Reserves.

Kerri T. Galvin, General Counsel, has determined that for each year of the first five years the proposed amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be clarification of the applicable definitions. There is no anticipated effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions for complying with the amendments if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendment is proposed under the provision of the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and Texas Finance Code Section 123.201, which authorizes the Commission to adopt rules governing credit unions' lending of funds.

The specific sections affected by the proposed amendment are Texas Finance Code, Sections 123.201, 124.001, 124.003, and 124.052.

§91.101. Definitions and Interpretations.

(a) Words and terms used in this chapter that are defined in Finance Code §121.002, have the same meanings as defined in the Finance Code. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--the Texas Credit Union Act (Texas Finance Code, Subtitle D).

(2) Allowance for loan and lease losses (ALLL)--a general valuation allowance that has been established through charges against earnings to absorb losses on loans and lease financing receivables. An ALLL excludes the regular reserve and special reserves.

(3) Applicant--an individual or credit union that has submitted an application to the commissioner.

(4) Application--a written request filed by an applicant with the department seeking to incorporate, amend articles of incorporation or bylaws, deviate from standard bylaws, obtain a certificate of authority to do business in the state of Texas or to obtain other relief for which the commission is authorized by the act to issue a final decision or order subject to judicial review.

(5) Automated teller machine (ATM)--an automated, unstaffed credit union facility owned by or operated exclusively for the credit union at which deposits are received, cash dispensed, or money lent.

(6) Community of interest--a unifying factor among persons that by virtue of its existence, facilitates the successful organization of a new credit union or promotes economic viability of an existing credit union. The types of community of interest currently recognized are:

(A) Occupational--based on an employment relationship that may be established by:

(i) employment (or a long term contractual relationship equivalent to employment) by a single employer, affiliated employers or employers under common ownership with at least a 10% ownership interest;

(ii) employment or attendance at a school; or

(iii) employment in the same trade, industry or profession (TIP) with a close nexus and narrow commonality of interest, which is geographically limited.

(B) Associational--based on groups consisting primarily of natural persons whose members participate in activities developing common loyalties, mutual benefits, or mutual interests. In determining whether a group has an associational community of interest, the commissioner shall consider the totality of the circumstances, which include:

(i) whether the members pay dues,

(ii) whether the members participate in furtherance of the goals of the association,

(iii) whether the members have voting rights,

(iv) whether there is a membership list,

(v) whether the association sponsors activities,

(vi) what the association's membership eligibility requirements are, and

(vii) the frequency of meetings. Associations formed primarily to qualify for credit union membership and associations based on client or customer relationships, do not have a sufficient associational community of interest.

(C) Geographic--based on a clearly defined and specific geographic area where persons have common interests and/or interact. More than one credit union may share the same geographic community of interest. There are currently four types of affinity on which a geographic community of interest can be based: persons, who

(i) live in,

(ii) worship in,

(iii) attend school in, or

(iv) work in that community. The geographic community of interest requirements are met if the area to be served is in a recognized single political jurisdiction, e.g., a city or a county, or a portion thereof.

(D) Other--The commissioner may authorize other types of community of interest, if the commissioner determines that either a credit union or foreign credit union has sufficiently demonstrated that a proposed factor creates an identifiable affinity among the persons within the proposed group . Such a factor shall be well-defined, have a geographic definition, and may not circumvent any limitation or restriction imposed on one of the other enumerated types.

(7) Construction or development loan--a financing arrangement for [~~the purpose of~~] acquiring property or rights to property, including land or structures, with the intent of converting the property into income-producing property[~~, including~~] such as residential housing for rental or sale; [~~,~~] commercial use; [~~,~~] industrial use; or similar use.

(8) Core capital--has the same meaning as "tier one capital" as set forth in the capital regulations adopted by the appropriate federal banking regulatory agency.

(9) Corporate credit union--a credit union whose field of membership consists primarily of other credit unions.

(10) Day--whenever periods of time are specified in this title in days, calendar days are intended. When the day, or the last day fixed by statute or under this title for taking any action falls on Saturday, Sunday, or a state holiday, the action may be taken on the next succeeding day which is not a Saturday, Sunday, or a state holiday.

(11) Department newsletter--the monthly publication that serves as an official notice of all applications, and by which procedures to protest applications are described.

(12) Field of membership (FOM)--refers to the totality of persons a credit union may accept as members. The FOM may consist of one group, several groups with a related community of interest, or several unrelated groups with each having its own community of interest.

(13) Imminent danger of insolvency--a circumstance or condition in which a credit union is unable or lacks the means to meet its current obligations as they come due in the regular and ordinary course of business, even if the value of its assets exceeds its liabilities; or the credit union has a positive net worth ratio equal to two percent or less of its assets.

(14) Improved residential property--real property consisting of a residential dwelling having one to four dwelling units, at least one of which is occupied by the owner of the property. This term shall also include a one to four unit dwelling occupied in whole or in part by the owner on a seasonal basis.

(15) Indirect financing--a program in which a credit union makes the credit decision in a transaction where the credit is extended by the vendor and assigned to the credit union or a loan transaction that generally involves substantial participation in and origination of the transaction by a vendor.

(16) Loan-to-value ratio--the aggregate amount of all sums borrowed including outstanding balances plus any unfunded commitment or line of credit from all sources [~~owed~~] on an item of collateral [~~securing a loan~~] divided by the market value of the collateral used to secure the loan.

(17) Loan and extension of credit--a direct or indirect advance of funds to a member, or on that member's behalf, that is conditioned upon the repayment of the funds by the member or the application of collateral. The terminology also includes the purchase of a member's loan or other obligation, a lease financing transaction, a credit sale, a line of credit or loan commitment under which the credit union is contractually obligated to advance funds to or on behalf of a member, an advance of funds to honor a check or share draft drawn on the credit union by a member, or any other indebtedness not classified as an investment security.

(18) Manufactured home--a HUD-code manufactured home as defined by the Texas Manufactured Housing Standards Act.

(19) Metropolitan Statistical Area (MSA)--a geographic area as defined by the director of the U. S. Office of Management and Budget.

(20) Mobile office--a branch office that does not have a single, permanent site, including a vehicle that travels to various public locations to enable members to conduct their credit union business.

(21) Office--includes any service facility or place of business established by a credit union at which deposits are received, checks or share drafts paid, or money lent. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements; however, it does not include the credit union's Internet website. This definition also includes a shared branch or a shared branch network if either:

(A) the credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or

(B) the service facility is local to the credit union and the credit union is an authorized participant in the service center.

(22) Overlap--the situation which exists when a group of persons is eligible for membership in two or more state, foreign, or federal credit unions doing business in this state. Notwithstanding this provision, no overlap exists if eligibility for credit union membership results solely from a family relationship.

(23) Person--an individual, partnership, corporation, association, government, governmental subdivision or agency, business trust, estate, trust, or any other public or private entity.

(24) Principal office--the home office of a credit union.

(25) Protestant--a credit union that opposes or objects to the relief requested by an applicant.

(26) Remote service facility--an automated, unstaffed credit union facility owned or operated by, or operated for, the credit union, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispensed, or money lent.

(27) Reserves--allocations of retained earnings including [~~and includes~~] regular and special reserves, except for any allowances for loan, lease or investment losses.

(28) Resident of this state--a person physically located in, living in or employed in the state of Texas.

(29) Respondent--a credit union or other person against whom a disciplinary proceeding is directed by the department.

(30) Shared service center--a facility which is connected electronically with two or more credit unions so as to permit the facility, through personnel at the facility and the electronic connection, to provide a credit union member at the facility the same credit union services that the credit union member could lawfully obtain at the principal office of the member's credit union.

(31) Secured credit--a loan made or extension of credit given upon an assignment of an interest in collateral pursuant to applicable state laws so as to make the enforcement or promise more certain than the mere personal obligation of the debtor or promisor. Any assignment may include an interest in personal property or real property or a combination thereof.

(32) Title--Title 7, Part VI of the Texas Administrative Code (TAC), Banking and Securities, which contains all of the department's rules.

(33) Underserved area--a geographic area, which could be described as one or more contiguous metropolitan statistical areas (MSA) or one or more contiguous political subdivisions, including counties, cities, and towns, that satisfy any one of the following criteria:

(A) A majority of the residents earn less than 80 percent of the average for all wage earners as established by the u. S. Bureau of labor statistics;

(B) The annual household income for a majority of the residents falls at or below 80 percent of the median household income for the nation; or

(C) The commission makes a determination that the lack of available or adequate financial services has adversely effected economic development within the specified area.

(34) Uninsured membership share--funds paid into a credit union by a member that constitute uninsured capital under conditions established by the credit union and agreed to by the member including possible reduction under section 122.105 of the act, risk of loss through operations, or other forfeiture. Such funds shall be considered an interest in the capital of the credit union upon liquidation, merger, or conversion.

(35) Unsecured credit--a loan or extension of credit based solely upon the general credit financial standing of the borrower. The term shall include loans or other extensions of credit supported by the signature of a co-maker, guarantor, or endorser.

(b) (No change.)

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404092
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 837-9236

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SUBCHAPTER B. ORGANIZATION PROCEDURES

7 TAC §91.201

The Credit Union Commission proposes an amendment to rule §91.201 relating to incorporation procedures.

The Credit Union Commission has completed its review of Texas Administrative Code Title 7, Chapter 91, §91.201 relating to incorporation procedures. The Commission believes that the reasons for initially adopting this rule continue to exist; however, it has determined from its review that modifications need to be made to itemize the details needed in the business plan required by Texas Finance Code Section 122.001.

The proposed amendment sets out the items that need to be included in the three year business plan submitted with an application to incorporate. Specifically, the business plan must describe the credit union's business, including the products, member services, and other activities; provide pro forma financial information for the three years of operation, including annual totals for the income statement; describe in detail all of the assumptions used to prepare the projected financial information; discuss the capital goals and the means to achieve them; discuss the overall marketing/advertising strategy to reach potential members; and describe the economic forecast for the three years of the plan.

Kerri T. Galvin, General Counsel, has determined that for each year of the first five years the proposed amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be clarification of the charter application requirements and a more in depth analysis of charter applications increasing the safety and soundness of newly chartered credit unions. There is no anticipated effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions for complying with the amendments if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under the provision of the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and Texas Finance Code Section 122.001, which authorizes the Commission to prescribe the form of charter applications.

The specific section affected by the proposed amendments is Texas Finance Code, Sections 122.001.

§91.201. Incorporation Procedures.

(a) An application to incorporate a credit union shall be in writing and supported by such information and data as the commissioner may require to make the findings necessary for the issuance of a certificate of incorporation.

(b) Business Plan. The application must include a business plan that covers three years and provides detailed explanations of actions that are proposed to accomplish the primary functions of the credit union. The description should provide enough detail to demonstrate that the institution has a reasonable chance for success, will operate in a safe and sound manner, and will maintain adequate capital to support its operations. Specifically the plan must:

(1) Describe the credit union's business, including the products, member services, and other activities;

(2) Provide pro forma financial information for the three years of operation, including annual totals for the Income Statement;

(3) Describe in detail all of the assumptions used to prepare the projected financial information;

(4) Discuss the capital goals and the means to achieve them;

(5) Discuss the overall marketing/advertising strategy to reach potential members; and

(6) Describe the economic forecast for the three years of the plan.

(c) [~~(b)~~] The commissioner shall determine whether or not an application is complete within thirty days of its receipt and provide written notice of the determination. If the application is deemed incomplete, the notice shall provide with reasonable specificity the deficiencies in the application.

(d) [~~(c)~~] Upon the determination that an application is complete, the commissioner shall make or cause to be made an investigation and examination of the facts concerning the applicant. It is essential that the investigation and examination confirm to the satisfaction of the commissioner that the proposed institution will have a reasonable opportunity to succeed.

(e) [~~(d)~~] Proposed credit unions must investigate the possibility of an overlap with existing state or federal credit unions doing business in this state prior to submitting an application. When an overlap situation does arise, officials of the involved entities must attempt to resolve the overlap issue. Typically, an overlap will not be considered adverse to the overlapped credit union if:

(1) the group has less than 3000 primary potential members or the overlap is otherwise incidental in nature;

(2) the overlapped credit union does not object to the overlap;

(3) there is limited participation by members or employees of the group in the original credit union after the expiration of a reasonable period of time; or

(4) a single occupational or associational based credit union overlaps a community chartered credit union.

(f) [~~(e)~~] When the applicant and a credit union agree and/or the commissioner has determined that overlap protection is appropriate, an exclusionary clause will be included in the proposed field of membership for a period of 24 months from the date the proposed credit union commences business. The commissioner, for good cause shown, may extend this period for an additional 24 months.

(g) [~~(f)~~] The commissioner may approve the application conditioned upon specific requirements being met, but the certificate of incorporation shall not be issued unless such conditions have been meet within the time specified in the approval order or any extension as set forth in Finance Code §122.006.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404090
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 837-9236

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SUBCHAPTER C. MEMBERS

7 TAC §91.302

The Credit Union Commission proposes an amendment to rule §91.302 relating to election or other vote by electronic device, absentee ballots, or mail ballots.

The Credit Union Commission has completed its review of Texas Administrative Code Title 7, Chapter 91, §91.302 relating to election or other vote by electronic device, absentee ballots, or mail ballots. The Commission believes that the reasons for initially adopting this rule continue to exist; however, it has determined from its review that certain modifications need to be made.

The amendments add a new subsection (a) requiring that a board of directors have established written election rules, including procedures to control, tabulate and retain ballots, capture invalid ballots; and handle disputed election results and tie votes, before holding an election or other vote by electronic device, absentee ballots, or mail ballots. The amendments also make this rule applicable to special meetings and votes other than just elections.

Kerri T. Galvin, General Counsel, has determined that for each year of the first five years the proposed amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be more clarity and consistency for credit union members voting on credit union matters. There is no anticipated effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions for complying with the amendments if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendment is proposed under the provision of the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and Texas Finance Code Section 122.052, which authorizes the Commission to adopt rules governing balloting.

The specific section affected by the proposed amendments is Texas Finance Code, Section 122.052.

§91.302. Election or Other Vote By Electronic Device, Absentee Ballots, or Mail Ballots.

(a) The board of directors, before holding an election or other vote by the membership that utilizes an electronic device, absentee ballots, or mail ballots, shall establish written election rules, including procedures to: control, tabulate and retain ballots; capture invalid ballots; and handle disputed election results and tie votes.

(b) [~~(a)~~] The use of electronic device, absentee or mail ballots by any credit union shall ensure fair and equitable opportunity for any qualified member to seek office, including a provision for nomination by petition, and providing the appropriate notice and information to all members.

(c) [~~(b)~~] Any elections or other vote held by electronic device[~~, absentee,~~] or mail ballot are subject to the following conditions:

(1) The election tellers shall be appointed by the board of directors;

(2) At least 30 days prior to the annual or special meeting, the board of directors will cause either a printed ballot or notice of a ballot, along with appropriate instructions, to be mailed to all members eligible to vote;

(3) Ballots must be received no later than midnight 5 calendar days prior to the annual or special meeting;

(4) The votes will be tallied by the tellers and the results of the vote will be made public at the annual or special meeting.

(d) [~~(c)~~] In the event of a malfunction of the electronic balloting system, the board of directors may in its discretion order elections or other vote to be held by mail ballot only. The board may make reasonable adjustments to the voting time frames in subsection (c) [~~(b)~~] of this section, or postpone the annual or special meeting if necessary, to complete the elections prior to the annual or special meeting.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404091
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 837-9236

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SUBCHAPTER H. INVESTMENTS

7 TAC §91.802

The Credit Union Commission proposes an amendment to rule §91.802 relating to other investments.

A proposal was previously published for a proposed amendment to §91.802 in the March 12, 2004 issue of the *Texas Register* (29 TexReg 2500). Notice of that version's withdrawal is published in the July 2, 2004 issue. Following the initial publication, one comment was received from an individual, suggesting additional clarifying language regarding definitions, usage of broker-dealers if certain due diligence conditions were met and discretionary control over investments and investment advisers. The Commission felt that these suggestions had merit and wanted to incorporate the suggestions into the proposed amendments. General Counsel advised that adding the revisions would constitute a substantive change to the published proposal. Therefore the Commission chose to withdraw the previously published amendments and publish these revised proposed amendments to §91.802.

The amendments to the rule are proposed to clarify that a credit union's investment policy must contain an appropriate risk management framework of the level of risk in the investment portfolio, including methods for evaluating, monitoring, and managing the various risks associated with its investment activities. The amendments add some new definitions for clarity. In addition, a new subsection (f) was added which impose a new requirement that third-party entities, used by a credit union to purchase or sell investments, must be registered with the Securities and Exchange Commission or be a financial institution. It also allows the purchase and sale of investments through broker-dealers if certain due diligence conditions are met. Finally, a new subsection (g) has been added to deal with discretionary control over investments and investment advisers.

Kerri T. Galvin, General Counsel, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

Ms. Galvin has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be improved safety and soundness given the additional guidance concerning risk management practices and the new restrictions on doing business with investment broker/dealers. There is no anticipated effect on small businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under the provision of the Texas Finance Code, Section 15.402, which authorizes the commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code, Section 124.351, which authorizes the Commission to adopt rules authorizing other investments permissible for credit unions that are responsive to changes in economic conditions or competitive practices and to the need for safety and soundness of credit union investments.

The specific section affected by the proposed amendments are Texas Finance Code, Section 124.351.

§91.802. Other Investments

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

(1) [~~(15)~~] Asset-backed security--A bond, note, or other obligation issued by a financial institution, trust, insurance company, or other corporation secured by either a pool of loans, extensions of credit which are unsecured or secured by personal property, or a pool of personal property leases.

(2) [~~(1)~~] Bailment for hire contract--A contract whereby a third party, bank, or other financial institution, for a fee, agrees to exercise ordinary care in protecting the securities held in safekeeping for its customers; also known as a custodial agreement.

(3) [~~(2)~~] Bankers' acceptance--A time draft that is drawn on and accepted by a bank, and that represents an irrevocable obligation of the bank.

(4) [~~(3)~~] Cash forward agreement--An agreement to purchase or sell a security with delivery and acceptance being mandatory and at a future date in excess of 30 days from the trade date.

(5) Counterparty--An entity with which a credit union conducts investment-related activities in such a manner as to create a credit risk exposure for the credit union to the entity.

(6) [~~(4)~~] Eurodollar deposit--A deposit denominated in U. S. dollars in a foreign branch of a United States financial institution.

(7) [~~(5)~~] Federal funds transaction--A short-term or open-ended transfer of funds to a financial institution.

(8) [~~(6)~~] Financial institution - A bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation, a federal or state-chartered credit union, or the National Credit Union Central Liquidity Facility.

(9) Investment--Any security, obligation, account, deposit, or other item authorized for investment by the Act or this section other than an investment authorized by §124.351(a)(1) of the Act.

(10) [~~(13)~~] Mortgage related security--A security which meets the definition of mortgage related security in United States Code Annotated, Title 15, §78c(a)(41); i.e., a privately-issued security backed by mortgages secured by real estate upon which is located a dwelling, a mixed residential and commercial structure, a residential manufactured home, or a commercial structure.

(11) [~~(14)~~] Nationally recognized statistical rating organization (NRSRO)--A rating organization recognized by the Securities and Exchange Commission.

(12) Ordinary care--The degree of care, which an ordinarily prudent and competent person engaged in the same line of business or endeavor should exercise under similar circumstances.

(13) [~~(7)~~] Repurchase transaction--A transaction in which a credit union agrees to purchase a security from a counterparty and to resell the same or any identical security to that counterparty at a later date and at a specified price.

(14) [~~(8)~~] Reverse repurchase transaction--A transaction whereby a credit union agrees to sell a security to a counterparty and to repurchase the same or any identical security from that counterparty at a future date and at a specified price.

(15) Security--An investment that has a CUSIP number or that is represented by a share, participation, or other interest in property or in an enterprise of the issuer or an obligation of the issuer that:

(A) either is represented by an instrument issued in bearer or registered form or, if not represented by an instrument, is registered in books maintained to record transfers by or on behalf of the issuer;

(B) is of a type commonly traded on securities exchanges or markets or, when represented by an instrument, is commonly recognized in any area in which it is issued or traded as a medium for investment; and

(C) either is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations.

(16) [~~(10)~~] Settlement date--The date originally agreed to by a credit union and a vendor for settlement of the purchase or sale of a security.

(17) [~~(11)~~] Trade date--The date a credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

(18) [~~(12)~~] Yankee dollar deposit--A deposit in a United States branch of a foreign bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, that is licensed to do business in the state in which it is located, or a deposit in a state chartered, foreign controlled bank.

(b) Policy. A credit union may invest funds not used in loans to members, subject to the conditions and limitations of the written investment policy of the board of directors. The investment policy may be part of a broader, asset-liability management policy. The board of directors must review the investment policy at least annually to ensure that the policies adequately address the following issues:

(1) The types of investments that are authorized by the board of directors.

(2) A specific limit on the amount that may be invested in any single investment or investment type.

(3) The delegation of investment authority to the credit union's officials or employees, including the person or persons authorized to purchase or sell investments, and a limit of the investment authority for each individual or committee.

(4) A list of authorized broker-dealers or other third-parties that may be used to purchase or sell investments, and an internal process for assessing the credentials and previous record of the individual or firm.

(5) An appropriate risk management framework for the level of risk in the investment portfolio. This will include specific [~~The~~] methods for evaluating, monitoring, and managing [~~to be used to manage~~] the [~~credit union's~~] credit risk, interest-rate risk, and liquidity risk from the [~~that are associated with its~~] investment[~~-related~~] activities.

(6) A list of authorized third-party safekeeping agents.

(7) If the credit union operates a trading account, the policy shall [~~should~~] specify the persons authorized to engage in trading account activities, trading account size limits, stop loss and sale provisions, time limits on inventoried trading account investments, and internal controls that specify the segregation of risk-taking and monitoring activities [~~that~~] related to trading account activities.

(8) The procedure for reporting to the board of directors investments and investment activities that become noncompliant with the credit union's investment policy subsequent to the initial purchase.

(c) Authorized activities.

(1) General authority. A credit union may contract for the purchase or sale of a security provided that delivery of the security is by regular-way settlement. Regular-way settlement means delivery of a security from a seller to a buyer within the time frame that the securities industry has established for that type of security. All purchases and sales of investments must be delivery versus payment (i.e., payment for an investment must occur simultaneously with its delivery).

(2) Cash forward agreements. A credit union may enter into a cash forward agreement to purchase or sell a security, provided that:

(A) the period from the trade date to the settlement date does not exceed 90 days;

(B) if the credit union is the purchaser, it has written cash flow projections evidencing its ability to purchase the security;

(C) if the credit union is the seller, it owns the security on the trade date; and

(D) the cash forward agreement is settled on a cash basis at the settlement date.

(3) Repurchase transactions. A credit union may enter a repurchase transaction provided:

(A) the purchase price of the security obtained in the transaction is at or below the market price;

(B) the repurchase securities are authorized investments under Texas Finance Code §124.351 or this section;

(C) the credit union has entered into signed contracts with all approved counterparties;

(D) the counterparty is rated no lower than BBB by Standard & Poor's or an equivalent rating by another NRSRO; and

(E) the credit union receives a daily assessment of the market value of the repurchase securities, including accrued interest, and maintains adequate margin that reflects a risk assessment of the repurchase securities and the term of the transaction.

(4) Reverse repurchase transactions. A credit union may enter into a reverse repurchase transaction, which is a borrowing transaction subject to the Act, provided:

(A) any securities received are authorized investments under Texas Finance Code §124.351 and this section;

(B) the credit union has entered into signed contracts with all approved counterparties; and

(C) for transaction with a maturity greater than one month, the credit union receives a monthly assessment of the market value of the securities received, including accrued interest, and maintains adequate margin that reflects a risk assessment of the securities and the term of the transaction.

(5) Federal funds. A credit union may enter into a federal funds transaction with a financial institution, provided that the interest or other consideration received from the financial institution is at the market rate for federal funds transactions and that the transaction has a maturity of one or more business days or the credit union is able to require repayment at any time.

(6) Yankee dollars. A credit union may invest in yankee dollar deposits.

(7) Eurodollars. A credit union may invest in eurodollar deposits.

(8) Bankers' acceptance. A credit union may invest in bankers' acceptances.

(9) Open-end Investment Companies (Mutual Funds). A credit union may invest funds in an open-end investment company established for investing directly or collectively in any authorized investment, including qualified money market mutual funds as defined by Securities and Exchange Commission regulations.

(10) Government-sponsored enterprises. A credit union may invest in government-sponsored enterprise obligations such as Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association and the Student Loan Marketing Association.

(11) Commercial paper. A credit union may invest in commercial paper issued by corporations domiciled within the United States and having a rating of no less than A1 or P1 by Standard & Poor's or Moody's, respectively, or an equivalent rating by a NRSRO.

(12) Corporate bonds. A credit union may invest in corporate bonds which are rated in one of the three highest rating categories by a NRSRO (e.g. Standard & Poor's ratings AAA, AA, and A) and have remaining maturities of five years or less.

(13) Municipal bonds. A credit union may invest in municipal bonds which are rated in one of the three highest rating categories by a NRSRO and have remaining maturities of five years or less.

(14) Mortgage related securities. A credit union may invest in mortgage related securities, except not in the "accrual bond" (or Z-bonds) or the residual interest of the mortgage related security which are rated in one of the three highest rating categories by a NRSRO.

(15) Asset-backed securities. A credit union may invest in asset-backed securities rated in one of the two highest rating categories by a NRSRO provided the underlying collateral is domestic- and consumer-based.

(d) Documentation. A credit union shall maintain files containing credit and other information adequate to demonstrate evidence of prudent business judgement in exercising the investment powers under the Act and this rule. Except for investments that are issued, insured or fully guaranteed as to principal and interest by the U.S. Government or its agencies, enterprises, or corporations or fully insured (including accumulated interest) by the National Credit Union Administration or the Federal Deposit Insurance Corporation, a credit union must conduct and document a credit analysis of the issuing entity and/or investment before purchasing the investment. The credit union must update the credit analysis at least annually as long as the investment is held. Credit and other due diligence documentation for each investment shall be maintained as long as the credit union holds the investment and until it has been both audited and examined. Before purchasing or selling a security, a credit union must obtain either price quotations on the security (or a similarly-structured security) from at least two broker-dealers or a price quotation on the security (or similarly-structured security) from an industry-recognized information provider.

(e) Classification. A credit union must classify a security as hold-to-maturity, available-for-sale, or trading, in accordance with generally accepted accounting principles and consistent with the credit union's documented intent and ability regarding the security.

(f) Purchase or Sale of Investments Through a Third-Party.

(1) A credit union may purchase and sell investments through a broker-dealer as long as the broker-dealer is registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or is a financial institution whose broker-dealer activities are regulated by a federal or state regulatory agency.

(2) Before purchasing an investment through a broker-dealer, a credit union must analyze and annually update the following information.

(A) The background of any sales representative and broker-dealer firm with whom the credit union is doing business, using information available from federal or state securities regulators and securities industry self-regulatory organizations, such as the National Association of Securities Dealers and the North American Securities Administrators Association, about any enforcement actions against the broker-dealer firm, its affiliates, or associated personnel.

(B) If the broker-dealer is acting as the credit union's counterparty, the ability of the broker-dealer and its subsidiaries or affiliates to fulfill commitments, as evidenced by capital strength, liquidity, and operating results. The credit union should consider current financial data, annual reports, reports of nationally-recognized statistical rating organizations, relevant disclosure documents, and other sources of financial information.

(3) Requirements (1) and (2) of this subsection do not apply when a credit union purchases a certificate of deposit or share certificate directly from a bank, credit union, or other financial institution.

(g) Discretionary Control Over Investments and Investment Advisers.

(1) Except as provided in paragraph (2) of this subsection, a credit union must retain discretionary control over its purchase and sale of investments. A credit union has not delegated discretionary control to an investment adviser when the credit union reviews all recommendations from investment adviser and is required to authorize a recommended purchase or sale transaction before its execution.

(2) A credit union may delegate discretionary control over the purchase and sale of investments in and aggregate amount not to exceed 100% of its reserves and undivided earnings at the time of delegation to persons other than the credit union's officials or employees, provided each such person is an investment adviser registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 (15 U.S.C. 80b).

(3) Before transacting business with an investment adviser to which discretionary control has been granted, an annually thereafter, a credit union must analyze the advisor's background and information available from federal and state securities regulators and securities industry self-regulatory organizations, including any enforcement actions against the adviser, associated personnel, and the firm for which the advisor works.

(4) A credit union may not compensate an investment advisor with discretionary control over the purchase and sale of investments on a per transaction basis or based on capital gains, capital appreciation, net income, performance relative to an index, or any other incentive basis.

(5) A credit union must obtain a report from its investment advisor at least monthly that details the investments under the adviser's control and their performance.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404088
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 837-9236

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code, §§70.10, 70.50, 70.70, and 70.73, and the repeal of existing rule §70.91 regarding the industrialized housing and buildings (IHB) program.

The amendment to §70.10 has been proposed to revise the definition of "Alteration" to indicate that only ordinary repairs are not considered alterations. The revision is necessary to correct a discrepancy in the definition of alteration with the procedures approved by the Texas Industrialized Building Code Council, which are adopted by reference in §70.74. The procedures indicate that only ordinary repairs are exempt from the review and inspection requirements for alterations to industrialized buildings and the definition has been revised to reflect this.

The amendments to §70.50(b) and (d) have been proposed to clarify when the clock starts for the retention of records by an industrialized builder, to require that certain records be retained for 10 years instead of 5, to require that the industrialized builder make a copy of the foundation plans available to the department upon request for units installed within the jurisdiction of a municipality, and to require that installation permit holders retain certain records and make those records available to the department upon request. The amendments are necessary to assure that the records necessary to resolve conflicts between industrialized builders or permit holders and local officials or to resolve consumer complaints are available to the department.

The amendments to §70.70(a)(4) have been proposed to require that manufacturers retain a copy of approved documents for a period of 10 years and make a copy of those documents available to the department upon request, to clarify when the clock starts for the retention of records by a design review agency, and to require that the design review agency make a copy of those records available to the department upon request. The amendments are necessary to assure that the records necessary to resolve conflicts between manufactures and local officials and to resolve consumer complaints are available to the department.

The amendments to §70.73(b) have been proposed to set a time limit on the completion of the site inspection requirements for the installation of industrialized housing and buildings, to clarify when the clock starts for the retention of inspection records by inspectors, to require that inspectors make a copy of the inspection report available to the department upon request, and to require that site inspections be recorded on a form and in the format required by the department. The amendments are necessary to assure timely completion of the required site inspections, to assure that inspection records are made available to the department to aid in resolving disputes, and to assure that information necessary to assure compliance with the site inspection requirements of the IHB program is recorded.

The amendments to §70.73(e) have been proposed to require that the industrialized builder retain a copy of the completed inspection report for 10 years, to clarify when the clock starts for the retention of the inspection report, and to require that a copy of the report be provided to the department upon request. The amendments are necessary to assure that inspection records are made available to the department to aid in resolving disputes.

Section 70.91 relates to sanctions, denial, revocation, or suspension of a license because of a criminal conviction. This section is no longer necessary because the Department has issued Criminal Conviction Guidelines pursuant to Texas Occupations Code, §53.025(a) which addresses the factors that the Department considers when determining whether a criminal conviction renders an applicant an unsuitable candidate for the license, or whether a conviction warrants revocation or suspension of a license previously granted.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments and repeal are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed amendments and repeal.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments and repeal are in effect, the public benefit will be the rules will be more concise and clear, and assure that the department can respond quickly to resolve compliance disputes and the public benefit for the proposed repeal will be less redundancy and a better clarification of the rules.

There will be no effect on small or micro-businesses as a result of the proposed amendments and repeal. There may be a very minimal economic cost to persons who are required to comply with the amendments and repeal in the form of increased costs for document retention.

Comments on the proposal may be submitted to William H. Kuntz, Jr., Executive Director, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile 512/475-2872, or electronically: whkuntz@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register*.

16 TAC §§70.10, 70.50, 70.70, 70.73

The amendments are proposed under Texas Occupations Code, Chapter 51 and Chapter 1202 which authorize the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Chapter 1202. No other statutes, articles, or codes are affected by the proposal.

§70.10. Definitions.

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

(1) Alteration--Any construction, other than ordinary repairs [~~repair~~] of the house or building, to an existing industrialized house or building after affixing of the decal by the manufacturer. Industrialized housing or buildings that have not been maintained shall be considered altered.

(2) - (39) (No change.)

(b) - (c) (No change.)

§70.50. Manufacturer's and Builder's Monthly Reports.

(a) (No change.)

(b) Each industrialized builder shall keep records of all industrialized housing, buildings, modules, and modular components that were sold, leased, or installed. These records shall be kept for a minimum of ten [~~five~~] years from the date of successful completion of the final site inspection [~~sale, lease, or installation~~] and shall be made available to the department for review upon request. If the builder is not responsible for the installation, then the records shall be maintained for a period of 5 years from the date of sale or lease and shall be made available to the department upon request. An annual audit of units sold, leased, or installed by the builders shall be conducted by the Department. The audit will identify the modules or modular components by the name and Texas registration number of the manufacturer of each unit and the assigned Texas decal or insignia numbers and the corresponding identification, or serial numbers, as assigned by the manufacturer. The builder [~~builders~~] shall report , or provide , the following information to the Department for each unit identified in the audit within the timeframe set by the audit . [~~:~~]

(1) Evidence [~~evidence~~] of compliance with §70.75 . [~~;~~]

(2) The [~~the~~] address where each unit was installed. If the builder is not responsible for the installation, then the address to where each unit was delivered. If the unit has not been installed, then the address where the unit is stored . [~~;~~]

(3) The [~~the~~] occupancy use of each building containing modules or modular components, i.e., classroom, restaurant, bank, equipment shelter, etc. [~~; and~~]

(4) If [~~if~~] the builder is responsible for the installation and site work, then the builder:

(A) shall, for units installed outside the jurisdiction of a municipality, keep a copy of the foundation plans and keep a copy of the site inspection report in accordance with §70.73. A copy of these documents shall be made available to the department upon request; or

(B) shall, if installed within the jurisdiction of a municipality, provide the name of the city responsible for the site inspection . The department may also request a copy of the foundation plans as part of the audit. [~~; or~~]

(5) If [~~if~~] the builder is not responsible for the installation and site work, or if the builder has transferred the ownership of the unit to another person, then the builder shall provide identification of the installation permit number, assigned by the Department, or builder registration number, assigned by the Department, of the person responsible.

(c) The manufacturer's monthly reports must be filed with the department no later than the 10th day of the following month.

(d) An installation permit holder shall keep a copy of the foundation plans and, for units installed outside the jurisdiction of a municipality, the site inspection report in accordance with §70.73 for a period of ten years from the date of successful completion of the final inspection of the industrialized house or building. A copy of these records shall be provided to the department upon request.

§70.70. Responsibilities of the Registrants--Manufacturer's Design Package

(a) Review and approval. The manufacturer's design package must be reviewed and approved in accordance with the following.

(1) - (3) (No change.)

(4) The DRA will signify approval of a drawing, specification, calculation, or any other document in the manufacturer's design package by applying the council's stamp to each page. An alternate council stamp as approved by the council may be used on all designs, plans, specifications, calculations, and other documentation with the exception of the first or cover page and the table of contents or index pages of the design package. The original council stamp with original signature will be required on these pages. The signature on the original council stamp must be the signature of the manager or chief executive officer of the DRA. The manager or chief executive officer of the DRA must be licensed in the State of Texas as a professional engineer or architect in accordance with the criteria for approval of DRA's established by the council. The stamp shall not be placed on any designs, plans, or specifications which do not meet the requirements of the applicable mandatory building codes or the requirements of these sections. The manufacturer and the DRA shall [~~must~~] keep copies of the approved documents. The manufacturer shall keep a copy of all approved documents for a minimum of ten years from the date the last unit constructed from the documents is shipped and make a copy of these documents available to the Department upon request. The DRA shall keep a copy on file of all approved documents for a minimum of five years from the date that these documents are superseded by adoption of later editions of the mandatory building codes and make a copy of these documents available to the Department upon request. [~~The DRA~~

must keep a copy on file of all approved documents deleted or superseded from a design package for a minimum of five years.] The manufacturer shall [must] make a copy available to the person performing in-plant inspections. A DRA will forward one approved copy of the design package, including additions and revisions, to the department within five days of approval and will return one approved copy to the manufacturer.

(5) - (8) (No change.)

(b) - (f) (No change.)

§70.73. Responsibilities of the Registrants--Building Site Inspections.

(a) (No change.)

(b) When the building site is outside a municipality, or within a municipality that has no building department or agency, a third party inspector will perform the required inspections in accordance with this section and the inspection procedures established by the Texas Industrialized Building Code Council. The on-site inspection is normally accomplished in three phases: foundation inspection, set inspection, and final inspection. The final inspection shall be completed within 180 days of the start of construction. The department may grant an extension upon receipt of a written request that demonstrates a justifiable cause. Site inspections are not required for the installation, on permanent foundations, of unoccupied industrialized buildings not open to the public with a gross area of less than or equal to 400 square feet, such as communication equipment shelters, that are not also classified as a hazardous occupancy by the mandatory building code. The builder, or installation permit holder, is responsible for scheduling each phase of the inspection with the third party inspector. Additional inspections will be scheduled as required for larger structures and to correct discrepancies. The industrialized builder, or installation permit holder, may utilize a different third party inspector for different projects, but may not change the inspector for a project once started without the written approval of the department. The inspector shall provide the builder or permit holder a copy of the site inspection report, [and] shall keep a copy for a minimum of five years from the date of successful completion of the final inspection, and make a copy of the inspection report available to the department upon request. The report shall be on the form and in the format required by the department and the Texas Industrialized Building Code Council. [may be in whatever format the inspector desires as long as the following information is included on the inspection report:]

[(1) dates of all inspections;]

[(2) the name, Texas registration number or license number, and signature of the inspector who performed the inspection;]

[(3) the name and Texas industrialized builder registration number, or the installation permit number, of the person responsible for the foundation and installation. Installation permit numbers are assigned by the Department in accordance with §70.20;]

[(4) the name and Texas registration number of the manufacturer of the modules or modular components inspected;]

[(5) the name and address of the owner of the building or buildings inspected;]

[(6) the complete site address of the modules or modular components inspected;]

[(7) the Texas decal or insignia numbers and manufacturer's identification or serial numbers of the modules or modular components inspected;]

[(8) the building codes the modules or modular components were designed to meet in accordance with the data plate on the building;]

[(9) the occupancy group and the building construction type of the building in accordance with the data plate on the building;]

[(10) a record of all system testing observed; and]

[(11) the date and description of any deviations to the approved plans, unique site completion documentation, or mandatory building codes and the corrective action, including the date of the corrective action, taken by the industrialized builder, or installation permit holder. If no deviations were observed, then this shall be noted on the report. The inspector shall notify the department of any deviations that cannot be corrected or that the builder, or installation permit holder, refuses to correct.]

(c) Destructive disassembly shall not be performed at the site in order to conduct tests or inspections, nor shall there be imposed standards or test criteria different from those required by the approved installation instructions, on-site construction documentation, and the applicable mandatory building code. Nondestructive disassembly may be performed only to the extent of opening access panels and cover plates.

(d) If an inspector finds a structure, or any part thereof, at the building site to be in violation of the approved design package and/or the unique on-site plans and specifications, the inspector shall immediately post a deviation notice and notify the industrialized builder or installation permit holder. The industrialized builder, or installation permit holder, is responsible for assuring that all deviations are corrected and inspected prior to occupation of the building.

(e) The industrialized builder, or installation permit holder, shall not permit occupancy of a structure until a successful final inspection has been completed and a certificate of occupancy issued by the local authorities. For industrialized housing and buildings installed outside the jurisdiction of a municipality, the [The] industrialized builder, or installation permit holder, shall keep a copy of the completed inspection report for the site inspection [in the files] for a minimum of ten [five] years from the date of successful completion of the final inspection and make a copy of the inspection report available to the department upon request.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404266
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-7348

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16 TAC §70.91

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

The repeal is proposed under Texas Occupations Code, Chapter 51 and Chapter 1202 which authorizes the Department to adopt

rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in Texas Occupations Code, Chapter 51 and Chapter 1202. No other statutes, articles, or codes are affected by the repeal.

§70.91. Sanctions--Revocation, Suspension, or Denial Because of a Criminal Record.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404267
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-7348

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PART 6. TEXAS MOTOR VEHICLE BOARD

CHAPTER 111. GENERAL DISTINGUISHING NUMBERS

16 TAC §111.9

The Texas Motor Vehicle Board proposes amendments to §111.9, by adding subsection §111.9(o). The amendment will limit the number of metal dealer license plates a Texas motor vehicle dealer may obtain, depending on the type of license and the number of vehicles sold per year. The proposed subsection provides for a waiver of the limits if a licensee states in writing why the additional plates are necessary to the continuation of the applicant's business.

Metal plates are a benefit to a licensed dealer, allowing the dealer and its employees to drive vehicles in inventory without registering or titling them. Currently, there is no limit on the number of metal dealer plates a dealer can order for business use. A growing trend has been discovered where Texas metal dealer plates are being rented to persons who cannot afford insurance or tax and title fees. Many of these plates are issued to dealers who do not sell or buy vehicles in Texas, but obtain a license solely to obtain plates. The licensee in turn rents plates to people in other states who wish avoid tax and insurance requirements in those states. The amendment is intended to curtail the excessive use of plates by those dealers who do little or no business in Texas and discourage sham license applications.

Brett Bray, Director, Motor Vehicle Board, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Bray has also determined that for each of the first five years the amendment is in effect, the public benefit anticipated from enforcement of the amendment will be a reduction of the number of plates used to avoid tax and insurance requirements within Texas and other states. The rule is expected to increase vehicle registrations, decrease the number of uninsured motorists, and help curb fraudulent dealer license applications. There is no anticipated cost to small business associated with complying with the rule.

Comments on the proposed amendments may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. The deadline for comments is August 20, 2004. Please submit fifteen copies. The Texas Motor Vehicle Board will consider the adoption of the proposed amendments at its meeting on September 9, 2004.

The amendments is proposed under the Texas Transportation Code, §503.002, which provides the Board with authority to amend and adopt rules as necessary and convenient to effectuate the provisions of Transportation Code Chapter 503.

Texas Transportation Code §§503.061, 503.066, 503.068, and 503.069 are affected by the proposed amendment.

§111.9. Metal Dealer License Plates and Temporary Cardboard Tags.

(a) - (n) (No change.)

(o) The number of metal dealer plates a dealer may order for business use shall be allocated based on the type of license applied for and the number of vehicles sold during the previous year. New license applicants shall be allotted a predetermined number of metal dealer plates during the first license term.

(1) New license applicants may receive metal dealer plates during the first term of licensure in accordance with the following schedule:

(A) Franchised motor vehicle dealer - 5

(B) Franchised motorcycle dealer - 5

(C) Independent motor vehicle dealer - 2

(D) Independent motorcycle dealer - 2

(E) Franchised or independent travel trailer dealer - 2

(F) Utility trailer or semi-trailer dealer - 2

(G) Wholesale dealer - 1.

(2) A newly licensed dealership is not subject to the initial allotment limits described in paragraph (1), and may rely on the previous license status to obtain dealer plates, if it is:

(A) a franchised dealership that has been subject to a buy-sell agreement, regardless of a change in the entity or ownership, or

(B) any dealership that relocates, if it has been licensed for a period of one year or more.

(3) Upon renewal, the maximum number of dealer plates issued to a motor vehicle dealer per license term shall be as follows:

(A) Franchised motor vehicle dealer - 30

(B) Franchised motorcycle dealer - 10

(C) Independent motor vehicle dealer - 3

(D) Independent motorcycle dealer - 3

(E) Franchised or independent travel trailer dealer - 3

(F) Utility trailer or semi-trailer dealer - 3

(G) Wholesale dealer - 1.

(4) To obtain more than the maximum number of plates set out in paragraph (3), a dealer must submit proof of sales to qualify for additional plates.

(A) Additional plates above the amounts set out in paragraph (3) shall be as follows:

(i) Wholesale Dealers - 1

(ii) Dealers selling less than 50 vehicles - 1

(iii) Dealers selling 50 to 99 vehicles - 2

(iv) Dealers selling 99 to 200 vehicles - 5

(v) Dealers selling 201 or more vehicles may obtain any number of dealer plates at the dealer's discretion.

(B) Proof of sales shall consist of a copy of the most recently filed Vehicle Inventory Tax Declaration or monthly statements duly filed with the proper taxing authority in the county of the dealership's location. Said copies should be stamped received by the tax authority. Any franchised dealer's renewal license application that indicates sales of 201 or more units shall be considered proof of sales of 201 or more and no additional proof is needed.

(5) The director or director's designee may waive the dealer plate issuance restrictions if the waiver both serves the purposes of this chapter and is essential to the continuation of the business. To determine the number of dealer plates the dealer needs, the director or the director's designee may base the decision on the dealer's past sales, inventory and any other pertinent factors as the director may determine.

(A) All requests for waivers shall be in writing and specifically state why the additional plates are necessary to the continuation of the applicant's business;

(B) All requests for waivers must be accompanied by proof of the dealer's sales for the previous year. Such proof shall consist of a copy of the most recently filed Vehicle Inventory Tax Declaration or monthly statements duly filed with the proper taxing authority in the county of the dealership's location. Said copies should be stamped received by the tax authority.

(C) Wholesale dealers may not apply for waiver of dealer plate issuance restrictions.

(D) Once a waiver is granted authorizing a certain number of plates, the authorization under that waiver is good for three (3) years.

(E) Waivers issued by the director or the director's designee shall be reported to the Board.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404086
Brett Bray
Director
Texas Motor Vehicle Board
Proposed date of adoption: September 9, 2004
For further information, please call: (512) 416-4899

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16 TAC §111.10

The Texas Motor Vehicle Board of the Texas Department of Transportation proposes amendments to §111.10 by adding paragraph (5), requiring public posting of a dealer's license at its place of business.

The addition of §111.10(5) requires a dealer to conspicuously display to the public the license issued by the Board at each place of business maintained by the dealer. This will inform the public that they are dealing with a properly licensed business.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five year period the proposed section is in effect, there will no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Bray also determined that for each year of the first five years the amendment is in effect, the anticipated public benefit will be to more easily determine the current license status of any dealer while at the dealership. The rule will be of no cost to small businesses. Mr. Bray has also certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the section.

Comments (15 copies), may be submitted to Brett Bray Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78767, (512) 416-4899. The Motor Vehicle Board will consider adoption of this proposed rule at its meeting on September 9, 2004. The deadline for comments on the proposed new rule is 5:00 p.m. on August 20, 2004.

The amendment is proposed under the Texas Occupations Code §2301.155, and Texas Transportation Code §503.002, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Texas Transportation Code §503.038 is affected by the proposed amendment.

§111.10. Established and Permanent Place of Business.

All dealers must meet the following requirements at each location where vehicles are sold or offered for sale.

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

(5) A dealer shall at all times display the dealer license issued by the Board in a manner that makes the license easily readable by the public, in a conspicuous place at each place of business for which it is issued. For dealers whose license applies to more than one location, a copy of the original license may be displayed in the supplemental location.

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

Filed with the Office of the Secretary of State on June 24, 2004.

TRD-200404220
Brett Bray
Director
Texas Motor Vehicle Board
Proposed date of adoption: September 9, 2004
For further information, please call: (512) 416-4899

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER J. CERTIFICATION REQUIREMENTS FOR EDUCATORS OTHER THAN CLASSROOM TEACHERS AND EDUCATIONAL AIDES

19 TAC §230.305

The State Board for Educator Certification proposes amendments to the following section of 19 TAC Chapter 230, Subchapter J: §230.305, relating to the creation of probationary certificates which are valid up to three years for assistant principals, principals and superintendents, including mentoring support and internships, to replace the five-year temporary certificates for these assignments.

The proposed amendments to §230.305 allow individuals to obtain a probationary certificate for up to a three-year period while completing the requirements for the certificate being sought. This would reduce the number of years allowed to complete the certificate requirements from five to a maximum of three and provide mentor support for the internship.

The proposed amendments to §230.305 also establish a deadline of May 31, 2005 to apply for a Temporary Assistant Principal, Temporary Principal and Temporary Superintendent Certificate under Chapter 230, Subchapter J. This would allow time for educator preparation programs to restructure their certificate programs, if necessary. Additionally, these amendments would provide that Temporary Assistant Principal, Temporary Principal or Temporary Superintendent Certificates issued on or before the May 31, 2005 deadline will be valid for five years, allowing time for candidates to complete the requirements of the certificate being sought.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Lisa Patterson, Legal Services, State Board for Educator Certification, 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 efficient and updated rules governing the assignment of public school educators. The purpose of the rules is to create probationary certificates which are valid up to three years for assistant principals, principals and superintendents, including mentoring support and internships, to replace the five-year temporary certificates for these assignments.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Legal Services, State Board for Educator Certification, Capitol Station, P.O. Box 12728, Austin, Texas 78711-2728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §230.305 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.305. Temporary Certificate.

(a) - (c) (No change.)

(d) Effective May 31, 2005, no certificates will be issued pursuant to §230.305. However, any certificate issued pursuant to §230.305 on or before May 31, 2005 will remain effective until its stated expiration date.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404171
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.436

The State Board for Educator Certification proposes amendments to the following section of 19 TAC Chapter 230, Subchapter N: §230.436, relating to the schedule of fees for certification services provided by the State Board for Educator Certification.

The proposed amendments to §230.436 allow establish fees for renewal of the standard and educational aide certificates, reactivation of an inactive certificate, late renewal, and reinstatement following restitution for default on student loan or nonpayment of child support. The Board will also be able to offer "e-pay" options for those services.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the rules are in effect, there will be no net fiscal implications for state

as a result of enforcing or administering the rules, because fees were set to be cost recovery only. No significant costs are anticipated to local government as a result of enforcing or administering the rules.

Lisa Patterson, Legal Services, State Board for Educator Certification, has determined that for each year of the first five years the rules are in effect, the public benefits by requiring applicants for certification to pay for certification services rendered by SBEC and by providing those individuals possessing a standard five year certificate notice of the fees required for renewal of those certificates.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Legal Services, State Board for Educator Certification, Capitol Station, P.O. Box 12728, Austin, Texas 78711-2728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §230.436 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators; Section 21.041(c), which authorizes SBEC to adopt a fee for the issuance and maintenance of an educator credential that is adequate to cover the cost of administration; and Section 2001.034 and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.436. Schedule of Fees for Certification Services.

An applicant for a certificate or a school district requesting a permit shall pay the applicable fee from the following list.

(1) - (12) (No change.)

(13) On-time renewal of Standard Educational Aide certificate--$10

(14) Additional fee for late renewal of Standard Educational Aide certificate--$5

(15) Reactivation of a inactive Standard Educational Aide certificate--$15

(16) Reinstatement following restitution of child support or student loan repayment for Standard Education Aide Certificate--$20

(17) One-time renewal of Standard certificate (to include any paraprofessional certificates if held)--$20

(18) Additional fee for late renewal of Standard certificate--$10

(19) Reactivation of an inactive Standard certificate--$40

(20) Reinstatement following restitution of child support or student loan repayment--$50

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404170
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 936-8239

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19 TAC §230.438

The State Board for Educator Certification proposes the following new section of 19 TAC Chapter 230, Subchapter N: §230.438, relating to the creation of an e-Pay supplemental fee to provide for the cost recovery of the E-Commerce proposal.

The proposed new rule §230.438 allows the Board to charge a fee to recover the costs of implementing the SBEC E-Commerce proposal. Benefits to SBEC customers will be: (1) additional methods of payment will be accepted including MasterCard, Visa, Discover, and American Express credit cards, as well as through the automated clearing house (ACH); (2) those choosing to pay via credit card may find the ability to spread payments over a number of months to be a benefit; and (3) processing time for credentials dependent on the receipt of funds should be reduced for those who elect to pay via credit card or ACH as compared to a longer processing time for those who choose to pay via traditional check through the U.S. mail.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the rules are in effect, there will be no net fiscal implications for state as a result of enforcing or administering the rules, because fees were set to be cost recovery only. Costs to school districts will increase only to the extent that they pay for certifications on behalf of educators. Impact to school districts will be $2 per permit or other license service request per the fee schedule.

Lisa Patterson, Legal Services, State Board for Educator Certification, has determined that for each year of the first five years the rules are in effect, the public benefits by expedited processing of the required fees for certification services, which will in turn result in faster issuance of educators' certifications.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed new rule would be a governmental action providing for the certification of a public school educator and

regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed new rule may be submitted to Lisa Patterson, Legal Services, State Board for Educator Certification, Capitol Station, P.O. Box 12728, Austin, Texas 78711-2728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed new §230.438 is proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators; Section 21.041(c), which authorizes SBEC to adopt a fee for the issuance and maintenance of an educator credential that is adequate to cover the cost of administration; and Section 2001.034 and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed new rule.

§230.438. E-Pay Supplemental Fee.

An applicant for a certificate or a school district requesting a permit shall pay a supplemental fee of $2 in addition to the fees outlined in §230.436 of this title, for the purpose of recovering the costs of the TexasOnline Initiative, with the exception of the following fees set forth in §230.436 of this title:

(1) On-time renewal of Standard Educational Aide certificate--$10

(2) Additional fee for late renewal of Standard Educational Aide certificate--$5

(3) Reactivation of an inactive Standard Educational Aide certificate--$15

(4) On-time renewal of Standard certificate (to include any paraprofessional certificates if held)--$20

(5) Additional fee for late renewal of Standard certificate--$10

(6) Reinstatement following restitution of child support or student loan repayment--$50

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404172
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER U. ASSIGNMENT OF PUBLIC SCHOOL PERSONNEL

19 TAC §230.601

(Editor's Note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §230.601 is not included in the print version of the Texas Register. The figure is available in the on-line issue of the July 9, 2004, issue of the Texas Register.)

The State Board for Educator Certification proposes amendments to § 230.601 of 19 TAC Chapter 230, Subchapter U, relating to eligibility requirements for the assignment of certified educators to teach Gifted and Talented courses.

The proposed amendments to 19 TAC Chapter 230, Subchapter U §230.601 will allow certified teachers who are assigned to teach Gifted and Talented courses prior to the 2005-2006 school year to continue to teach the courses, provided those teachers stay current through documented annual continuing education and professional development directly related to Gifted and Talented education.

The Board approved standards and a new supplemental certificate for Gifted and Talented in October 2001. At that time, members of the advisory committee who created the standards for the Gifted and Talented certificate expressed that the supplemental certificate should be required to teach in a Gifted and Talented program to ensure that the special needs of Gifted and Talented students are met.

In April 2004, the Board adopted rules for the Gifted and Talented Supplemental Certificate, which will replace the current Gifted and Talented Endorsement on September 1, 2005. Those rules specify that the holders of the supplemental certificate may teach students in a Gifted and Talented program at the same grade levels and in the same content area(s) of the holder's base certificate. However, the rules do not clearly indicate that the supplemental certificate is required for assignment.

The rules for the new Gifted and Talented Supplemental Certificate were adopted in April 2004 with the intent that SBEC will not require educators who hold one of the optional Gifted and Talented Endorsements to obtain the new Gifted and Talented Supplemental Certificate. 19 TAC, Chapter 230, Subchapter U, Assignment of Public School Personnel, contains the requirements for assignment of certified educators who do not hold one of the new TExES-based certificates. The amendments will allow certain certified educators to retain their eligibility to be assigned to teach Gifted and Talented courses, provided they adhere to the requirement for annual continuing education and professional development in gifted education as specified in State Board of Education rules.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 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 efficient and updated rules governing the assignment of public school educators.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, Capitol Station, P.O. Box 12728, Austin, Texas 78711-2728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed new 19 TAC Chapter 230, Subchapter U is proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.601. Assignment of Public School Personnel.

(a) - (e) (No change.)

(f) A public school employee must have the appropriate credentials for his or her current assignment specified in the charts in this section or elsewhere in this title, unless the appropriate permit has been issued under Subchapter Q of this chapter (relating to Permits).
Figure: 19 TAC §230.601(f)

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404096
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 936-8239

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TITLE 22. EXAMINING BOARDS

PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

CHAPTER 1. ARCHITECTS

SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §§1.9 - 1.11, 1.13, 1.14

(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 Board of Architectural Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Architectural Examiners proposes the repeal of §1.9, pertaining to officers and employees; §1.10, pertaining to committees; §1.11, pertaining to official seal; §1.13, pertaining to Robert's Rules of Order; and §1.14, pertaining to procedure for addressing the board for Title 22, Chapter 1, Subchapter A. The Board is proposing the repeal of these rules because the Board is proposing the creation of other rules that would address the same subjects addressed by these rules in a new Chapter 7 of Title 22, relating to the administration of the agency, procedures relating to the operation of the Board, and the schedule of fees charged for services rendered by the agency.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be to avoid the duplication of these rules in the proposed Title 22, Chapter 7 and to prevent confusion resulting from differences in the repealed rules and the proposed new rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

The proposed repeal does not affect any other statutes.

§1.9. Officers and Employees.

§1.10. Committees.

§1.11. Official Seal.

§1.13. Robert's Rules of Order.

§1.14. Procedure for Addressing the Board.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404244
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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SUBCHAPTER E. FEES

22 TAC §1.81

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

The Texas Board of Architectural Examiners proposes the repeal of §1.81, pertaining to fees for Title 22, Chapter 1, Subchapter E. The Board is proposing the repeal of this rule because the Board is proposing the adoption of an identical rule within a new Chapter 7 the Board is proposing, which would include current and new rules relating to agency administration and Board procedures.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be the elimination of duplicative rules. The fee rule will be located in one chapter relating to the administration and management of the agency instead of identical fee rules appearing in three separate chapters relating to the regulation of architecture, landscape architecture, and interior design, under the current compilation of the rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

This proposed repeal does not affect any other statutes.

§1.81. General.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404245
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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CHAPTER 3. LANDSCAPE ARCHITECTS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §§3.9 - 3.11, 3.13, 3.14

(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 Board of Architectural Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Architectural Examiners proposes the repeal of §3.9, pertaining to officers and employees; §3.10, pertaining to committees; §3.11, pertaining to official seal; §3.13, pertaining to Robert's Rules of Order; and §3.14, pertaining to procedure for addressing the board for Title 22, Chapter 3, Subchapter A. The Board is proposing the repeal of these rules because the Board is proposing the creation of other rules that would address the same subjects addressed by these rules in a new Chapter 7 of Title 22, relating to the administration of the agency, procedures relating to the operation of the Board, and the schedule of fees charged for services rendered by the agency.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be to avoid the duplication of these rules in the proposed Title 22, Chapter 7 and to prevent confusion resulting from differences in the repealed rules and the proposed new rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

This proposed repeal does not affect any other statutes.

§3.9. Officers and Employees.

§3.10. Committees.

§3.11. Official Seal.

§3.13. Robert's Rules of Order.

§3.14. Procedure for Addressing the Board.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404246
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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SUBCHAPTER C. EXAMINATION

22 TAC §3.42

The Texas Board of Architectural Examiners proposes an amendment to §3.42, pertaining to the administration and scoring of the landscape architect registration examination for Title 22, Chapter 3, Subchapter C. The proposed amendment is to conform the rule to changes made by the examination provider in the scheduling of the examination and the manner in which the examination is to be administered. The rule

currently states that the examination will be administered by the Board twice annually. Under the Board's contract with the Council of Landscape Architectural Registration Boards, the organization that sells the examination to the Board, the entire examination will no longer be administered twice per year. Pursuant to the contract, the Board will administer one portion of the examination twice per year and the Council, under contract with the Board, will administer a multiple choice portion of the examination via computer on a separate date at test centers. Under the contract, a candidate will have the option of selecting one of several dates to sit for the multiple choice portion of the examination. The proposed amendment to the rule would delete deadlines applicable to the former procedures for administering the examination. Pursuant to the proposed amendment, the deadline for applying to take a portion of the examination would be four months prior to the earliest date upon which the examinee would be able to sit for that portion of the examination. The proposed amendment would delete a requirement that candidates present an identification card that currently is provided to candidates for admission to the examination. The Council will no longer issue the identification cards. The proposed amendment would require the presentation of an official form of identification bearing a recent photograph of the candidate in order for the candidate to gain admission to the examination. The proposed amendment also would delete a provision that allows a candidate to review his or her examination, after receiving the results of the examination. Pursuant to the contract with the examination provider, a portion of the examination will be administered on computers. There will be no copy of that portion of the examination on paper that may be reviewed. It is likely that the entire examination will be administered on computer in the future and that no record of the examination will exist on paper that may be reviewed. Therefore, the proposed amendment would delete the provision for reviewing the examination from the rule.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed amendment is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the amendment.

Ms. Hendricks has also determined that for each year of the first five years after the proposed amendment, the public benefits anticipated as a result of the amendment will be to provide accurate information on the manner in which the examination will be administered pursuant to the Board's contract with the examination provider. In addition, pursuant to the proposed amendment of the rule, the public will benefit from the requirement that the schedule for administering different portions of the examination be posted on the Board's Web site. Without the proposed amendment, the rule would mislead the public in representing that the Board will be administering the examination twice per year. The proposed amendment is not expected to impact small business significantly. No significant economic cost to persons affected by the amendment is expected as a result of the amendment.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The amendment is proposed pursuant to Section 1052.153 of the Tex. Occupations Code Annotated ch. 1052, which requires the Board to prescribe the scope of the examination to receive a certificate of registration as a landscape architect, and to approve the examination, and to administer the examination. The amendment is also proposed pursuant to Section 1051.202 of the Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules to administer laws enforced by the Board.

This proposed amendment does not affect any other statutes.

§3.42. Examination Administration and Scoring.

(a) An Applicant must apply for landscape architectural registration by examination through CLARB as described in Section 3.23.

(b) An Applicant's application and supporting documentation to take a portion of the LARE must be postmarked or received by the Board no later than four (4) months before the earliest date upon which that portion of the LARE is to be administered. The Board shall publish the examination schedule and the application deadline for each portion of the examination on its Web site. [~~The LARE shall be administered by the Board twice annually in June and December.~~]

[~~(c) In order for an Applicant to take the LARE in June, the Applicant's application and supporting documentation must be postmarked or received by the Board no later than February 1st. In order for an Applicant to take the LARE in December, the Applicant's application and supporting documentation must be postmarked or received by the Board no later than August 15th. If the deadline falls on a date when the Board's office is closed, the application and supporting documentation must be postmarked or received by the Board no later than the next date when the Board's office is open.~~]

(c) [~~(d)~~] A Candidate who is approved to take the LARE must appear personally for examination as directed in the notification letter sent to the Applicant. In order to be admitted for examination, the Candidate must present an [~~the candidate's identification card that was mailed to the Candidate prior to the examination date and must present a separate~~] official form of identification bearing a recent photograph of the Candidate.

(d) [~~(e)~~] Each Candidate shall be responsible for taking to the examination all tools necessary to complete the examination.

(e) [~~(f)~~] An explanation of the scoring procedures for the LARE shall be provided to each Candidate before the examination is administered to the Candidate.

(f) [~~(g)~~] A Candidate's LARE scores shall be determined by CLARB. The Board shall not review any LARE score to determine its validity.

[~~(h) A Candidate may review his/her own examination by requesting review within 14 days of receipt of the results of the examination. The Candidate must complete the review within 20 days of the date the Candidate receives confirmation that the Candidate may review the examination.~~]

(g) [~~(i)~~] If, for any reason, a Candidate takes a section or sections of the LARE but does not receive a score for the section or sections, the Board shall have no liability beyond authorizing the Candidate to retake the section or sections with the corresponding fee waived.

(h) [~~(j)~~] Each Candidate's examination material shall be retained by CLARB for a period of one year following the date the examination was administered.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404247

Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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SUBCHAPTER E. FEES

22 TAC §3.81

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

The Texas Board of Architectural Examiners proposes the repeal of §3.81, pertaining to fees for Title 22, Chapter 3, Subchapter E. The Board is proposing the repeal of this rule because the Board is proposing the adoption of an identical rule within a new Chapter 7 the Board is proposing, which would include current and new rules relating to agency administration and Board procedures.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be the elimination of duplicative rules. The fee rule will be located in one chapter relating to the administration and management of the agency instead of identical fee rules appearing in three separate chapters relating to the regulation of architecture, landscape architecture, and interior design, under the current compilation of the rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

This proposed repeal does not affect any other statutes.

§3.81. General.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404248
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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CHAPTER 5. INTERIOR DESIGNERS
SUBCHAPTER A. SCOPE; DEFINITIONS

22 TAC §§5.9 - 5.11, 5.13, 5.14

(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 Board of Architectural Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Board of Architectural Examiners proposes the repeal of §5.9, pertaining to officers and employees; §5.10, pertaining to committees; §5.11, pertaining to official seal; §5.13, pertaining to Robert's Rules of Order; and §5.14, pertaining to procedure for addressing the board for Title 22, Chapter 5, Subchapter A. The Board is proposing the repeal of these rules because the Board is proposing the creation of other rules that would address the same subjects addressed by these rules in a new Chapter 7 of Title 22, relating to the administration of the agency, procedures relating to the operation of the Board, and the schedule of fees charged for services rendered by the agency.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be to avoid the duplication of these rules in the proposed Title 22, Chapter 7 and to prevent confusion resulting from differences in the repealed rules and the proposed new rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

This proposed repeal does not affect any other statutes.

§5.9. Officers and Employees.

§5.10. Committees.

§5.11. Official Seal.

§5.13. Robert's Rules of Order.

§5.14. Procedure for Addressing the Board.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404249
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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SUBCHAPTER E. FEES

22 TAC §5.91

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

The Texas Board of Architectural Examiners proposes the repeal of §5.91, pertaining to fees for Title 22, Chapter 5, Subchapter E. The Board is proposing the repeal of this rule because the Board is proposing the adoption of an identical rule within a new Chapter 7 the Board is proposing, which would include current and new rules relating to agency administration and Board procedures.

Cathy L. Hendricks, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, there are expected to be no significant fiscal implications for state or local government as a result of the repeal.

Ms. Hendricks has also determined that for each year of the first five years after the repeal, the public benefits anticipated as a result of the repeal will be the elimination of duplicative rules. The fee rule will be located in one chapter relating to the administration and management of the agency instead of identical fee rules appearing in three separate chapters relating to the regulation of architecture, landscape architecture, and interior design, under the current compilation of the rules. The repeal is not expected to impact small business significantly. No significant economic cost to persons affected by the repeal is expected as a result of the repeal.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

The repeal is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which grants to the Board general authority to adopt rules as needed to administer the laws under the Board's jurisdiction.

This proposed repeal does not affect any other statutes.

§5.91. General.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404250
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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CHAPTER 7. ADMINISTRATION

22 TAC §§7.1 - 7.10

The Texas Board of Architectural Examiners proposes new §§7.1 - 7.10 under a new Chapter 7 titled "Administration" for Title 22, pertaining to the administration of Board meetings, agency operations, and the schedule of fees imposed for services rendered by the Board. Proposed Chapter 7 includes new rules to replace rules that currently appear in Chapter 1, "Architects," Chapter 3, "Landscape Architects," and Chapter 5, "Interior Designers," of Title 22. These rules do not apply directly to the regulation of architecture, landscape architecture, and interior design in that they address agency operations or the conduct of Board meetings. Proposed Chapter 7 consolidates the rules so that they may be repealed from Chapters 1, 3, and 5. Proposed Chapter 7 also includes new rules that currently do not appear in Chapter 1, Chapter 3, or Chapter 5 to implement legislation enacted by the 78th Legislature, Regular Session. The Texas Board of Architectural Examiners proposes the following new rules for Chapter 7.

Rule 7.1 restates the statutory requirement that the Chairman of the Board be appointed by the Governor, and that the Board shall elect a Vice-Chairman and a Secretary-Treasurer. Rule 7.1 also requires the Board to employ an Executive Director to hire and manage staff at the Board's office. The rule requires the Board to establish an annual budget and to follow the rules of the Texas Building and Procurement Commission relating to Historically Underutilized Businesses. Rule 7.1 includes the substance of current Rules 1.9, 3.9, and 5.9 which will be repealed.

Rule 7.2 implements a policy to separate the responsibilities of the Board from the responsibilities of the Executive Director and staff of the Board. Rule 7.2 specifies that the Board's policymaking responsibilities include adopting rules, disciplining persons registered by the Board, and exercising other powers delegated by the Legislature. Rule 7.2 lists the management responsibilities of the Executive Director and the staff of the Board, including the Executive Director's responsibility for employing and managing staff, fulfilling the administrative requirements of agency regulations, issuing subpoenas as part of investigations, and procuring services and materials as required to manage the agency. Rule 7.2 does not include the substance of any pre-existing rule.

Rule 7.3 allows the Chairman of the Board to appoint committees of the Board necessary to conduct the business of the Board. Rule 7.3 is identical to current Rules 1.10, 3.10, and 5.10 which will be repealed.

Rule 7.4 adopts an official seal of the Board and would describe the official seal. Rule 7.4 includes the substance of Rules 1.11, 3.11, and 5.11 but also includes a more detailed description of the seal. Rules 1.11, 3.11, and 5.11 will be repealed and replaced by Rule 7..

Rule 7.5 requires the Board to use Robert's Rules of Order in conducting meetings of the Board, except where the law requires otherwise. Rule 7.5 is identical to current Rules 1.13, 3.13, and 5.13, which will be repealed and replaced by Rule 7.5.

Rule 7.6 specifies procedures for addressing the board. Rule 7.6 requires the Board to include "Public Comment" as a topic on the agenda for each Board meeting. The rule limits each presentation by a member of the public to five minutes unless the Board extends the period for the presentation. The rule limits the Board's responses to, and deliberations upon, inquiries on matters not on the agenda in accordance with the Texas Open Meetings Act. Rule 7.6 is identical to current Rules 1.14, 3.14, and 5.14 which will be repealed and replaced by Rule 7.6.

Rule 7.7 implements procedures for the Board to engage in negotiated rulemaking pursuant to a requirement enacted by the 78th Legislature, Regular Session. Rule 7.7 specifies the procedure for a person to petition the Board to adopt a new rule or to amend an existing Rule. The Rule allows the Board to utilize the methods specified in Chapter 2008, Texas Government

Code, for negotiating the substance of a rule. The Rule prohibits the Board from negotiating a rule that is outside the statutory authority of the Board. The substance of Rule 7.7 does not exist in a current rule.

Rule 7.8 implements a policy that encourages the use of alternative dispute resolution procedures for early resolution and settlement of the Board's disciplinary cases and internal personnel disputes, pursuant to a requirement enacted by the 78th Legislature, Regular Session. Rule 7.8 requires the Executive Director to designate at least one employee to serve as the alternative dispute resolution coordinator and specifies the role of the coordinator. Rule 7.8 also allows any party to a dispute to request resolution through any manner specified Chapter 154 of Tex. Civil Practices and Remedies Code Annotated relating to alternative dispute resolution in civil actions. The Rule allows for the allocation of the costs of alternative dispute resolution. Under the Rule, any agreement that purports to bind the Board would be subject to the approval of the Board at a meeting subject to the Texas Open Meetings Act. The Rule clarifies that any records arising from alternative dispute resolution would be subject to the Texas Public Information Act.

Rule 7.9 implements a procedure for contractors and prospective contractors who seek to contract with the agency to protest procurement decisions made by the agency. The Board is required to adopt a procurement protest procedure that is modeled upon the protest procedure adopted by the Texas Building and Procurement Commission, pursuant to Section 2155.076 of Tex. Government Code Annotated ch. 2155. Under the procedure, a protesting contractor or prospective contractor may file a protest with the procurement director, may appeal the procurement director's decision to the Executive Director, and may appeal the Executive Director's determination to the Board. The Board's decision is the final action on the protest. The agency will be required to cease the procurement process upon the timely filing of the protest, unless the Executive Director determines in writing that the procurement without delay is in the best interests of the state. The Rule specifies the deadline for filing the protest, the parties who must be issued notice of the protest, and the contents of the written protest.

Rule 7.10 specifies a schedule of fees for various services rendered by the Board. Rule 7.10 and all the fees listed in the rule are identical to current Rules 1.81, 3.81, and 5.91, which will be repealed and replace by Rule 7.10.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rules are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering these rules as proposed. Most of the rules to be adopted in Chapter 7 are already in effect. The new rules regarding negotiated rulemaking, alternative dispute resolution, and protests by contractors are mandated by statutes which were determined to have no significant fiscal impact. Therefore, the rules, as proposed, will have no significant fiscal impact.

Cathy L. Hendricks, Executive Director, Texas Board of Architectural Examiners, has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of the new rules are as follows: by repealing rules that are currently in three separate chapters and consolidating them in one new chapter, the rules should be easier to access. Furthermore, the current three chapters will be shorter and easier to use. By specifying the procedures for engaging in negotiated rulemaking and alternative dispute resolution, there would be a public benefit in having greater input in the substance of the Board's rules and in reaching a resolution of disputes in a more efficient, less costly manner. There is no anticipated economic cost to parties arising from Rule 7.8 because the use of alternative dispute resolution methods is voluntary and the distribution of costs would be subject to agreement with the agency. There may be a minor cost to persons, including small businesses and micro-businesses, who are contractors required to follow Rule 7.9 to protest a procurement decision made by the agency. There may also be cost to contractors whose contract award is delayed pending the outcome of such a protest. However, in the absence of the procedures outlined in the rule, a protest by a prospective contractor would also delay a contract award. The delay under such circumstances would likely be longer if specific procedures for resolving the complaint were not in place. Therefore, the cost, if any, to persons required to follow the rule are not attributable to the rule because a procurement protest would delay the award of the contract regardless of whether protest procedures outlined in the rule existed.

Comments may be submitted to Cathy L. Hendricks, ASID/IIDA, Executive Director, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

New Rule 7.1 is proposed pursuant to Section 1051.107 of Tex. Occupations Code Annotated ch. 1051, which provides that the Governor shall designate a member of the Board to serve as the presiding officer and that the Board shall elect an assistant presiding officer and a secretary-treasurer; Section 6(a) of Article 8930 of Tex. Civil Statutes Annotated which requires the Board to adopt an annual budget; and Section 2161.003 of Tex. Government Code Annotated which requires the agency to adopt the rules of the Texas Building and Procurement Commission regarding Historically Underutilized Businesses as its own rules. New Rule 7.2 is proposed pursuant to Section 1051.153 of Tex. Occupations Code Annotated ch. 1051 which requires the Board to develop and implement a policy separating the policymaking functions of the Board from the management functions of the Board's staff. New Rule 7.3 is proposed pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 which provides the Board with general authority to adopt rules necessary to the administration of its statutory responsibilities. New Rule 7.4 is proposed pursuant to Section 1051.206 of Tex. Occupations Code Annotated ch. 1051 which requires the Board to adopt an official seal for use on official documents and specifies certain mandatory details of the seal. New Rule 7.5 is adopted pursuant to Section 1051.202 of Tex. Occupations Code Annotated ch. 1051 with provides the Board with general authority to adopt rules necessary to the administration of its statutory duties. New Rule 7.6 is proposed pursuant to Section 1051.254 of Tex. Occupations Code Annotated ch. 1051, which requires the Board to develop and implement policies that provide the public a reasonable opportunity to appear before the Board and speak on any issue under the Board's jurisdiction; and under Section 551.042 of Tex. Government Code Annotated ch. 551, which allows a person to petition the Board for the adoption of rules. New Rule 7.7 is proposed pursuant to Section 1051.211(a)(1) of Tex. Occupations Code Annotated ch. 1051, which requires the Board to implement a policy to encourage the use of negotiated rulemaking in the adoption of Board rules. New Rule 7.8 is adopted pursuant to Section 1051.211(a)(2), (b), and (c) of Tex. Occupations Code Annotated ch. 1051, which requires the Board to implement a policy to encourage the use of alternative dispute resolution procedures to assist in the resolution of

internal and external disputes under the Board's jurisdiction; to conform to the extent possible to certain guidelines; and to appoint an alternative dispute resolution coordinator. New Rule 7.9 is adopted pursuant to Section 2155.076 of Tex. Government Code Annotated ch. 2155, which requires the Board to adopt procedures for contractors and other interested parties to protest a procurement decision made by the Board. New Rule 7.10 is proposed pursuant to Sections 1051.351, 1051.351, 1051.354, 1051.355, 1051.357, 1051.403, 1051.651, 1051.652, 1052.054, 1051.0541, 1053.052, and 1053.0521 of Tex. Occupations Code Annotated ch. 1051, ch. 1052, and ch. 1053, which allows the Board to charge a fee for the annual renewal of registrations of architects, landscape architects, and interior designers; provides an exemption from the fee for military personnel on active duty; allows the Board to charge an annual renewal fee for a registration on inactive status and an administrative fee to reactivate an inactive registration; allows the Board to charge a fee to architects whose registration is on emeritus status; allows the Board to charge a fee for reinstatement of registration after its denial, revocation, or suspension; allows the Board to charge a fee to architects to fund architectural examination fee scholarships; and allows the Board to set a fee for a Board action involving an administrative expense in an amount that is reasonable and necessary to cover the cost of the administrative expense. The new rules are also proposed pursuant to Section [1051.202] of Tex. Occupations Code Annotated ch. [1051], which provides the Board with general authority to promulgate rules necessary to the administration of its statutory responsibilities.

The proposed new rules do not affect any other statutes.

§7.1. Officers and Employees.

(a) As prescribed by law, the Governor shall appoint a Chairman, and the Board, appointed by the Governor, shall elect a Vice-Chairman and a Secretary-Treasurer. The Chairman shall hold office until replaced by the Governor. The Vice-Chairman and Secretary-Treasurer shall hold office until their successors have been elected.

(b) The Board shall employ an executive director to conduct the affairs of the Board under the Board's direction. The executive director shall be responsible for hiring and managing additional staff as necessary to sustain the daily operations of the Board's office.

(c) The Board shall be responsible for establishing an annual budget to govern the expenditure of funds received by the Board. All expenditures must comply with applicable statutory provisions and rules, including the most recently adopted rules of the Texas Building and Procurement Commission relating to Historically Underutilized Businesses.

§7.2. Division of Responsibilities.

(a) It is the Board's policy to maintain separation between the policymaking responsibilities of the Board and the management responsibilities of the executive director and the staff of the Board.

(b) The Board has the duty to exercise the legal authority delegated to it by the Legislature. The Board's responsibilities are limited to:

(1) the adoption of rules interpreting and implementing the Board's enabling legislation and other statutes that vests legislative authority in the Board;

(2) disciplining Registrants according to statute;

(3) imposing administrative penalties on unregistered persons pursuant to law;

(4) bringing an action to enjoin a violation of the laws and rules enforced by the Board or to enforce a subpoena issued by the executive director;

(5) addressing issues that relate to regulation of the professions under the Board's jurisdiction; and

(6) employing an executive director, evaluating the performance of the executive director, and setting compensation for the executive director.

(c) The executive director and the staff of the Board are responsible for carrying out the Board's direction and the ministerial functions in implementing and enforcing the law. The responsibilities of the executive director are limited to:

(1) employing, directing, evaluating the performance of, and setting compensation for the staff;

(2) directing the administrative functions in regulating the professions under the Board's jurisdiction, including the processing of applications for registration by the Board, monitoring of continuing education of Registrants, investigating alleged violations of the law enforced by the Board, recommending enforcement action to the Board, receiving and accounting for administrative fees and penalties, and all other management responsibilities;

(3) issuing subpoenas to compel the production of information relevant to the investigation of an alleged violation of the laws enforced by the Board;

(4) contracting for services and materials necessary to fulfill the requirements of the law as implemented by the Board; and

(5) providing administrative support and information to the Board as required for the Board to fulfill its policymaking responsibilities.

§7.3. Committees.

The Chairman may appoint members of the Board to serve on committees as necessary to conduct the business of the Board.

§7.4. Official Seal.

The Board's official seal includes a border of two concentric circles around a five-pointed star, the outer circle resembling a rope and the inner circle resembling a chain. The words "Texas Board of Architectural Examiners" shall appear within the border between the two circles.

§7.5. Robert's Rules of Order.

Unless required otherwise by law or this chapter, Robert's Rules of Order shall be used in the conduct of the Board's meetings.

§7.6. Procedures for Addressing the Board.

(a) The Board shall include "public comment" as a topic on the agenda for each regularly scheduled meeting of the Board.

(b) During the "public comment" portion of a meeting, any member of the public may address the Board regarding any subject related to the business of the Board. Each member of the public shall be allotted five (5) minutes to make a presentation to the Board. The five-minute period may be extended at the Board's discretion.

(c) Pursuant to Chapter 551, Texas Government Code, relating to open meetings, the Board may respond to an inquiry regarding a subject not listed on the agenda only with:

(1) a statement of specific factual information in response to the inquiry; or

(2) a recitation of existing policy in response to the inquiry.

(d) Except as allowed by subsection (c) of this section, any deliberation of or decision about a subject not listed on the agenda shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

§7.7. Negotiated Rulemaking.

(a) It is the policy of the Board to encourage public input and negotiation in the Board's rulemaking process.

(b) A petition to initiate a rulemaking proceeding pursuant to §2001.021, Government Code, must be submitted to the Board's offices in writing. A petition must include:

(1) a brief explanation of the proposed rule;

(2) the full text of the proposed rule, and, if the petition is to modify an existing rule, the text of the proposed rule prepared in the same manner as an amendment to legislation that clearly identifies any words to be added or deleted from the existing text by underscoring added words and striking through words to be deleted;

(3) a concise explanation of the legal authority to adopt the proposed rule, including a specific reference to the particular statute or other authority that authorizes it;

(4) an explanation of how the proposed rule would protect life, health, property, and public welfare within the jurisdiction of the Board;

(5) all available data or information showing a need for the proposed rule; and

(6) such other information that the Board or the staff of the Board may request.

(c) The Board may initiate a negotiated rulemaking process pursuant to Chapter 2008, Government Code, upon:

(1) the filing of a petition to initiate the rulemaking proceeding under subsection (b) of this section;

(2) the filing of a petition to initiate negotiated rulemaking proceeding with regard to a rule that has been proposed by the Board; or

(3) a determination by the Board that negotiated rulemaking would be beneficial to the Board's consideration of a proposed rule.

(d) The Board may select any method of negotiation specified in Chapter 2008, Government Code, including the appointment of a convener, a negotiated rule-making committee, and a facilitator. The Chairman shall make all appointments involved in the negotiated rulemaking process.

(e) The Board may adopt, amend, or refuse to adopt a rule created through the negotiated rulemaking process. The Board may not adopt any rule or any provision within a rule that the Board has no legal authority to adopt.

§7.8. Alternative Dispute Resolution.

(a) It is the Board's policy to encourage the resolution and early settlement of all disputed matters, internal and external, through voluntary settlement procedures.

(b) The executive director shall designate at least one employee of the Board to serve as the Board's alternative dispute resolution coordinator to:

(1) coordinate the implementation of the Board's alternative dispute resolution policies;

(2) serve as a resource for any training needed to implement the procedures for negotiated rule-making or alternative dispute resolution; and

(3) collect data concerning the effectiveness of these procedures, as implemented by the Board.

(c) The Board, a respondent, the executive director, or any other party involved in an internal or external disputed matter may request that the matter be resolved through any manner of alternative dispute resolution specified in Chapter 154, Civil Practice and Remedies Code, including mediation, arbitration, and moderated settlement conferences, or through the appointment of an ombudsman.

(d) The allocation of the costs of alternative dispute resolution is subject to negotiation and agreement between the parties. The party who requests alternative dispute resolution may be liable for the cost of any third-party mediator, moderator, arbitrator, or ombudsman and shall otherwise bear her or his own cost arising from alternative dispute resolution.

(e) Any resolution reached as a result of an alternative dispute resolution procedure is intended to be through the voluntary agreement of the parties. Any resolution that purports to bind the Board must be approved by the Board at a meeting subject to the Texas Open Meetings Act, Chapter 551, Government Code.

(f) The Board is subject to the Texas Public Information Act, Chapter 552, Government Code. Any written record, communication, or other material is confidential only to the extent provided by law and subject to the exemptions provided in that Act.

§7.9. Procurement--Protests/Dispute Resolution/Hearing.

(a) An actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract by the Board may file a formal protest with the Board's procurement director. A formal protest must be in writing and received by the procurement director within ten (10) business days after the aggrieved person knows or should have known of the occurrence of the action which is protested. The aggrieved person may mail or deliver copies of the protest to all vendors who have submitted bids or proposals for the contract at issue.

(b) In the event of a timely protest or appeal filed pursuant to this section, the Board may not proceed further with the solicitation or with the award of the contract unless the executive director, after consultation with the procurement director, makes a written determination that the award of contract without delay is necessary to protect the best interests of the state.

(c) A formal protest must be sworn and include:

(1) an identification of the specific statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of relevant facts;

(4) an identification of the issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a notation stating whether copies of the protest have been mailed or delivered to all other vendors who have submitted bids or proposals for the contract at issue.

(d) The procurement director is authorized, prior to appeal to the executive director, to settle and resolve the dispute concerning the

solicitation or the award of a contract. The procurement director may solicit responses to the protest from other interested parties.

(e) If the protest is not resolved by mutual agreement, the procurement director shall issue a written determination of the protest.

(f) The procurement director shall send written notice of the determination of the protest to the aggrieved party and to other vendors who submitted bids or proposals for the contract. The procurement director's determination shall set out the reasons for the determination and appropriate remedial action, if any, which may include ordering the contract at issue in the protest void. The procurement director shall confer with the Board's general counsel prior to issuing a written determination of a protest.

(g) The protesting party may appeal the procurement director's determination of the protest to the executive director of the Board. The appeal must be written and received in the executive director's office no later than ten (10) business days after the date of the procurement director's determination. The appeal shall be limited to a review of the determination. The protesting party may mail or deliver copies of the appeal to each other vendor who submitted bids or proposals on the contract at issue. If applicable, the appeal must include a certified statement that copies have been sent to the other vendors.

(h) The executive director may confer with general counsel in reviewing the appeal of the protest. The executive director may:

(1) issue a written decision on the protest, or

(2) refer the appeal to the Board for resolution.

(i) If the executive director refers the appeal to the Board, a copy of the appeal, the procurement director's determination of the appeal, and copies of statements or correspondence, if any, from other vendors must be submitted to the Board. The Board may issue a final order on any appeal referred to the Board.

(j) A written decision issued by either the Board or the executive director shall be the final administrative action of the Board.

(k) Protests and appeals that are not timely filed will not be considered, unless good cause is established or the procurement director determines that the protest or appeal raises issues significant to the agency's procurement practices or procedures.

§7.10. Fees--General.

(a) In addition to any fees established elsewhere in these rules, by the Act, or by another provision of Texas law, the following fees shall apply to services provided by the Board:
Figure: 22 TAC §7.10(a)

(b) The Board cannot accept cash as payment for any fee.

(c) An official postmark from the U.S. Postal Service may be presented to the Board to demonstrate the timely payment of any fee.

(d) If a check is submitted to the Board to pay a fee and the bank upon which the check is drawn refuses to pay the check, the fee shall be considered unpaid and any applicable late fees shall accrue. The Board shall impose a processing fee for any check that is returned unpaid by the bank upon which the check is drawn.

(e) A Registrant who is in Good Standing or was in Good Standing at the time the Registrant entered into military service shall be exempt from the payment of any fee during any period of active duty service in the U. S. military. The exemption under this subsection shall continue through the remainder of the fiscal year during which the Registrant's active duty status expires.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404243
Cathy L. Hendricks, ASID/IIDA
Executive Director
Texas Board of Architectural Examiners
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8535

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PART 4. TEXAS COSMETOLOGY COMMISSION

CHAPTER 89. GENERAL RULES AND REGULATIONS

22 TAC §89.5

The Texas Cosmetology Commission proposes an amendment to §89.5 concerning License Fees. The proposed amendment will increase the original independent contractor license fee by $2, the renewal fee for the independent contractor license by $2, the original salon license fee by $6 and the renewal fee for the salon license by $4 in order to pay for Texas Online Service.

Ms. Antoinette Humphrey, Executive Director, Texas Cosmetology Commission, has determined 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 the increased fees.

Ms. Humphrey has also determined that for each year of the first five years this fee is in effect, the public benefit anticipated will be to allow licensees and salon owners to renew online. The cost to small businesses and independent contractors will be limited to the increased fees listed above.

Comments on these proposed rules may be submitted to Mr. Virgil Seals, Texas Cosmetology Commission, P.O. Box 26700, Austin, Texas 78755-0700. Comments may also be submitted electronically to virgil.seals@txcc.state.tx.us or faxed to (512) 454-0339.

The amended sections are proposed under Texas Occupations Code, Chapter 1602, §1602.151, which provides the commission with the authority to "adopt rules consistent with this chapter."

§89.5. License Fees.

(a) The fees pertain to the following licensees at all times:

(1) Individual Licenses: $53

(2) Instructor Licenses: $70

(3) Salon Licenses: [~~$65~~]

(A) Original: $106

(B) Renewal: $69

(4) Independent Contractor: [~~$65~~]

(A) Original: $67

(B) Renewal: $67

(5) School Licenses (initial) $500 School Licenses (renewal) $200

(b) The fee to issue a duplicate license for all licensees and establishments is $53.

~~[(c) All licensees are required to submit a health certificate, not more than one year old, in addition to the proper renewal fee.]~~

(c) ~~[(d)]~~ All licensees other than salons or private beauty culture, vocational cosmetology, and post secondary schools must notify the commission not later than thirty (30) days following any change of address. The commission may send all notices on other information required by The Cosmetology Act or any commission rule to any licensee's last known address on file with the commission.

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

Filed with the Office of the Secretary of State on June 29, 2004.

TRD-200404288
Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 380-7644

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22 TAC §89.72

The Texas Cosmetology Commission proposes amendments to §89.72(3) concerning Curriculum Posted. The commission proposes to increase the required Facial Specialist Curriculum hours from 600 to 750.

Ms. Antoinette Humphrey, Executive Director, Texas Cosmetology Commission, has determined 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 the increased hours.

Ms. Humphrey has also determined that for each year of the first five years the hours are increased, the public benefit anticipated will be to increase the standards for facial estheticians. The cost to small businesses and independent contractors will be limited to the increased fees listed above.

Comments on these proposed rules may be submitted to Mr. Virgil Seals, Texas Cosmetology Commission, P.O. Box 26700, Austin, Texas 78755-0700. Comments may also be submitted electronically to virgil.seals@txcc.state.tx.us or faxed to (512) 374-1564.

The amended sections are proposed under Texas Occupations Code, Chapter 1602, 1602.151, which provides the commission with the authority to "adopt rules consistent with this chapter."

§89.72. Curriculum Posted.
The curriculum listed has been established by the Texas Cosmetology Commission and must be followed by all cosmetology schools. The curriculum shall be posted in a conspicuous place in the school. A current syllabus and lesson plans for each course shall be maintained by the school and be available for inspection. Operator Curriculum:

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

(3) Facial specialist curriculum (total 750 ~~[600]~~ hours):

(A) orientation and T.C.C. Rules and Regulations 50 ~~[25]~~ hours;

(B) sanitation, safety, and first aid 40 ~~[25]~~ hours;

(C) anatomy and physiology 90 hours;

(D) chemistry 50 ~~[20]~~ hours;

(E) electricity, machines, and related equipment 75 ~~[60]~~ hours;

(F) care of client 50 ~~[15]~~ hours;

(G) facial treatment (cleansing, masking, therapy) 225 ~~[200]~~ hours;

(H) superfluous hair removal 25 ~~[20]~~ hours;

(I) aroma therapy 15 hours;

(J) nutrition 10 hours;

(K) color psychology 10 hours;

(L) makeup 75 hours;

(M) management 35 hours.

(4) - (9) (No change.)

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404262
Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 380-7644

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PART 20. TEXAS COMMISSION ON PRIVATE SECURITY

CHAPTER 421. DEFINITIONS

22 TAC §421.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 421, §421.1, concerning Definitions. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§421.1. Definitions.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404119
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 422. PROHIBITIONS

22 TAC §§422.1 - 422.4

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 422, §§422.1 - 422.4, concerning Prohibitions. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003). House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§422.1. Fraudulent Application Prohibited.

§422.2. Permitting or Allowing Violations.

§422.3. Return of Equipment.

§422.4. Good Standing Required for Renewal.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404120
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 423. RULE MAKING PROCEDURES

22 TAC §§423.1 - 423.3

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 423, §§423.1 - 423.3, concerning Rule Making Procedures. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§423.1. Amendments to Commission Rules.

§423.2. Effective Date.

§423.3. Petition for Adoption of a Rule.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404121
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 424. STANDARDS

22 TAC §§424.1 - 424.12

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 424, §§424.1 - 424.12, concerning Standards. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House

Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§424.1. Complaint Limitation.

§424.2. Date of Licensing, Certification or Acknowledgement.

§424.3. Certificate of Installation.

§424.4. Standards of Conduct.

§424.5. Standards of Services.

§424.6. Consumer Information.

§424.7. Information Show in Advertisements.

§424.8. Standards of Reports.

§424.9. Uniform Requirements.

§424.10. Confidential Information.

§424.11. Response to Request for Subpoena.

§424.12. Voluntary Revocation.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404122
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 425. SUMMARY SUSPENSION

22 TAC §425.1, §425.33

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 425, §425.1 and §425.33, concerning Summary Suspension. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§425.1. Stay of Summary Suspension.

§425.33. Service of Notice in Non-Rulemaking Proceedings.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404123
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 426. GENERAL ADMINISTRATION AND EXAMINATION

22 TAC §§426.1 - 426.15

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 426, §§426.1 - 426.15, concerning General Administration and Examination. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to

assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§426.1. Written Examination for Managers.

§426.2. Reexamination Fee.

§426.3. Photographs.

§426.4. Fingerprint Cards.

§426.5. Assumed Name Requirements.

§426.6. Verification of Corporations.

§426.7. Assignment Under Class.

§426.8. Procedure for Termination of License or Branch License.

§426.9. Assignment to Spouse or Heirs.

§426.10. Fees.

§426.11. Operation without Manager.

§426.12. Fingerprint Submission.

§426.13. Change of Expiration date of: License.

§426.14. Reapplication after Revocation.

§426.15. Private Security Consultants.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404124
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 427. ADMINISTRATIVE HEARINGS

22 TAC §§427.1 - 427.6

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 427, §§427.1 - 427.6, concerning Administrative Hearings. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer

the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§427.1. Administrative Hearings Procedures.
§427.2. Service of Notice in Non-Rulemaking Proceedings.
§427.3. Penalty Range.
§427.4. Default Judgments.
§427.5. Trial on the merits.
§427.6. Appeal.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404125
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 428. UNIFORMED MOTORCYCLE ESCORT SERVICE

22 TAC §§428.1 - 428.7

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 428, §§428.1 - 428.7, concerning Uniformed Motorcycle Escort Service. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§428.1. Escort License Required.
§428.2. Approved Uniforms.
§428.3. Insurance.
§428.4. Driver's License Required.
§428.5. Restrictions on Lights.
§428.6. Arrest for Conviction of Driving While Intoxicated.
§428.7. Police Officers May Furnish Escorts.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404126
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 429. GUARD DOGS

22 TAC §429.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 429, §429.1, concerning Guard Dogs. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to

assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§429.1. Welfare Requirements.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404127
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 430. COMMISSIONED SECURITY OFFICERS

22 TAC §§430.1 - 430.6, 430.55

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 430, §§430.1 - 430.6 and §430.55, concerning Commissioned Security Officers. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§430.1. Requirements for Issuance of a Security Officer Commission by the Commission.

§430.2. Commission Applications.

§430.3. Drug Testing Required for Commissioned Security Officers.

§430.4. Violations by Commissioned Security Officers.

§430.5. Carrying of A Security Officer Commission.

§430.6. Renewal of Security Officer Commission.

§430.55. Requirements for Private Security Consultants.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404128
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 431. PERSONAL PROTECTION OFFICERS

22 TAC §§431.1 - 431.3

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 431, §§431.1 - 431.3, concerning Personal Protection Officers. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§431.1. Requirements for Issuance of a Personal Protection Authorization.

§431.2. Requirement for Personal Protection Employer.

§431.3. Violations of the Act by Personal Protection Officers.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404129
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 432. LETTERS OF AUTHORITY

22 TAC §432.1, §432.2

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 432, §432.1 and §432.2, concerning Letters of Authority. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§432.1. Requirements for Issuance of a Private Business Letter of Authority.

§432.2. Requirements for Issuance of A Government Letter of Authority.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404130
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 433. GENERAL REGISTRATION REQUIREMENTS

22 TAC §§433.1 - 433.6

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 433, §§433.1 - 433.6, concerning General Registration Requirements. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§433.1. Employment Requirements.

§433.2. Fingerprints.

§433.3. Exhibit Pocket Card.

§433.4. Licensed Company Responsible for the Registration of Employees.

§433.5. Registration Deadline.

§433.6. Registration Applications.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404131
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 434. COMPANY RECORDS

22 TAC §§434.1 - 434.5

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 434, §§434.1 - 434.5, concerning Company Records. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§434.1. Employee Records.

§434.2. Location of Records.

§434.3. Records to be Available for Inspection.

§434.4. Pre-Employment Check.

§434.5. Records Required on Commissioned Security Officers.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404132
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 435. RECIPROCITY

22 TAC §435.1, §435.2

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 435, §435.1 and §435.2, concerning Reciprocity. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House

Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§435.1. General Reciprocity.

§435.2. Limited Reciprocity.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404133
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 436. SUBSCRIPTION FEES

22 TAC §436.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 436, §436.1, concerning Subscription Fees. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session, (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§436.1. Renewal Subscription Fee.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404134
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 437. BUSINESS EVALUATION SERVICE

22 TAC §437.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 437, §437.1, concerning Business Evaluation Service. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§437.1. Business Evaluation Service.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404135
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 440. TRAINING

22 TAC §§440.1, 440.2, 440.4 - 440.19

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 440, §§440.1, 440.2, and 440.4 - 440.19, concerning Training. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§440.1. Application for a Training School Approval.
§440.2. Attendance, Progress, and Completion Records Required.
§440.4. Commission Refusal of Certificate of Completion.
§440.5. Withdrawal of Training School Approval.
§440.6. Notification of Denial or Withdrawal of a Letter of Approval.
§440.7. Application for a Training Instructor Letter of Approval.
§440.8. Training Courses.
§440.9. Firearm Courses.
§440.10. Shotgun Training.
§440.11. Shotgun Training Requirements.
§440.12. Training School and Instructor Approval.
§440.13. Security Officer Training Manual and Examination.
§440.14. Alarm Installer and Alarm Systems Salesperson Training and Testing/Application for Alarm Training Program Approval.
§440.15. Attendance, Progress and Completion Records Required.
§440.16. Alarm Systems Installer or Alarm Systems Salesperson.
§440.17. Records Required on Manager.
§440.18. Statutory or Rules Violations.
§440.19. Certificate of Completion.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404136
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 441. PERSONAL PROTECTION OFFICERS TRAINING

22 TAC §441.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 441, §441.1, concerning Personal Protection Officers Training. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§441.1. Training--Personal Protection Officers.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404137
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 442. CONTINUING EDUCATION

22 TAC §442.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 442, §442.1, concerning Continuing Education. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer

the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§442.1. Continuing Education Courses.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404138
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 449. DELEGATION OF AUTHORITY

22 TAC §449.1

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

The Texas Department of Public Safety proposes the repeal of Title 22, Examining Boards, Part 20, Texas Commission on Private Security, Chapter 449, §449.1, concerning Delegation of Authority. The repeal is proposed simultaneously with the proposal of new Chapter 35 to Texas Administrative Code, Title 37, Part 1. The repeal of the rules is necessary in order to implement the transfer of administration of the Texas Private Security Board to the Department of Public Safety (DPS) as provided by Texas House Bill 28, 78th Legislature, 3rd Called Session (2003).

House Bill 28, provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the repeal is in effect the anticipated public benefit resulting from the adoption of the repeal will be current and updated rules relating to the administration of the Private Security Board rules and regulations. There is no anticipated cost to individuals, small businesses, or micro-businesses.

Comments on the repeal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240, (512) 424-7711. Written comments will be accepted regarding the proposed repeal for 30 days after the date of publication.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article VIII, §4 and Article IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Texas House Bill 1, 78th Legislature, Regular Session (2003), Article IX, §11.20 are affected by this proposal.

§449.1. Executive Director.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404139
Thomas A. Davis, Jr.
Director, Texas Department of Public Safety
Texas Commission on Private Security
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §573.27

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §573.27, concerning Observation of Confidentiality. This proposed amendment implements the statutory prohibition against a veterinarian releasing information concerning a patient to persons not authorized to receive the information. (Occupations Code §801.353) The amended section adds an exception to confidentiality based on §826.0211, Health and Safety Code, that allows information contained in a rabies certificate to be provided to a governmental entity only for purposes related to the protection of public health and safety. The amendments provide the public with up-to-date statutory requirements concerning confidentiality.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to enhance the public's awareness of its rights to confidentiality of patient records. There

will be no effect on small businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, and must be received by August 16, 2004.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §801.353 relating to confidentiality.

§573.27. Observance of Confidentiality.

(a) A veterinarian shall not violate the confidential relationship between the veterinarian and a client.

(b) Except as provided in subsection (c) of this section, a veterinarian shall not disclose any information concerning the veterinarian's care for an animal except:

(1) on written or oral authorization or other form of waiver executed by the client; or

(2) on receipt by the veterinarian of an appropriate court order or subpoena.

(c) A veterinarian may, without authorization by the client, disclose information contained in a rabies certificate to a governmental entity only for purposes related to the protection of public health and safety. [~~In accordance with §18E of the Veterinary Licensing Act, a licensed veterinarian shall not violate the confidential relationship between the veterinarian and a client, and may not be required to disclose any information concerning the veterinarian's care for an animal except on written authorization or another form of waiver executed by the client or on receipt by the veterinarian of an appropriate court order, or subpoena duces tecum. Another form of waiver includes verbal authorization by the client. Confidentiality extends to care and treatment of the animal, but does not preclude the veterinarian from divulging the name and address of the animal owner to any health authority, veterinarian, or physician who requests the identity of the client for purposes of obtaining the information to verify rabies vaccinations or other treatment involving life threatening situations.~~]

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404162
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 14, 2004
For further information, please call: (512) 305-7555

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.70

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §573.70, concerning Operation of Temporary Limited Service Veterinary Services. This section provides requirements for veterinary clinics that provide vaccination and other services at a temporary location. The amendments change the period for which a veterinarian must maintain rabies vaccination records for these clinics, from three years to five years. This amendment is the result of changes in the rabies control program administered by the Texas Department of Health. The Health Department now requires that rabies records be retained for five years.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to provide consistency in regulations that overlap several agencies. There will be no effect on small businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, and must be received by August 16, 2004.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Veterinary Licensing Act, Texas Occupations Code, §801.151, requiring the Board to protect the public health.

§573.70. Operation of Temporary Limited-Service Veterinary Services.

(a) Requirements for operation. Veterinarians operating temporary limited service clinics shall [~~are required to~~]:

(1) maintain sanitary conditions at the clinic site, including, but not limited to, removal of animal solid waste and sanitizing/disinfecting of urine and solid waste sites;

(2) provide injections [~~inject~~] with sterile disposal needles and syringes;

(3) utilize a non-porous table for examining and/or injecting small animals;

(4) maintain biologics and injectable medications between temperature ranges of 35 to 45 degrees Fahrenheit;

(5) perform and complete blood and fecal examinations before dispensing relevant federal legend medications;

(6) maintain rabies vaccination records for five years and treatment records for three years, indexed alphabetically by the client's [~~owner's~~] last name and by vaccination tag numbers, if issued; and

(7) provide clients with a printed form that contains the identity of the administering veterinarian and the address of the places where the records are to be maintained.

(b) (No change.)

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404163
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 14, 2004
For further information, please call: (512) 305-7555

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CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.27

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §575.27, concerning Complaints - Receipt, Investigation, and Disposition. This section sets out the process used by the Board in receiving and processing complaints. The section currently requires any complaints involving a violation of the statute or Board rules by a veterinarian to be reviewed by the Board secretary - a veterinarian - as part of the complaint processing. Since, however, the Board secretary's review of complaints is primarily to determine violations involving medical judgments and practice, it should not be necessary for him or her to review non-medical issues, such as the adequacy of continuing education hours or issues involving the proper display of credentials. The amendments remove the participation of the Board secretary in the review and consideration (usually at informal conferences) of non-medical issues and instead allow the Executive Director and staff to review these matters.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section. Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to reduce the time and expense to Board members of having to review non-medical cases. Travel time for the Board secretary will be reduced, and the turnaround time of cases will be improved. There will be no effect on small businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, and must be received by August 16, 2004.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Veterinary Licensing Act, Texas Occupations Code, Chapter 801, Subchapter E, which requires the Board to develop and implement a complaint procedure.

§575.27. Complaints--Receipt, Investigation and Disposition.

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

(c) Investigation of complaints.

(1) - (6) (No change.)

(7) Upon the completion of an investigation, the director of enforcement shall present to the executive director a report of investigation (ROI) and a conclusion as to the probability that a violation(s) exists. If the executive director determines from the ROI that the probability of a violation involving medical judgment or practice exists, the director of enforcement shall forward a copy of the complaint file to the board secretary, who will determine whether or not the complaint should be closed, further investigation is warranted, or if the licensee should be invited to respond to the complaint at an informal conference at the board offices. If the probable violation does not involve medical judgment or practice, the executive director shall not forward the complaint file to the board secretary, and the executive director shall determine whether or not the complaint should be closed, further investigation is warranted, or if the licensee should be invited to respond to the complaint at an informal conference at the board offices. If the board secretary or executive director determines that a violation has not occurred, the executive director or director of enforcement shall notify the complainant and licensee in writing of the conclusion and that the complaint is dismissed.

(8) If the board secretary or executive director concludes that a probable violation(s) does exist, the executive director shall invite the licensee in writing to an informal conference to discuss the complaint made against the licensee. The letter invitation shall be mailed by certified mail, return receipt requested, and must include a list of the specific allegations of the complaint.

(d) Informal conferences

(1) (No change.)

(2) The board may be represented at the informal conference by a committee of the executive director, the board secretary (if the complaint involves medical judgement or practice), the [~~board's~~] director of enforcement, the investigator assigned to the complaint, the board's legal counsel and a public member of the board. The complainant and the licensee and the licensee's legal counsel may attend the conference. Any other attendees are allowed at the discretion of the executive director. The executive director or the director of enforcement shall conduct the conference. The board secretary, with the advice of the other members of the committee, determines the recommended disposition of a [~~the~~] complaint involving medical judgment or practice.

(3) (No change.)

(4) At the conclusion of the informal conference, the board secretary or executive director, as appropriate, shall determine if a violation has occurred. If the board secretary or executive director determines that a violation has not occurred, the board secretary or executive director will dismiss the complaint, and will advise all parties of the decision and the reasons why the complaint was dismissed.

(5) If the board secretary or executive director determines that a violation has occurred and that disciplinary action is warranted, the board secretary or executive director will advise the licensee of the alleged violations and offer the licensee a settlement in the form of an agreed order that specifies the disciplinary action and monetary penalty. The board secretary or executive director must inform the licensee that the licensee has a right to a hearing before an administrative law judge on the finding of the occurrence of the violation, the type of disciplinary action, and/or the amount of the recommended penalty.

(6) Within 20 days after the date the licensee receives the settlement offer, the licensee must submit a written response to the board

(A) accepting the [board secretary's] settlement offer and recommended disciplinary action, or

(B) (No change.)

(7) (No change.)

(e) - (h) (No change.)

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404164
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 14, 2004
For further information, please call: (512) 305-7555

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES

SUBCHAPTER B. STAFF AND MISCELLANEOUS

22 TAC §577.17

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §577.17, concerning Purchasing Protest Procedures. This section, as required by law, incorporates by reference rules regarding how to file protests to purchasing procedures developed by the Texas Building and Procurement Commission. The amendments change the old name of the agency, the General Services Commission, to the current name, the Texas Building and Procurement Commission.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to make the public aware of the name change of the agency which developed the purchasing protest rules. There will be no effect on small businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, and must be received by August 16, 2004.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Government Code, §2155.076, which requires the Board to adopt rules for purchasing protest procedures.

§577.17. Purchasing Protest Procedures.

The Board [Texas State Board of Veterinary Medical Examiners] adopts by reference the rules promulgated by the Texas Building and Procurement Commission [General Services Commission] regarding purchasing protest procedures as set forth in Subchapter A of 1 TAC §111.3. [Chapter 111 of Title 1 of the Texas Administrative Code]

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404165
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Proposed date of adoption: October 14, 2004
For further information, please call: (512) 305-7555

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22 TAC §577.18

The Texas Board of Veterinary Medical Examiners ("Board") proposes amendments to §577.18, concerning Historically Underutilized Businesses. This section, as required by law, incorporates by reference rules regarding historically underutilized businesses (HUB's) developed by the Texas Building and Procurement Commission. The amendments change the old name of the agency, the General Services Commission, to the current name, the Texas Building and Procurement Commission.

Mr. Ron Allen, Executive Director, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Allen has also determined that for the first five years the section is in effect the public benefit anticipated as a result of enforcing the amended section will be to make the public aware of the name change of the agency that developed the HUB rules. There will be no effect on small businesses. There will be no economic cost to persons required to comply with the amended section as proposed.

Comments on the proposed amendments may be submitted in writing to Julie Barker, Texas Board of Veterinary Medical Examiners, 333 Guadalupe, Suite 3-810, Austin, Texas 78701, phone (512) 305-7555, fax (512) 305-7556, and must be received by August 16, 2004.

The amendments are proposed under the authority of the Veterinary Licensing Act, Texas Occupations Code, §801.151 (a) which states that the Board may adopt rules necessary to administer the chapter.

The amendments affect the Government Code, §2161.003, which requires the Board to adopt by reference the Commission's HUB rules.

§577.18. Historically Underutilized Businesses.

The Board [Texas State Board of Veterinary Medical Examiners] adopts by reference the rules promulgated by the Texas Building and Procurement Commission [General Services Commission] which are set forth in Subchapter B of 1 TAC §§111.11 - 111.28 [111.24] regarding the Historically Underutilized Business Program.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404166
Julie A. Barker
Executive Assistant
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Proposed date of adoption: October 14, 2004
For further information, please call: (512) 305-7555

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 6. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUND EMISSIONS CAP AND TRADE PROGRAM

30 TAC §§101.390 - 101.394, 101.396, 101.399 - 101.401, 101.403

The Texas Commission on Environmental Quality (commission) proposes new §§101.390 - 101.394, 101.396, 101.399 - 101.401, and 101.403. These new sections are being proposed in Subchapter H, Emissions Banking and Trading, new Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program.

The new sections are proposed to be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston/Galveston ozone nonattainment area (HGA) is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (as codified in 42 United States Code (USC), §§7401 *et seq*.), and therefore, is required to attain the one-hour ozone standard of 0.12 parts per million (125 parts per billion) by November 15, 2007. The HGA consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGA SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be extremely challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the EPA and the commission, who have worked diligently to identify and quantify control strategy measures for the HGA attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGA ozone attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGA attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGA included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (the commission committed to making this change when the rule was adopted in December 2000); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGA; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) replacement of these rules with the Texas Emission Reduction Plan program; 9) layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGA; and 10) replacement of 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 parts per billion peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. An additional five tpd were added to the shortfall, because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air - Appeal Group and several regulated companies challenged the December 2000 HGA SIP and some of the associated rules. Specifically, the Business Coalition for Clean Air - Appeal Group challenged the 90% NO_x reduction requirement from stationary sources in the HGA. In May 2001, the parties agreed to a stay in the case, and Judge Margaret Cooper, Travis County District Court, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGA attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGA and east Texas regions. The study revealed that while industrial source NO_x emissions were generally correctly accounted for, industrial source VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient to capture the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, aircraft instruments recorded ozone levels exceeding 125 parts per billion that were missed by surface monitoring equipment. The findings from the study are constantly evolving and have raised questions about the formation of high ozone levels in the HGA.

To address these findings and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The results of photochemical grid modeling and analysis indicated that the same level of air quality benefits achieved with a 90% industrial NO_x emissions reduction could be achieved with an overall 80% industrial NO_x emissions reduction when combined with an industrial VOC emissions reduction. This conclusion was based on results from several studies, including photochemical grid modeling of the August - September 2000 episode using a top-down emissions inventory adjustment to point source HRVOC emissions, and analyses of ambient HRVOC measurements made by commission automated gas chromatographs and airborne canisters using the maximum incremental reactivity and hydroxyl reactivity scales. Four HRVOCs (ethylene, propylene, 1,3-butadiene, and butenes) clearly play important roles in the HGA ozone formation, and these four are the best candidates for the first round of HRVOC controls.

In order to address these scientific findings, the commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contains new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based and emphasize monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the revision contains the supporting analysis for early results from ongoing analysis examining whether reductions in HRVOC emissions could replace the last 10% of industrial NO_x controls with a reduction of approximately 64% in industrial HRVOC emissions, while ensuring that the air quality specified in the approved December 2000 HGA SIP is met.

Current SIP Revision

As mentioned previously, the commission committed to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the ability to update emissions inventory data, utilize current modeling tools, such as MOBILE6, and enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGA. All of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGA that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period the EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003 issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning that states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions would be the most beneficial measure in reducing ozone in the HGA. The commission is proposing to reduce HRVOC emissions to reach attainment of the one-hour ozone standard. The photochemical modeling of the August - September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission is proposing a two-pronged approach that would address variable short-term emissions through a not-to-exceed limit, and would address steady state and routine emissions through an annual cap. The annual HRVOC cap in Harris County would be reduced from the existing HRVOC cap in order to support the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 revision, but represented on an annual basis instead of a 24-hour rolling average. The commission will continue to evaluate the necessity to require short-term and annual reductions from those sites subject to Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the

seven-county surrounding area. If the evaluation demonstrates that reductions from these counties have little impact on attainment of the one-hour ozone standard, the short-term and annual limits for those other seven counties within HGA may no longer be required.

The annual cap emissions would be distributed and enforced through an HRVOC emissions cap and trade program through Subchapter H, Division 6 of Chapter 101. This program would establish a mandatory annual HRVOC emission cap on all sites located in the HGA that have the potential to emit more than ten tpy of HRVOC and that are subject to the HRVOC control requirements of 30 TAC Chapter 115, Subchapter H, Division 1, Vent Gas Control, or Division 2, Cooling Tower Heat Exchange Systems. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap would be established at levels demonstrated as necessary to allow the HGA to attain the one-hour ozone standard. The proposed cap would initially be implemented on April 1, 2006. These proposed sections would also require all sites with new or modified HRVOC sources in the HGA to obtain unused allowances from other sites already participating under the cap for any increased HRVOC emissions. For sites that have the potential to emit ten tons per year (tpy) or less of HRVOC from sources subject to the HRVOC control requirements of Chapter 115, Subchapter H, Divisions 1 or 2, the total, aggregate HRVOC emissions from those sources would be limited to ten tpy. Sites exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tpy limit.

The HGA SIP no longer relies solely on NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions appear to be the most effective means of reducing ozone in the HGA and there is no longer a NO_x shortfall in the HGA SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision is proposing the repeal of the commercial lawn and garden equipment restrictions, the repeal of the heavy-duty vehicle idling restrictions, and the removal of the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP proposal includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55 mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speed limits to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this proposal would remove the reinstatement of the 55 mph speed limit on May 1, 2005, and would maintain the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is proposing new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these proposed changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This proposal demonstrates attainment of the one-hour ozone standard in the HGA in 2007 and provides a preliminary analysis of the HGA in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission believes the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

This is to put all interested parties on notice that, although the commission is proposing the following rules, including a cap and trade program and a short-term limit on HRVOC emissions, the commission may significantly amend these proposed rules at adoption, repropose a portion of these rules, or propose additional rules, as appropriate.

First, the commission continues to analyze the rules for implementation of the eight-hour ozone standard adopted by EPA on April 15, 2004. These rules and their preamble suggest that a demonstration of attainment of the one-hour ozone standard may not be required for the portion of the SIP pertaining to the HGA. This means that the commission will need to review the measures contained in the current proposal to ensure that they are needed in this form in order to demonstrate noninterference. Additional analysis of the impact of the proposed rules on attainment of the eight-hour standard may indicate a need for new or more stringent control measures and could result in the modification of the HRVOC emissions caps established under this proposed rule.

Second, the commission may determine that, if a one-hour attainment demonstration is necessary, additional, different, or more stringent control measures may be needed based on additional modeling. The commission staff continues to model scenarios under the one-hour standard, and the commission may determine that the results indicate a need for changes in control strategies. Moreover, the one-hour attainment demonstration includes a weight-of-evidence argument. Additional review of the issues relating to the weight-of-evidence argument could lead the commission to propose new strategies or to repropose the control strategies proposed today.

SECTION BY SECTION DISCUSSION

Section 101.390, Definitions

The proposed new §101.390 would contain the definitions to be used with the proposed new HRVOC emissions cap and trade program. The definition of "Allowance" would be the authorization to emit 1/10 ton of HRVOC during a control period. The definition of "Authorized account representative" would be the responsible person who is authorized in writing, to transfer and otherwise manage allowances. The definition of "Banked allowance" would be an allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted in the compliance or broker account as banked. The definition of "Broker" would be a person not required to participate in the requirements of this division who opens an account under this division for the purpose of banking and trading allowances. The definition of "Broker account" would be the account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division. The definition of "Compliance account" would be the account where allowances held by a source or multiple sources are recorded for the purposes of meeting the requirements of this division.

Sources not under common ownership or control may have separate compliance accounts. The definition of "Level of activity" would be the amount of HRVOCs in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled HRVOCs internal to the process unit. The definition of "Petroleum refinery" would be the collection of process units used at a site primarily engaged in petroleum refining as defined in the North American Industrial Classification System for Petroleum Refining (324110). For the purposes of this subchapter, a petroleum refinery process unit refers only to those process units located at sites that do not include process units that produce ethylene except as a by-product. The definition of "Process unit" would be a collection of equipment assembled and connected by hardpiping or duct work, used to process a raw material or intermediate in the manufacture or production of a final product.

The new division refers to the following predefined definitions: "Cooling tower heat exchange system" as defined in 30 TAC §115.760; "Flare" as defined in 30 TAC §101.1; "Houston/Galveston (HGA) ozone nonattainment area" as defined in §101.1; "HRVOC" as defined in 30 TAC §115.10; "Site" as defined by 30 TAC §122.10; and "Vent" as defined in §101.1.

Section 101.391, Applicability

The proposed new §101.391 would state that the requirements of Division 6 apply to each site located in the HGA that is subject to the HRVOC requirements of Chapter 115, Subchapter H, Division 1 or 2 and the types of facilities covered. The proposed new §101.391 would also state that any site that elects to opt-in to this division under §101.392(b), Exemptions, would always be subject to the program.

Section 101.392, Exemptions

The proposed new §101.392 would exempt from this division any site meeting the applicability requirements of §101.391 with the potential to emit ten tpy or less of HRVOC from all covered facilities at the site. For the purpose of determining exemption status, the site's potential to emit HRVOC from all covered facilities would be compared to the ten tpy exemption level for each year of operation beginning with calendar year 2000. If at any time the site's potential to emit exceeds the ten tpy exemption level, the site would be subject to the HRVOC emissions cap and trade program. Once subject to the HRVOC cap and trade program, a site would always be subject to the program. Sites exempt from this division would be extended an opportunity to opt-in to the HRVOC emissions cap and trade program. Notification of a site's election to opt-in to the requirements of this division would be required in writing to the executive director no later than April 30, 2005.

Section 101.393, General Provisions

The proposed new §101.393 would state that allowances may only be used to meet the requirements of Division 6 and cannot be used to meet or exceed the limitations of any annual emission limitation established under 30 TAC Chapter 116, Subchapter B, any applicable rule or law, or for netting purposes to avoid the applicability of federal and state new source review (NSR) requirements. The new section would set the initial control period as April 1, 2006 through December 31, 2006 with each control period thereafter beginning on January 1 and ending on December 31. The new section would require each site subject to this division to hold a quantity of allowances in its compliance account equal to or greater than its total HRVOC emissions from all covered facilities during the previous control period. The new section states that allowances may be simultaneously used to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Subchapter B, Division 7 but not for netting requirements. The new section states that all allowances would be allocated, transferred, deducted, or used in tenths of tons and that one compliance account shall be used for each site. The new section states that an allowance would not constitute a security or a property right. The commission would maintain a registry of the allowances in each compliance and broker account. The registry would not contain proprietary information. Requests for information identified as proprietary when submitted to the agency would be subject to the procedures set out in the Texas Public Information Act.

Section 101.394, Allocation of Allowances

The proposed new §101.394 describes how allowances would be allocated to each site subject to this division. The executive director would allocate allowances under this division on March 31, 2006. For sites subject to this division that are located in Harris County, allowances would be allocated for emissions of the following HRVOCs: 1,3-butadiene; all isomers of butene (e.g., isobutene (2-methylpropene or isobutylene), alpha-butylene (ethylethylene) and beta-butylene (dimethylethylene, including both cis- and trans- isomers)); ethylene; and propylene. Allowances would be allocated in the aggregate, not specifically identified for each HRVOC species. Sites within Harris County that would not receive an allocation under subsection (c) or (d) would receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all sites within Harris County. This percentage would then be applied to the tons of HRVOC modeled in the attainment demonstration for those sites within Harris County. For sites subject to this division that are located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances would be allocated for emissions of the following HRVOCs: ethylene and propylene. Allowances would be allocated in the aggregate, not specifically identified for each HRVOC species. Sites within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties that would not receive an allocation under subsection (c) or (d) would receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all sites within those counties. This percentage would then be applied to the tons of HRVOC modeled in the attainment demonstration for those sites within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. The level of activity baseline for a site would be calculated as the average annual level of activity for the five consecutive year period of calendar years 2000 through 2004. For the five-year period, the level of activity would be determined by summing the levels of activity for all process units located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product. New sites or sites that become subject to this division at a later date by increasing HRVOC emissions above the exemption level would be required to obtain allowances from other sites already participating in the cap and trade program.

Sites subject to this division that do not include process units that produce or use an HRVOC would receive an allocation based on HRVOC throughput or storage capacity for the five consecutive

year period between calendar years 2000 through 2004. Examples of facilities that do not produce or use HRVOCs include storage facilities or pipelines. Up to 10% of the total HRVOC emissions for Harris County would be equitably allocated to those sites within Harris County subject to this division but that do not include process units that produce or use an HRVOC. Likewise, up to 10% of the total HRVOC emissions for Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties would be equitably allocated to sites in those counties meeting the same qualifications. In order to be allocated allowances from this set-aside, owners or operators of sites subject to this division that do not include process units that produce or use an HRVOC would be required to apply to the executive director no later than January 30, 2005. Allowances up to the full 10% not allocated to sites meeting the previously mentioned criteria would be distributed proportionately to those sites producing or using an HRVOC. The commission may evaluate the distribution of any allowances remaining from this 10% that has been set aside to sites that are newly constructed, and therefore, have not established a baseline.

The commission proposes to allocate allowances to those process units that are a part of a petroleum refinery independent of those process units that are a part of a chemical plant or a petroleum refinery collocated with a chemical plant. Because the commission's allocation process is based on HRVOC production or use, the commission is segregating these refineries to an independent segment of the emissions allocation. This segregation is based on the understanding that HRVOC emissions from a refinery may be disproportionate to HRVOC emissions from a chemical plant. As a part of the refining process, HRVOCs are produced in the cracking of gas oil feedstocks into lower molecular weight hydrocarbons and distributed throughout the refinery in various production units. The HRVOC produced or used in a refinery may be associated with multiple emission points resulting in a greater chance for the HRVOCs to escape controls while the HRVOC produced or used in a chemical or olefins plant may be more typically associated with fewer emission points and has greater potential to be present in a concentrated stream and controlled at fewer emission points. Therefore emissions from refineries may be disproportionate when basing allowance allocations on HRVOC production use and versus chemical plants.

For petroleum refinery process units subject to this division that are located in Harris County, allowances would be allocated for emissions of the following HRVOCs: 1,3-butadiene; all isomers of butene (e.g., isobutene (2-methylpropene or isobutylene), alpha-butylene (ethylethylene) and beta-butylene (dimethylethylene, including both cis- and trans- isomers)); ethylene; and propylene. Allowances would be allocated in the aggregate, not specifically identified for each HRVOC species. Petroleum refineries within Harris County would receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all refinery process units within Harris County. This percentage would then be applied to the tons of HRVOC modeled in the attainment demonstration for those refinery units within Harris County. For petroleum refinery process units subject to this division that are located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances would be allocated for emissions of the following HRVOCs: ethylene and propylene. Allowances would be allocated in the aggregate, not specifically identified for each HRVOC species. Petroleum refineries within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties would receive an allocation based on a percentage of the site's baseline level of activity relative to the total baseline level of activity for all petroleum refineries within those counties. This percentage would then be applied to the tons of HRVOC modeled in the attainment demonstration for those sites within Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. The level of activity baseline for a site would be calculated as the average annual level of activity for the five consecutive year period between calendar years 2000 through 2004. For the five-year period, the level of activity would be determined by summing the levels of activity for all process units located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

The section states that if a site emits more HRVOC than what was held in the compliance account on March 1 following a control period, that the allocation for the next control period will be reduced by an amount equal to the emissions exceeding the compliance account plus an additional 10%. For example, an emissions exceedance of ten tons would result in a penalty reduction of 11 tons for the next control period. If a compliance account does not have sufficient allowances to accommodate the penalty reduction, it is the responsibility of the owner or operator to purchase or transfer additional allowances within 30 days of the notice of deficiency from the executive director. Allowances would be deposited initially by March 31, 2006 and subsequently by January 1 of each control period. To account for program implementation on April 1, allocations for the 2006 control period would be reduced by 25% from the annual allocation to be distributed in each control period thereafter. The annual allocation of allowances may be adjusted to reflect any new or existing SIP requirements. Allowances may be added or subtracted from a site's compliance account in accordance with the annual reporting requirements in §101.400. Proposed language would allow an owner or operator of a site to request that the executive director approve the substitution of the level of activity from one calendar year with the level of activity from the preceding or following calendar year within the 2000 through 2004 time period due to extenuating circumstances at the site. The executive director would only consider circumstances not attributable to economic fluctuation.

Section 101.396, Allowance Deductions

The proposed new §101.396 describes how allowances would be deducted from compliance accounts. On March 31 of the year following each control period, allowances would be deducted from the site's compliance account equivalent to the total HRVOC emissions from all covered facilities at the site. The amount of HRVOC emissions would be required to be based on the monitoring and testing protocols established in 30 TAC §115.725 and §115.764, as appropriate for each process unit at the site. The section states that annual HRVOC emissions from covered facilities would be calculated for each hour of the year and summed to determine the total annual HRVOC emissions. Emissions events subject to the requirements of 30 TAC §101.201 and emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of 30 TAC §101.211 would be required to be included in the total annual HRVOC emissions for each control period. However, the hourly emissions for emission events or emissions from scheduled maintenance, startup, or shutdown activities to be included in the summation cannot exceed the short-term limit of 30 TAC §115.722(c) and §115.761(c). This section would

also include a provision for missing data. Should the monitoring and testing data required by this section be nonexistent or unavailable, a site would be allowed to determine its HRVOC emissions using the following methods and in the following order: continuous monitoring data; periodic monitoring data; testing data; data from manufacturers; and engineering calculations. For sources using continuous monitors to measure emissions, the last valid data point from the monitor would be allowed to substitute for the missing data. A justification would be required for sites using one of these alternate methods for determining HRVOC emissions due to missing monitoring and testing data. The section states that the executive director shall deduct allowances for compliance with a control period beginning with the most recently allocated allowances prior to deducting banked allowances.

Section 101.399, Allowance Banking and Trading

The proposed new §101.399 describes how allowances may be traded and banked. Allowances may generally be banked for future use or traded during the control period for which they are allocated or the following control period. Any allowance not used for compliance may be banked or traded for use in the following control period. The section states that allowances that have not expired or been used would be available for trade at any time after they have been allocated. Trade requests involving allowances allocated for the current control period or excess allowances from the previous control period would be made through the submittal of a completed Form ECT-2, Application for Transfer of Allowances. Persons receiving an annual allocation of HRVOC allowances would be allowed to permanently transfer ownership of the current and future allowances to be allocated to that site through the submittal of a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership. Trades involving the transfer of allowances scheduled to be allocated for a future control period would be allowed through the submittal of a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances. With the exception of transfers between sites under common ownership or control, the account representative would be required to report the price paid per allowance for all transfer transactions. All trades would be completed through the executive director and would be considered final when the executive director issues a letter to buyer and seller reflecting the transaction. Allowances initially allocated to sites located in Harris County would be restricted from use at sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties. Allowances initially allocated to sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties would be restricted from use in Harris County. Only authorized account representatives would be permitted to trade allowances. The section states that allowances subject to an approved transaction would be deposited into the purchaser's broker or compliance account within 30 days of receipt of a completed transfer application.

Section 101.400, Reporting

The proposed new §101.400 states that sites shall submit a completed HRVOC Emissions Cap and Trade Annual Compliance Report to the executive director no later than March 31 following each control period detailing the amount of actual HRVOC emissions for the preceding control period. The Annual Compliance Report would be required to include the total amount of HRVOC emissions from each covered facility at the site, the methods used in determining the HRVOC emissions, and a summary of all final trades. The commission also proposes to give the executive director authority to suspend trades involving the transfer of allowances for future control periods from any site that has not submitted an HRVOC Emissions Cap and Trade Annual Compliance Report. For example, if after March 31, 2007, site A has not submitted an HRVOC Emissions Cap and Trade Annual Compliance Report for the 2006 control period but has submitted an application for transfer of 2003 allowances to site B, the trade would be withheld pending the submittal of site A's HRVOC Emissions Cap and Trade Annual Compliance Report and verification of compliance for 2006.

Section 101.401, Level of Activity Certification

The proposed new §101.401 states that all sites subject to this division would be required to submit a completed Level of Activity Certification Form certifying their baseline level of activity no later than April 30, 2005. The Level of Activity Certification would include the level of activity for all covered facilities at the site during the five consecutive year period between calendar years 2000 through 2004. The Level of Activity Certification would be required to include information and documentation in support of the proposed level of activity baseline such as production, purchase, or usage records. This information will be used to calculate each site's allocation. The proposed section would allow an owner or operator to mark any portion of the Level of Activity Certification Form and the supporting documentation relating to HRVOC production or use as confidential under Texas Health and Safety Code, §382.041.

Section 101.403, Program Audits and Reports

The proposed new §101.403 would require the executive director to perform an audit of the HRVOC emissions cap and trade program within three years of the effective date of the new division and every three years thereafter. The audit would evaluate the impact of the program on the state implementation plan, availability and cost of allowances, compliance by participants, necessity for additional trading restrictions, and any other elements chosen by the executive director. Additionally, no later than June 30 following each control period, the executive director would be required to prepare and make available a report for the previous control period. This report would detail the number of allowances allocated to each compliance account, total number of allowances allocated under this division, total amount of HRVOC allowances deducted from each compliance account based on actual HRVOC emissions, and a summary of all trades for the control period.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, determined that for the first five-year period the proposed rules are in effect, there will be no significant fiscal impact to the agency or other units of state and local government as a result of the administration or enforcement of the proposed rules.

The proposed rules would establish a mandatory annual cap for HRVOC emissions on all sites located in the HGA that emit, or have the potential to emit, more than ten tpy of HRVOC and are subject to the HRVOC control requirements for vent gas control or cooling tower heat exchange systems. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap would be established at levels necessary for the HGA to attain the national ambient air quality standard (NAAQS) for the one-hour ozone standard. Unused allowances from one

site could be traded or sold to another site in the HGA. The proposed rules would also require all sites with new or modified HRVOC sources in the HGA to obtain unused allowances from other sites already participating under the cap to offset any increased HRVOC emissions.

For sites that emit, or have the potential to emit, less than ten tons of HRVOC per year from sources subject to the HRVOC control requirements for vent gas control or cooling tower heat exchange systems, the total, aggregate emissions from those sources would be limited to ten tpy of HRVOC. Sites exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tpy limit.

To implement the mandatory cap and allowance trading program, the agency would have to perform oversight functions. Specifically, the commission's Air Permits Division would allocate allowances, process allowance trades, and review annual compliance reports as required by the proposed rules. These tasks would be done by using existing resources within the Air Permits Division.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated will be the reduction of ground-level ozone in the HGA to levels determined by EPA as necessary for a healthy and safe environment.

There will be a significant impact on petrochemical, chemical, refinery, storage, and loading companies located in the HGA ozone nonattainment area that emit, or have the potential to emit, more than ten tpy of HRVOC and are subject to the HRVOC control requirements for vent gas control or cooling tower heat exchange systems. Approximately 150 sites will be subject to the proposed rules. They would be required to submit a Level of Activity Certification form to the agency no later than April 30, 2005. Compliance with the annual cap and trade program would begin on April 1, 2006. By March 1 of each year, sites would be required to possess a quantity of HRVOC allowances equivalent to the previous year's actual HRVOC emissions. No later than March 31, 2007 and every March 31 for each year thereafter, sites would be required to submit to the agency an Annual Compliance Report to demonstrate compliance with the cap and trade program for the previous year.

Affected sites may incur significant costs related to the control of HRVOC emissions or purchase of additional HRVOC allowances. Through the cap and trade approach, sites would have the choice of controlling HRVOC emissions or purchasing additional HRVOC allowances in order to meet their allowance obligations. Costs may vary significantly depending on whether a site chooses to control emissions or purchase allowances for compliance.

Because the commission does not know which methods companies will choose to comply with the mandatory cap, it is unable to provide detailed cost estimates for each site or process. However, the commission does have some estimated cost information for particular devices and allowances that companies may choose to utilize when complying with the cap. Based on fiscal information provided in the 2002 HRVOC rule proposal, if a company wants to control HRVOC emissions by installing an additional control device for previously uncontrolled vent gas streams, the estimated capital and annual operating costs for such a device could be approximately $600,000 and $360,000 respectively. If a company chooses to purchase allowances, it may find that the costs of purchasing allowances may vary significantly depending on their availability and the demand for them. Also, no historical data for the price of trading allowances of HRVOCs exists. The only available cost data is for NO_x allowances. The cost of allowances under the mass emissions cap and trade program for NO_x has historically yielded allowance prices in the range of $100 to $200 per ton for a current year allowance and $40,000 per ton for a continuous stream of allowances. Affected industries would be required to possess allowances equivalent to the actual HRVOC emissions from the site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission has been unable to identify any small or micro-businesses that would be affected by the proposed rules. If there are affected small or micro-businesses, the estimated capital and annualized cost in this fiscal note could be a used as a cost estimate for small or micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed rulemaking action to Chapter 101 and revisions to the SIP would affect owners and operators of sources emitting HRVOC subject to Chapter 115, Subchapter H, Divisions 1 and 2. The rules are intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on owners and operators of certain sources. Many of these sources are owned or operated by utilities, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This determination is based on the analysis provided elsewhere in this preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of this proposal.

This proposed rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rulemaking implements requirements of 42 USC. Under 42 USC, §7410, states are required to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code were amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct an regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGA. The proposed rules, that will reduce ambient HRVOC and ozone in the HGA, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, the banking and trading scheme in the proposed rules are necessary to address some of the elevated ozone levels observed in the HGA; this scheme will result in reductions in ozone formation in the HGA and help bring the HGA into compliance with the air quality standards established under federal law as NAAQS for ozone.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App.-Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.-Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.-Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft RIA determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this proposed rulemaking action under Texas Government Code, §2007.043. The rules are proposed as part of a strategy to reduce and permanently cap HRVOC emissions to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The proposed rules do not affect

private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances created under these rules are not property rights. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the 42 USC, §7410. Specifically, the emission limitations and control requirements within these rules were developed in order to meet the ozone NAAQS set by the EPA under the 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking action is to revise programs which provide flexibility in meeting the ozone NAAQS set by the EPA under 42 USC, §7409. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the proposed rules will maintain the same level of, or reduce the level of emissions as the existing rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Because Chapter 101 contains applicable requirements under 30 TAC Chapter 122, Federal Operating Permits, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 101 requirements for each emission unit at their site affected by the revisions to Chapter 101.

ANNOUNCEMENT OF HEARING

Public hearings for this proposed rulemaking have been scheduled for the following times and locations: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearings to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Commission on Environmental Quality, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808, or emailed to *siprules@tceq.state.tx.us*. All comments should reference Rule Project Number 2004-058-101-AI. Comments must be received by 5:00 p.m., August 9, 2004. For further information, please contact Cory Chism, Air Permits Division, (512) 239-0539 or Clifton Wise, Policy and Regulations Division, (512) 239-2263.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state air. The new sections are also proposed under Texas Health and Safety Code, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop and

emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The new sections are also adopted under 42 USC, §7410(a)(2)(A), that requires SIPs to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017; and House Bill 2912, §5.01 and §18.14, 77th Legislature, 2001.

§101.390. Definitions.

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

(1) Allowance--The authorization to emit one ton of highly-reactive volatile organic compounds, expressed in tenths of a ton, during a control period.

(2) Authorized account representative--The responsible person who is authorized in writing to transfer and otherwise manage allowances for the site.

(3) Banked allowance--An allowance that is not used to reconcile emissions in the designated year of allocation, but is carried forward for up to one year and noted as banked in the compliance account or broker account.

(4) Broker--A person that is not required to participate in the requirements of this division, but that opens an account under this division for the purpose of banking and trading allowances.

(5) Broker account--The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(6) Compliance account--The account in which allowances held by a site are recorded for the purposes of meeting the requirements of this division.

(7) Level of activity--The amount of highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), in pounds produced as an intermediate, by-product, or final product or used by a process unit during a given period of time, but excluding any recycled highly-reactive volatile organic compounds internal to the process unit.

(8) Petroleum refinery--A collection of process units used at a site primarily engaged in petroleum refining as defined in the North American Industry Classification System (324110). For the purposes of this division, a petroleum refinery process unit refers only to those process units located at sites that do not include process units that produce ethylene except as a by-product.

(9) Process unit--A collection of equipment assembled and connected by hardpiping or duct work, used to process a raw material or intermediate in the manufacture or production of a final product.

§101.391. Applicability.

This division applies to each site, as defined in §122.10 of this title (relating to General Definitions), in the Houston/Galveston ozone nonattainment area, as defined in §101.1 of this title (relating to Definitions), that is subject to Chapter 115, Subchapter H, Division 1 of this title (relating to Vent Gas Control) or Division 2 of this title (relating to Cooling Tower Heat Exchange Systems). Covered facilities include all vent gas streams, flares, and cooling tower heat exchange systems that emit highly-reactive volatile organic compounds, as defined in §115.10 of this title (relating to Definitions), and that are located at a site subject to Chapter 115, Subchapter H of this title (relating to Highly-Reactive Volatile Organic Compounds). For the purpose of compliance with Chapter 115, Subchapter H, Divisions 1 or 2 of this title, each site that meets the applicability requirements of this section, or elects to opt-in to this division under §101.392(b) of this title (relating to Exemptions), shall always be considered to be subject to this division.

§101.392. Exemptions

(a) Sites in the Houston/Galveston ozone nonattainment area that have the potential to emit ten tons per year or less of highly-reactive volatile organic compounds from all covered facilities at the site are exempt from the requirements of this division.

(b) Sites exempt from this division under subsection (a) of this section may elect to opt-in to the requirements of this division by notifying the executive director in writing by April 30, 2005.

§101.393. General Provisions.

(a) Allowances may be used only for the purposes described in this division and may not be used to meet or exceed the emission limitations authorized under Chapter 116, Subchapter B of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) The initial control period is April 1, 2006 through December 31, 2006. Each control period after December 31, 2006 shall begin January 1 and end December 31 of each year. No later than March 1 after each control period, a site subject to this division must hold a quantity of allowances in its compliance account that is equal to or greater than the total highly-reactive volatile organic compound emissions from the covered facilities located at the site during the control period.

(c) Allowances may not be used to satisfy netting requirements under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review; and Prevention of Significant Deterioration Review).

(d) Allowances may be used simultaneously to satisfy the requirements of this division and the one-to-one portion of the offset requirements for new or modified covered facilities, subject to federal nonattainment new source review requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions: Offsets).

(e) An allowance does not constitute a security or a property right.

(f) All allowances will be allocated, transferred, deducted, or used in tenths of tons. The number of allowances will be rounded down to the nearest tenth of a ton when determining excess allowances and rounded up to the nearest tenth of a ton when determining allowances used.

(g) Each site shall have only one compliance account.

(h) The commission will maintain a registry of compliance accounts and broker accounts. The registry will not contain proprietary information.

§101.394. Allocation of Allowances

(a) On March 31, 2006, the executive director will allocate allowances as follows.

(1) For sites located in Harris County that are not eligible to receive allowances under subsection (c) or (d) of this section, allowances for the emissions of one or more of the highly-reactive

volatile organic compounds (HRVOC) as defined in §115.10 of this title (relating to Definitions), will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(a)(1)

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties that are not eligible to receive allowances under subsection (c) or (d) of this section, allowances for emissions of ethylene and propylene for each site will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(a)(2)

(b) The level of activity of a site for a year shall be determined by summing the levels of activity for all process units located at the site that produce one or more HRVOCs as an intermediate, by-product, or final product or that use one or more HRVOCs as a raw material or intermediate to produce a product.

(c) The owner or operator of a site that is subject to this division, but that does not include a process unit that produces or uses an HRVOC, shall apply by January 30, 2005 to the executive director for an allocation based on HRVOC throughput or storage capacity for the five consecutive calendar year period of 2000 through 2004.

(1) The executive director may equitably allocate up to 10% of the total HRVOC allocations for Harris County to all such sites located in Harris County;

(2) For sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, the executive director may allocate up to 10% of the total HRVOC emissions allocated for those counties to all such sites located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties.

(3) The executive director shall distribute all allowances not allocated under this subsection proportionally to those sites receiving allocations under subsections (a) and (b) of this section.

(d) On March 31, 2006, the executive director will allocate allowances to petroleum refineries as follows.

(1) For petroleum refinery process units located in Harris County, allowances for the emissions of one or more of the HRVOCs, will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(d)(1)

(2) For petroleum refinery process units located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, allowances for emissions of ethylene and propylene for each refinery will be determined using the equation in the following figure.
Figure: 30 TAC §101.394(d)(2)

(e) If the total actual HRVOC emissions from the covered facilities at a site during a control period exceed the amount of allowances in the compliance account for the site on March 1 following the control period, allowances for the next control period shall be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus 10% of the exceedance. This allocation reduction does not preclude the executive director from initiating an enforcement action. If a compliance account does not have sufficient allowances to accommodate the reduction, it is the responsibility of the owner or operator to purchase or transfer additional allowances within 30 days of the notice of deficiency from the executive director.

(f) Allowances will be allocated by the executive director, who will deposit allowances into each compliance account:

(1) initially, by March 31, 2006; and

(2) subsequently, by January 1 of each following year.

(g) The executive director may adjust the deposits for any control period to reflect new or existing state implementation plan requirements.

(h) The executive director may add or deduct allowances from compliance accounts based on the review of reports required under §101.400 of this title (relating to Reporting).

(i) To account for extenuating circumstances, the owner or operator of a site may request that the executive director approve a substitution as follows. In calculating the average level of activity, the level of activity from one calendar year may be replaced with the level of activity from the preceding or following calendar year. Applications for extenuating circumstances shall be submitted by the owner or operator of the site to the executive director no later than April 30, 2005. The executive director shall consider the following circumstances as candidates for extenuating circumstances: production loss due to Acts of God, fire, power outages, or other circumstances not attributable to economic fluctuation.

(j) Allocations for the first control period, April 1, 2006 through December 31, 2006, shall be reduced by 25% from the total annual allocation.

§101.396. Allowance Deductions.

(a) On March 31 of each year after a control period, allowances representing the total highly-reactive volatile organic compounds (HRVOC) emissions from the covered facilities at a site during the previous control period will be deducted from the compliance account for the site. The amount of HRVOC emissions will be based upon the monitoring and testing protocols established in §115.725 and §115.764 of this title (relating to Monitoring and Testing Requirements), as appropriate.

(b) The amount of HRVOC emissions from covered facilities shall be calculated for each hour of the year and summed to determine the annual emissions for compliance. For emissions from emissions events subject to the requirements of §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) or emissions from scheduled maintenance, startup, or shutdown activities subject to the requirements of §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the hourly emissions to be included in the summation shall not exceed the short-term limit of §115.722(c) and §115.761(c) of this title (relating to Site-wide Cap and Control Requirements; and Site-wide Cap).

(c) If the monitoring and testing data referenced in subsection (a) of this section does not exist or is unavailable, the site may determine its HRVOC emissions for that period of time using the following methods and in the following order: continuous monitoring data; periodic monitoring data; testing data; data from manufacturers; and engineering calculations. When determining the amount of HRVOC emissions under this subsection, the site shall include a justification for using the substitute method or methods in lieu of the methods referenced in subsection (a) of this section.

(d) When deducting allowances from the compliance account of a site for a control period, the executive director will deduct the allowances beginning with the most recently allocated allowances before deducting banked allowances.

§101.399. Allowance Banking and Trading.

(a) Allowances allocated for a control period that are not used for compliance in that control period may be banked for use in demonstrating compliance for the next control period or transferred.

(b) Allowances that have not expired or been used may be transferred at any time during a control period, except as provided in this section.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-2, Application for Transfer of Allowances.

(2) The ECT-2 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(c) A person receiving allowances on an annual basis may permanently transfer ownership of current and future allowances to any person in accordance with the following requirements.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-4, Application for Permanent Transfer of Allowance Ownership.

(2) The ECT-4 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(d) A person may transfer allowances that are scheduled to be allocated in a future control period but have not yet been deposited into an account.

(1) The person desiring to transfer the allowances shall apply for approval of the transaction to the executive director by submitting a completed Form ECT-5, Application for Transfer of Individual Future Year Allowances.

(2) The ECT-5 form must include the purchase price per allowance proposed to be paid, except for transactions between sites under common ownership or control.

(3) All information regarding the quantity and purchase price of the allowances will be immediately made available to the public.

(4) If the executive director approves the application, the executive director will send a letter to the seller and purchaser reflecting the transaction. The transaction is final upon issuance of the letter.

(e) Allowances generated from sites located in counties other than Harris County may not be used at sites located in Harris County. Allowances generated from sites located in Harris County may not be used at sites located in counties other than Harris County.

(f) Only authorized account representatives may transfer allowances.

(g) Allowances subject to an approved transaction will be deposited into the purchaser's broker or compliance account within 30 days of receipt of a completed transfer application.

§101.400. Reporting.

(a) No later than March 31 after each control period, each site shall submit a completed highly-reactive volatile organic compound (HRVOC) Emissions Cap and Trade Annual Compliance Report to the executive director, which shall include the following:

(1) the total amount of actual HRVOC emissions from covered facilities at the site during the preceding control period;

(2) the method or methods used to determine the actual HRVOC emissions, including, but not limited to, monitoring protocol and results, calculation methodologies, and emission factors; and

(3) a summary of all final transactions for the preceding control period.

(b) For sites failing to submit a HRVOC Emissions Cap and Trade Annual Compliance Report by the required deadline in subsection (a) of this section, the executive director may withhold approval of any proposed trades from that site involving allowances allocated for the control period for which the ECT-1 Form is due or to be allocated in subsequent control periods.

§101.401. Level of Activity Certification.

(a) No later than April 30, 2005, the owner or operator of each site subject to this division shall submit to the executive director a completed Level of Activity Certification Form.

(b) For each process unit subject to this division, the owner or operator shall certify in the Level of Activity Certification Form the level of activity for the five consecutive calendar year period of 2000 through 2004.

(c) The owner or operator shall attach to the Level of Activity Certification Form information and documentation necessary to support the proposed level of activity baseline.

(d) The owner or operator of the site may mark any portion of the Level of Activity Certification Form, or supporting information and documentation, relating to production and use of highly-reactive volatile organic compounds, as confidential under Texas Health and Safety Code, §382.041.

§101.403. Program Audits and Reports.

(a) No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the impact of the program on the state's ozone attainment demonstration, the availability and cost of allowances, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of allowances may be limited or discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.

(b) No later than June 30, following the end of each control period, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency, a report that includes:

(1) number of allowances allocated to each compliance account;

(2) total number of allowances allocated under this division;

(3) number of actual highly-reactive volatile organic compound allowances subtracted from each compliance account based on the actual highly-reactive volatile organic compound emissions from the site; and

(4) a summary of all trades completed under this division.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404252
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Law Division
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-4712

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (commission) proposes amendments to §§115.10, 115.720, 115.722, 115.725 - 115.727, 115.729, 115.760, 115.761, 115.764, 115.769, 115.780 - 115.783, and 115.786 - 115.789. The commission also proposes to repeal §§115.766 - 115.768 and 115.785, and proposes new §115.766 and §115.767. These amendments, repeals, and new sections are being proposed in Subchapter A, Definitions; Subchapter H, Highly-Reactive Volatile Organic Compounds, Division 1, Vent Gas Control; Subchapter H, Division 2, Cooling Tower Heat Exchange Systems; and Subchapter H, Division 3, Fugitive Emissions.

The amended, repealed, and new sections are proposed to be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston/Galveston/Brazoria ozone nonattainment area (HGA) is classified as Severe-17 under the Federal Clean Air Act Amendments of 1990 (as codified in 42 United States Code (USC), §§7401 *et seq*.), and therefore, is required to attain the one-hour ozone standard of 0.12 parts per million (125 parts per billion) by November 15, 2007. The HGA consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, and the commission has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. The most relevant HGA SIP revisions to date are the December 2000 one-hour ozone standard attainment demonstration, the September 2001 follow-up revision, and the December 2002 nitrogen oxides (NO_x)/highly-reactive volatile organic compound (HRVOC) revision.

This process has proven to be extremely challenging due to the magnitude of reductions needed for attainment. The emission reduction requirements included as part of the December 2000 SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA, in partnership with the commission, to address ozone. These coalitions include local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as EPA and the commission, and worked diligently to identify and quantify control strategy measures for the HGA attainment demonstration.

December 2000

The December 2000 SIP revision contained rules and photochemical modeling analyses in support of the HGA ozone attainment demonstration. The majority of the emissions reductions identified in this revision were from a 90% reduction in point source NO_x. The modeling analysis also indicated a shortfall in necessary NO_x emission reductions, such that an additional 91 tons per day (tpd) of NO_x reductions were necessary for an approvable attainment demonstration. In addition, the revision contained post-1999 rate-of-progress (ROP) plans for the milestone years 2002 and 2005 and for the attainment year 2007, and transportation conformity motor vehicle emissions budgets (MVEB) for NO_x and volatile organic compound (VOC) emissions. The SIP also contained enforceable commitments to implement further measures in support of the HGA attainment demonstration, as well as a commitment to perform and submit a midcourse review.

September 2001

The September 2001 SIP revision for the HGA included the following elements: 1) corrections to the ROP table/budget for the years 2002, 2005, and 2007 due to a mathematical inconsistency; 2) incorporation of a change to the idling restriction control strategy to clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle (the commission committed to making this change when the rule was adopted in December 2000); 3) incorporation of revisions to the clean diesel fuel rules to provide greater flexibility for compliance with the requirements of the rule while preserving the emission reductions necessary to demonstrate attainment in the HGA; 4) incorporation of a stationary diesel engine rule that was developed as a result of the state's analysis of EPA's reasonably available control measures; 5) incorporation of revisions to the point source NO_x rules; 6) incorporation of revisions to the emissions cap and trade rules; 7) the removal of the construction equipment operating restriction and the accelerated purchase requirement for Tier 2/3 heavy-duty equipment; 8) the replacement of these rules with the Texas Emission Reduction Plan program; 9) the layout of the midcourse review process that details how the state will fulfill the commitment to obtain the additional emission reductions necessary to demonstrate attainment of the one-hour ozone standard in the HGA; and 10) replacement of the 2007 ROP MVEBs to be consistent with the attainment MVEBs.

As was discussed in the December 2000 revision, the modeling resulted in a 141 parts per billion peak ozone level that correlated to a shortfall calculation of 91 tpd NO_x equivalent emissions. An additional five tpd was added to the shortfall, because the state could not take credit for the NO_x reductions associated with the diesel pull-ahead strategy. The excess emissions from this strategy were not included in the original emissions inventory. The gap control measures adopted in December 2000, along with the stationary diesel engine rules included in the September 2001 revision, resulted in NO_x reductions of 40 tpd, which left a total remaining shortfall of 56 tpd. The state committed to address this shortfall through the midcourse review process.

December 2002

In January 2001, the Business Coalition for Clean Air--Appeal Group (BCCA-AG) and several regulated companies challenged the December 2000 HGA SIP and some of the associated rules. Specifically, the BCCA-AG challenged the 90% NO_x reduction requirement from stationary sources in the HGA. In May 2001, the parties agreed to a stay in the case, and Judge Margaret Cooper, Travis County District Court, signed a consent order, effective June 8, 2001, requiring the commission to perform an independent, thorough analysis of the causes of rapid ozone formation events and identify potential mitigating measures not yet identified in the HGA attainment demonstration, according to the milestones and procedures in Exhibit C (Scientific Evaluation) of the order.

In compliance with the consent order, the commission conducted a scientific evaluation based in large part on aircraft data collected by the Texas 2000 Air Quality Study (TexAQS). The TexAQS, a comprehensive research project conducted in August and September 2000 involving more than 40 research organizations and over 200 scientists, studied ground-level ozone air pollution in the HGA and East Texas regions. The study revealed that while industrial source NO_x emissions were generally correctly accounted for, industrial source VOC emissions were likely significantly understated in earlier emissions inventories. The study also showed that surface monitors were insufficient to capture the phenomenon of ozone plumes downwind of industrial facilities. On four separate days, aircraft instruments recorded ozone levels exceeding 125 parts per billion that were missed by surface monitoring equipment. The findings from the study are constantly evolving and have raised questions about the formation of high ozone levels in the HGA.

To address these findings and to fulfill obligations in the consent order, the commission adopted a SIP revision in December 2002 that focused on replacing the most stringent 10% industrial NO_x reductions with VOC controls. In light of the TexAQS study, the commission conducted further modeling analysis of ambient VOC data. The results of photochemical grid modeling and analysis indicated that the same level of air quality benefits achieved with a 90% industrial NO_x emissions reduction could be achieved with an overall 80% industrial NO_x emissions reduction when combined with an industrial VOC emissions reduction. This conclusion was based on results from several studies, including photochemical grid modeling of the August-September 2000 episode using a top-down emissions inventory adjustment to point source HRVOC emissions, and analyses of ambient HRVOC measurements made by commission automated gas chromatographs and airborne canisters using the maximum incremental reactivity and hydroxyl reactivity scales. Four HRVOCs (ethylene, propylene, 1,3-butadiene, and butenes) clearly play important roles in the HGA ozone formation, and these four seemed to be the best candidates for the first round of HRVOC controls.

In order to address these scientific findings, the commission adopted revisions to the industrial source control requirements, one of the control strategies within the existing federally approved SIP. The December 2002 revision contains new rules to reduce HRVOC emissions from four key industrial sources: fugitives, flares, process vents, and cooling towers. The adopted rules target HRVOCs while maintaining the integrity of the SIP. Analysis showed that limiting emissions of ethylene, propylene, 1,3-butadiene, and butenes in conjunction with an 80% reduction in NO_x is equivalent in terms of air quality benefit to that resulting from a 90% point source NO_x reduction requirement. As such, the HRVOC rules are performance-based, emphasizing monitoring, recordkeeping, reporting, and enforcement, rather than establishing individual unit emission rates.

The technical support documentation accompanying the revision contains the supporting analysis for early results from ongoing analysis examining whether reductions in HRVOC emissions could replace the last 10% of industrial NO_x controls with a reduction of approximately 64% in industrial HRVOC emissions, while ensuring that the air quality specified in the approved December 2000 HGA SIP is met.

Current SIP Revision

As mentioned previously, the commission committed to perform a midcourse review to ensure attainment of the one-hour ozone standard. The midcourse review process provides the ability to update emissions inventory data, utilize current modeling tools, such as MOBILE6, and enhance the photochemical grid modeling. The data gathered from the TexAQS continues to improve photochemical modeling of the HGA. The collection of these technical improvements give a more comprehensive understanding of the ozone challenge in the HGA that is necessary to develop an attainment plan. In the early part of 2003, the commission was preparing to move forward with the midcourse review; however, during the same time period EPA announced its plans to begin implementation of the eight-hour ozone standard. The EPA published proposed rules for implementation of the eight-hour ozone standard in the June 2, 2003 issue of the *Federal Register* (68 FR 32802). In the same time frame, EPA also formalized its intentions to designate areas for the eight-hour ozone standard by April 15, 2004, meaning states would need to reassess their efforts and control strategies to address this new standard by 2007. Recognizing that existing one-hour nonattainment areas would soon be subject to the eight-hour ozone standard, and in an effort to efficiently manage the state's limited resources, the commission decided to develop an approach that addresses the outstanding obligations under the one-hour ozone standard while beginning to analyze eight-hour ozone issues.

The commission's one-hour ozone SIP commitments include: 1) completing a one-hour ozone midcourse review; 2) performing modeling; 3) adopting measures sufficient to fill the NO_x shortfall; 4) adopting measures sufficient to demonstrate attainment; and 5) revising the MVEB using MOBILE6.

Results from the TexAQS and recent photochemical modeling indicate that additional HRVOC reductions will be the most beneficial measure to reduce ozone in the HGA. The commission is proposing to reduce HRVOC emissions to reach attainment of the one-hour ozone standard. The photochemical modeling of the August-September 2000 episode coupled with a weight-of-evidence argument demonstrates attainment of the one-hour ozone standard. To achieve the necessary HRVOC reductions, the commission is proposing a two-pronged approach that would address variable short-term emissions through a not-to-exceed limit, and would address steady-state and routine emissions through an annual cap. The annual HRVOC cap in Harris County would be reduced from the existing HRVOC cap in order to support the attainment demonstration modeling. The annual HRVOC cap in the seven-county surrounding area is equivalent to the total emissions limits established in the December 2002 SIP revision, but represented on an annual basis instead of a 24-hour rolling average. The commission will continue to evaluate the necessity to require short-term

and annual reductions from those sites subject to Chapter 115, Subchapter H, Divisions 1 and 2, that are located within the seven-county surrounding area. If the evaluation demonstrates that reductions from these counties have little impact on attainment of the one-hour ozone standard, the short-term and annual limits for those other seven counties may no longer be required. The commission also solicits comments on possible ways to mitigate violations of the short-term emissions cap.

The annual HRVOC cap emissions would be distributed and enforced through an HRVOC emissions cap and trade program under 30 TAC Chapter 101, Subchapter H, new Division 6 (Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program) being proposed in concurrent rulemaking. This program would establish a mandatory annual HRVOC emissions cap on all sites located in the HGA that emit or have the potential to emit more than ten tons per year of HRVOC, and that are subject to the HRVOC control requirements of Chapter 115, Subchapter H, Division 1 or Division 2. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of HRVOC emissions. This HRVOC cap would be established at levels demonstrated as necessary to allow the HGA to attain the one-hour ozone standard. The proposed cap would initially be implemented on April 1, 2006. The proposed HRVOC cap and trade program would also require all sites with new or modified HRVOC sources in the HGA to obtain unused allowances from other sites already participating under the cap to offset any increased HRVOC emissions. For sites that have the potential to emit ten tons per year or less of HRVOCs from sources subject to the HRVOC control requirements of Subchapter H, Division 1 or 2, the total aggregate HRVOC emissions from those sources would be limited to ten tons per year. Sites that are exempt from the HRVOC emissions cap and trade program would be extended an opportunity to opt-in, receive an HRVOC allocation, and thereby not be restricted to the ten tons per year limit.

The HGA SIP no longer relies solely on NO_x-based strategies. A combination of point source HRVOC controls and NO_x reductions appear to be the most effective means of reducing ozone in the HGA and there is no longer a NO_x shortfall in the HGA SIP. The commission also evaluated a number of the existing control strategies that were put in place in the December 2000 revision. The photochemical modeling shows that some of these strategies are no longer necessary to attain the one-hour ozone standard. This SIP revision is proposing the repeal of the commercial lawn and garden equipment restrictions, the repeal of the heavy-duty vehicle idling restrictions, and the removal of the motor vehicle inspection and maintenance program requirements from Chambers, Liberty, and Waller Counties. In addition, this SIP proposal includes revisions to the environmental speed limit strategy. In September 2002, the commission revised the existing speed limit strategy to suspend the 55 mile per hour (mph) speed limit until May 1, 2005, and, where posted speeds were 65 mph or higher before May 1, 2002, to increase speed limits to five mph below what was posted. The 78th Legislature, 2003, removed the commission's authority to determine speed limits for environmental purposes; therefore, this proposal would remove the reinstatement of the 55 mph speed limit on May 1, 2005, and would maintain the currently posted speed limits at five mph below the posted limit before May 1, 2002. Also, as part of this SIP revision, the commission is proposing new statewide portable fuel container rules. Historically, the commission has expressed a preference to implement technology-based strategies over behavior-altering strategies, and these proposed changes embody that philosophy.

Through this revision, the commission is fulfilling its outstanding one-hour ozone SIP obligations and beginning to plan for the upcoming eight-hour ozone standard. This proposal demonstrates attainment of the one-hour ozone standard in the HGA in 2007 and provides a preliminary analysis of the HGA in terms of the eight-hour ozone standard in 2007 and 2010. EPA's proposed eight-hour implementation rules provide flexibility to the states in transitioning from the one-hour to the eight-hour ozone standard, and the commission believes the steps taken in this proposal and the technical work performed to date will be invaluable through the transition period. Upon EPA's finalization of the eight-hour implementation and the transportation conformity rules, the commission expects to begin developing eight-hour ozone SIPs.

This is to put all interested parties on notice that, although the commission is proposing the following rules, including an annual cap and a short-term limit on HRVOC emissions, the commission may significantly amend these proposed rules at adoption, repropose a portion of these rules, or propose additional rules, as appropriate.

First, the commission continues to analyze the rules for implementation of the eight-hour ozone standard adopted by EPA on April 15, 2004. These rules and their preamble suggest that a demonstration of attainment of the one-hour ozone standard may not be required for the portion of the SIP pertaining to the HGA. This means that the commission will need to review the measures contained in the current proposal to ensure that they are needed in this form in order to demonstrate noninterference. Additional analysis of the impact of the proposed rules on attainment of the eight-hour standard may indicate a need for new or more stringent control measures.

Second, the commission may determine that, if a one-hour attainment demonstration is necessary, additional, different, or more stringent control measures may be needed based on additional modeling. The commission staff continues to model scenarios under the one-hour standard, and the commission may determine that the results indicate a need for changes in control strategies. Moreover, the one-hour attainment demonstration includes a weight-of-evidence argument. Additional review of the issues relating to the weight-of-evidence argument could lead the commission to propose new strategies or to repropose the control strategies proposed today.

Finally, the commission is also concurrently proposing a cap and trade program in Chapter 101, Subchapter H, new Division 6 as a refinement of the annual cap proposed for HRVOC emissions.

SECTION BY SECTION DISCUSSION

General Administrative Rule Language Changes

The commission proposes to change the word "which" to "that" and the word "shall" to "must" in numerous locations in the rule language to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002.

The commission proposes to spell out acronyms the first time they are used in a section and to delete acronyms that are only used once in a section.

SUBCHAPTER A, DEFINITIONS

The proposed amendment to §115.10, concerning Definitions, would add a new definition of "Emergency flare" to differentiate flares that only receive emissions during upset events or unscheduled maintenance, startup, or shutdown activities from other flares. The remaining definitions in §115.10 are proposed to be renumbered accordingly.

The proposed amendment to the definition of "Strippable volatile organic compound" would remove the listing of test methods used to determine the concentration of strippable VOC because the test methods are not necessary to define the term and are already listed in the cooling tower rules.

SUBCHAPTER H, HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS

Division 1, Vent Gas Control

Section 115.720, Applicability and Definitions

The proposed amendment to §115.720(a) would add language to specify that the applicability of this rule includes both controlled and uncontrolled vent gas streams containing HRVOC. A new definition for "Degassing safety device" is proposed in §115.720(b) to address low-flow pilots that are typically permitted as flares, but used only at geologic storage facilities during emergency releases. The remaining definitions in §115.720 are proposed to be renumbered accordingly.

Section 115.722, Site-wide Cap and Control Requirements

The commission proposes to amend this section to allow sites the flexibility of compliance with the vent gas control requirements of this division through compliance with the HRVOC emissions cap and trade program. The proposed amendment to §115.722(a) would change the long-term site-wide cap strategy to a calendar year basis instead of the existing 24-hour rolling average basis, and would state that owners or operators of a site subject to the HRVOC vent gas rules shall comply with the HRVOC emissions cap and trade program in Chapter 101, Subchapter H, Division 6. The proposed amendment to §115.722(a) would also remove the reference to the site-cap limits in the tables of the SIP.

Proposed new §115.722(b) would specify that all sites subject to this division or to Division 2 that are exempt from the HRVOC emissions cap and trade program in accordance with §101.392 (Exemptions) are limited to ten tons of HRVOC emissions per calendar year.

Proposed new §115.722(c) would provide a short-term, not-to-exceed limit, in pounds of HRVOC per one-hour block, for all sites subject to this division. The commission continues to evaluate the magnitude of the short-term limit, and the time period over which this short-term limit would be enforced. The commission solicits comment regarding the appropriate level for this short-term limit, and requests any supporting data regarding alternatives to the magnitude and time period. Proposed new §115.722(c)(3) would address how exceedances of the short-term limits should be calculated to determine compliance with the long-term cap. Existing §115.722(b) and (c) are proposed to be relettered to §115.722(d) and (e), respectively. The proposed amendment to relettered §115.722(d) would correct a citation to 40 Code of Federal Regulations (CFR) §60.18 and add two new paragraphs to specify the methods to demonstrate compliance with the minimum net heating value requirements and the maximum exit velocity requirements. The commission does not propose to require continuous monitoring of potential visible emissions from flares.

Section 115.725, Monitoring and Testing Requirements

The proposed amendment to §115.725(a) would specify that pressure relief valves are not subject to the requirements of §115.725(a). Proposed §115.725(a) would also specify that each vent gas that is not controlled by a flare must be tested. The proposed amendment to §115.725(a) would specify that HRVOC emissions are considered to be zero during non-operational periods for cyclic or batch processes. Additionally, the proposed amendment to §115.725(a) would add requirements in §115.725(a)(1) and (2) for owners or operators to select operational parameters for uncontrolled and controlled vents, monitor those parameters, and establish operating limits based on averages during the tests required by §115.725(a). The process parameter monitoring requirements are necessary to help assure compliance with the site-wide caps in §115.722(c). Proposed new §115.725(a)(3) would require that HRVOC emissions during emissions events and scheduled startup, shutdown, and maintenance activities be determined using either testing or process knowledge and engineering calculations. This requirement is necessary due to the inclusion of emissions from emissions events and scheduled startup, shutdown, and maintenance activities in the site-wide caps in §115.722 and to better assure compliance with the HGA attainment demonstration SIP. Proposed new §115.725(a)(4) would require the owner or operator to develop, implement, and follow written monitoring plans for the operational parameters required under §115.725(a)(1) and (2). Proposed new §115.725(a)(5) would specify that additional testing may be performed to update emission data after the initial HRVOC emission test has been performed, and that test plans for additional testing must be submitted to the executive director at least 45 days prior to testing. Proposed new §115.725(a)(6) would include the provisions currently under §115.725(c), regarding the use of testing performed prior to approval of the test plans, and proposed new §115.725(a)(7) would include the language currently under §115.725(g), regarding test waivers for one-half of the vents that are identical in design and operation.

The proposed amendment to §115.725(b) would specify that the alternatives provided may not be applied to pressure relief valves and that the vent gas stream must comply with the process parameter monitoring requirements of §115.725(a). The proposed amendment to §115.725(b)(1)(B) would specify that cylinder gas audits must be performed at a minimum quarterly, after the initial cylinder gas audit. The proposed amendment in §115.725(b)(2) would specify that process data, "sufficient to demonstrate compliance status" may be used to determine maximum potential HRVOC hourly emissions, and would remove pressure relief valves from the types of processes for which process knowledge may be used. Finally, the proposed amendment to §115.725(b) would include the addition of degassing safety devices in §115.725(b)(2)(D) to the types of processes for which process knowledge may be used in lieu of testing.

Proposed new §115.725(c) would provide monitoring requirements for pressure relief valves, and the proposed new language in §115.725(c)(1) would specify the requirements of the pressure relief valve monitoring system. Proposed new §115.725(c)(2) would specify that the owner or operator may use process knowledge to determine the HRVOC emission rates during events when the pressure relief valves open. Proposed new §115.725(c)(3) would require written monitoring plans for the pressure relief valve monitoring systems, and would specify the requirements of the plans. Finally, proposed

new §115.725(c)(4) would specify that the written monitoring plans must be submitted within 30 days upon written request by the executive director, and that the executive director may require additional or alternative monitoring requirements.

The proposed amendment to §115.725(d) would specify that except for subsections (e) - (i), the owner or operator shall perform continuous monitoring in accordance with the requirements of §115.725(d) to demonstrate compliance with §115.722(a) - (d). The proposed amendment to §115.725(d)(2) would revise the calibration requirements for the on-line analyzer. The proposed amendment to §115.725(d)(2)(A)(i) would specify that for HRVOC constituents, the owner or operator must follow the procedures and requirements of 40 CFR Part 60, Appendix B, Section 10 of Performance Specification 9, except as provided for in §115.725(d)(2)(A)(i). Proposed new §115.725(d)(2)(A)(ii) would specify that for the constituents monitoring to determine net heating value and molecular weight, the owner or operator may elect to follow the §115.725(d)(2)(A)(i) calibration requirements or the manufacturer recommended procedures. Proposed new §115.725(d)(2)(A)(ii)(I) would require that if the manufacturer recommended procedures are selected, those procedures must include, at a minimum, weekly calibration checks of the top two non-HRVOC constituents affecting molecular weight and net heating value to meet the performance criteria of Section 10.2 of Performance Specification 9. Proposed new §115.725(d)(2)(A)(ii)(II) would require that manufacturer information and data be submitted with a quality assurance plan (QAP) for those constituents for which routine calibration is not performed. Proposed new §115.725(d)(2)(A)(iii) would specify that the range of calibration standards required for calibration of the on-line analyzer may be based on the typical concentrations instead of the full potential range of concentrations. The language in §115.725(d)(2)(A)(iii) would also specify that data must be submitted with the QAP to demonstrate the accuracy of the analyzer at the maximum concentrations outside the proposed calibration range. Proposed new §115.725(d)(2)(A)(iv) would state that the executive director may specify calibration requirements in the approval of the QAP. Finally, proposed new §115.725(d)(2)(B) would specify that the owner or operator may install an on-line calorimeter to determine net heating value instead of monitoring for individual constituents to determine net heating value. It has come to the commission's attention that a reference in Performance Specification 9, Section 10.1 correctly cites Section 13.3 of Performance Specification 9 with regard to the acceptance criteria for multipoint calibration requirements. Section 13.3 would require industry to comply with a five-minute sampling frequency for the on-line analyzers. The correct citation for the precision and linearity requirements should be Section 13.2 of Performance Specification 9. The commission has confirmed the appropriate citation with the EPA. Therefore, it is the commission's position that industry should comply with the multipoint calibration requirements in Section 13.2 of Performance Specification 9.

The proposed amendment to §115.725(d)(3) would specify the calculation methodology for determining the percent measurement data availability. The proposed amendment to §115.725(d)(4) would change the start of daily sampling from within 24 hours to within ten hours of initial on-line analyzer malfunction, and would specify that the samples collected during periods of monitor downtime shall be used to demonstrate "continuous compliance with the requirements of §115.722(a) - (d) of this title." The proposed amendment to §115.725(d)(5) would delete the move the language specifying that compliance with the minimum net heating value requirements is based on block one-hour average to §115.722(d)(1). The language currently in §115.725(d)(7) would be renumbered to §115.725(d)(6) and revised to move language to §115.722(d)(2) specifying that compliance with the exit velocity requirements is based on a block one-hour average. Additionally, §115.725(d)(6) would be renumbered to §115.725(d)(7) and revised to specify that HRVOC emission rates shall be calculated from data gathered according to paragraphs (1) - (6), and to specify that the heating value requirement is based on net heating value. Finally, in order to better organize the monitoring and testing rules, §115.725(d)(8) regarding minor modifications to the methods and alternative monitoring methods, is proposed to be moved to a new §115.725(j) and the language revised to better specify the requirements.

Section 115.725(e) currently states that flares used solely for abatement of emissions from loading operations for transport vessels or temporary portable flares used solely for the abatement of emissions from scheduled maintenance or startup or shutdown activities are not required to comply with the monitoring requirement of §115.725(d) provided specific requirements are satisfied. The proposed amendment to §115.725(e) specifies that this subsection would only apply to flares used solely for abatement of HRVOC emissions, would apply to loading operations from marine vessels, and would not apply to temporary portable flares used solely for scheduled startup, shutdown, or maintenance activities. The proposed amendment to §115.725(e) would also move the recordkeeping requirements in §115.725(e)(1)(B) to §115.726(d)(5), and renumber §115.725(e)(1)(A) - (D) to §115.725(e)(1) - (3). The proposed amendment to §115.725(e)(1) - (3) would also specify the requirements to demonstrate compliance with the minimum net heating value requirements and the exit velocity requirements of §115.722(d), and compliance with the site-wide cap in §115.722. Proposed new §115.725(e)(4) would specify that the owner or operator may use process knowledge to determine net heating value and HRVOC emissions for flares that receive greater than 98% of an individual HRVOC at all times.

The proposed amendment would reletter §115.725(f) to §115.725(j) and specify that minor modifications to either test methods or monitoring methods may be approved by the executive director.

Proposed new §115.725(f) would specify monitoring requirements for flares used solely for abatement of emissions from scheduled startup, shutdown, and maintenance activities. Proposed new §115.725(f) would incorporate language removed from §115.725(e)(2), regarding temporary portable flares; however, but would also expand the applicability to any flare type used solely for scheduled startup, shutdown, and maintenance activities. Proposed new §115.725(f)(2) would limit the total number of days to 28 days in 12 consecutive months for which an account may temporarily send HRVOC to multiple flares under the provisions of §115.725(f). Proposed new §115.725(f)(6) would specify that the owner or operator may use process knowledge to determine net heating value and HRVOC emissions for flares that receive greater than 98% of an individual HRVOC at all times.

The proposed amendment to §115.725(g), regarding test waivers for one-half of the vents that are identical in design and operation, would move the language to §115.725(a)(8).

Proposed new §115.725(g) would specify monitoring requirements for emergency flares as proposed to be defined in

§115.10. Proposed new §115.725(g)(1) and (2) would provide the option of complying with the monitoring requirements of §115.725(d) or using process knowledge and engineering calculations to determine compliance with §115.722(a) - (d). Proposed new §115.725(g)(2) would specify additional requirements for emergency flares for which process knowledge and engineering calculations are used. Proposed new §115.725(g)(2)(A) would specify parameter monitoring for emergency flares with physical seals, such as water seals, to monitor the status of the physical seals, record the time and duration of each event when emissions are sent to the flare, and verifies that the seals have been restored after an event. Proposed new §115.725(g)(2)(B) would specify parameter monitoring for emergency flares without physical seals to monitor flow to the emergency flare with a flow monitor or flow indicator to determine the time and duration of each event when emissions are sent to the flare and to determine the minimum flow rate that indicates when emissions are sent to the flare. Proposed new §115.725(g)(2)(C) would specify that any owner or operator electing to use process knowledge for emergency flares, must develop, implement, and follow a written monitoring plan for the parameter monitoring under §115.725(g)(2)(A) or (B). Proposed new §115.725(g)(2)(D) would specify that the written monitoring plans must be submitted within 30 days upon written request by the executive director. Proposed new §115.725(g)(2)(E) would specify the calculation methods for the actual exit velocity and the HRVOC hourly average mass emission rate from the flare, and the destruction efficiencies for various situations.

Proposed new §115.725(h) would specify requirements for flares other than emergency flares that temporarily receive HRVOC emissions from activities other than scheduled startup, shutdown, and maintenance. Proposed new §115.725(h)(1) and (2) would limit the total number of days that HRVOC may be temporarily sent to an individual flare, or to multiple flares at an account under the provisions of §115.725(h). Proposed new §115.725(h)(3) would options to determine flow rate to the flare in lieu of monitoring in accordance with §115.725(d)(2), including process knowledge, actual measurement, or for flares that temporarily receive HRVOC emissions from flare systems that are monitored according to §115.725(d), data substitution. Proposed new §115.725(h)(4) would specify options to determine net heating value and HRVOC constituents in lieu of monitoring in accordance with §115.725(d)(2), including daily sampling according to §115.725(d)(4) or, for flares that temporarily receive HRVOC emissions from flare systems that are monitored according §115.725(d), data substitution for time periods up to 72 consecutive hours. Finally, proposed new §115.725(h)(5) would specify that, if an emissions event occurs while HRVOC emissions are sent temporarily to a flare under §115.725(h), then process knowledge may be used to determine compliance with §115.722(a) - (d).

Proposed new §115.725(i) would specify that process knowledge may be used to determine compliance with §115.722(a) - (d) for flares that are specifically designed to receive and control liquid or dual phase streams. This amendment is necessary because the monitoring provisions in the §115.725 are not applicable to flares designed to control liquid streams, and the current state of monitoring technology is not sufficient to allow continuous monitoring of dual phase streams.

Proposed new §115.725(j) (that was relettered from §115.725(f)) would incorporate language previously in §115.725(f) to specify that minor modifications to either test methods or monitoring methods may be approved the executive director.

Finally, proposed new §115.725(k) would specify that when process information and engineering calculations are used to demonstrate compliance with §115.722(a) - (d), the process information and engineering calculations must be submitted within 30 days upon written request by the executive director. This addition to §115.725 is necessary to ensure the commission has adequate information to determine compliance with the site-wide caps.

Section 115.726, Recordkeeping and Reporting Requirements

The proposed amendment to §115.726(a) would remove the unnecessary language specifying review of test plans and QAPs, and would specify that the owner or operator of each affected flare or vent gas stream subject must subsequently comply with the approved testing plans and QAPs for monitoring. The proposed amendment to §115.726(a)(1) would specify that the paragraph applies to the monitoring requirements in §115.725(d) and the proposed amendment to §115.726(a)(1)(A) would specify the latest date that the QAP must be submitted. The proposed amendment to §115.726(a)(1)(B) would change the requirement to submit QAP for flares that become subject to the requirements of the division after the compliance date. The proposed amendment to §115.726(a)(1)(B) would change the requirement to submit the QAP at least 60 days prior to the flare being place in HRVOC service by removing the 60-day time period and only require that the QAP be submitted prior to the flare being placed in HRVOC service. The proposed amendment to §115.726(a)(2) would specify that the paragraph only applies to the testing requirements in §115.725(a). Additionally, proposed new §115.726(a)(2)(D) would specify that the operation parameters required in proposed new provisions in §115.725(a)(1) and (2) must be identified in the test plan.

The proposed amendment to §115.726(b) would include more specific recordkeeping requirements of the vent testing and monitoring conducted as required by §115.725(a) and (b). Proposed new §115.726(b)(1) - (3) would include the addition of recordkeeping requirements for the process parameter monitoring and monitoring plans required under proposed new §115.725(a)(1), (2), and (4). Additionally, proposed new §115.726(b)(4) - (7) would provide more specific recordkeeping requirements for vent gas streams monitored using a continuous emission monitoring systems in accordance with §115.725(b)(1), and for vent gas streams for which alternatives to testing have been allowed under §115.726(b)(2).

The proposed amendment would reletter §115.726(c), relating to recordkeeping requirements for flares monitored in accordance with §115.725, to §115.726(d). Proposed new §115.726(c) would include recordkeeping requirements for affected pressure relief valves monitored in accordance with the proposed new provisions in §115.725(c). The proposed additional recordkeeping requirements would include records of the date, time, duration, volumetric flow rate, and speciated and total HRVOC emissions for each pressure relief event. The proposed recordkeeping requirements for affected pressure relief valves would include records of the parameters monitored in accordance with §115.725(c)(1), all process information, data, and calculations used to determine flow and emission data as specified in §115.725(c)(2), and the monitoring plans required under §115.725(c)(3).

The proposed amendment to §115.726(d) (that was relettered from §115.726(c)) would specify that the recordkeeping requirements are for flares monitored in accordance with §115.725. The proposed amendment to §115.726(d)(4) (that was renumbered

from §115.726(c)(4)) would specify that the records maintained for the calculated net heating values and exit velocities must be recorded on a 15-minute average basis rather than instantaneous values.

Proposed new §115.726(d)(5) would specify recordkeeping requirements specific to flares used solely for loading operations under §115.725(e), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). The proposed new language in §115.726(d)(5) would incorporate recordkeeping requirements moved from §115.725(e)(1)(B) and the requirement in §115.726(d)(5)(A) would require the size of vessel being loading instead of the type of vessel.

Proposed new §115.726(d)(6) would specify recordkeeping requirements specific to flares used solely for scheduled startup, shutdown, and maintenance activities under §115.725(f), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Similarly, proposed new §115.726(d)(7) would specify recordkeeping requirements specific to emergency flares subject to §115.725(g), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4). Finally, proposed new §115.726(d)(8) would specify recordkeeping requirements specific to flares subject to the requirements of §115.725(h) or (i), in addition to the general flare recordkeeping requirements in §115.726(d)(1) - (4).

The proposed amendment would reletter §115.726(d), related to records for exemptions to §115.726(e), and would specify that the records correspond to the exemptions listed in §115.727(a) - (e). The proposed amendment to §115.726(e)(1) (that was renumbered from §115.726(d)(1)) would specify that the records applied to vent gas streams that are routed to flares and that contain less than 5.0% by weight HRVOC, and to vent gas streams that are not routed to flares that does not exceed 100 parts per million by volume HRVOC. The proposed amendment to §115.726(e)(3) would correct cross-references.

The proposed amendment would reletter §115.726(f) to §115.726(i) and add a new §115.726(f) that would specify that an owner or operator claiming exemption under §115.727(e) must submit written notification at least 15 days prior to permanently removing a flare from service, but no later than December 31, 2005.

The proposed amendment would reletter §115.726(e) to §115.726(g). The proposed amendment to §115.726(g) would specify that daily records are required to demonstrate compliance with the tons per calendar year emissions limits in §115.722(a) and (b). Furthermore, the proposed amendment to §115.726(g)(2) would include pressure relief valves in addition to all flares and vents subject to §115.725. Finally, the proposed amendment would delete §115.726(g)(3) because this specific recordkeeping requirement would be moved to §115.726(g)(2).

Proposed new §115.726(h) would specify the recordkeeping requirements to demonstrate compliance with the one-hour block emission limits in §115.722(c).

The proposed amendment to §115.726(i) (relettered from §115.726(f)) would specify that records must be maintained on-site.

Section 115.727, Exemptions

The proposed amendment to §115.727(b)(1) and (2) would correct cross-references. Additionally, the proposed amendment to §115.727 would delete §115.727(c) that specified that emissions from scheduled maintenance, startup, and shutdown activities in compliance with 30 TAC §101.211 are exempt from the requirements of §115.722(a), and §115.727(d) that specifies that emissions from emissions events in compliance with §101.201 are exempt from the requirements of §115.722(a). The proposal to remove the exemptions in §115.727(c) and (d) is necessary to better ensure an approvable SIP and the demonstration of attainment.

The proposed amendment would reletter §115.727(e) to §115.727(c) and include the addition of language to specify that the exemptions in §115.727(c) may apply to vent gas streams that are not routed to a flare. The proposed amendment to §115.727(c)(1) - (3) would correct cross-references. The proposed amendment to §115.727(c)(2) would also add language to provide exemption for vent gas streams with low volumetric rates equal to or less than 100 dry standard cubic feet per hour. This proposed revision provides flexibility for exempting vent gas streams that may exceed the 100 parts per million by volume exemption level already provided, but have minimal HRVOC emissions due to very low volumetric flow rate. An additional proposed amendment to §115.727(c)(2) would specify that the 5.0% limit for the total number of vents claimed exempt under §115.727(c)(2) is based on the long-term pound per hour cap limitation in §115.722(a) or (b). Finally, the proposed amendment to §115.727(c)(3)(A) would add incinerators to list of the sources for which an exemption may be claimed and would specify that the exemption for vent gas streams resulting from the combustion of less than 5.0% HRVOC is "by weight."

The proposed amendment would reletter §115.727(f) to §115.727(d) and correct a cross-reference.

Proposed new §115.727(e) would specify that any flares that will be permanently out of service by April 1, 2006 are exempt from the requirements of the division except for the recordkeeping requirements of §115.726(f). The new proposed exemption will provide relief for owner or operators with flares that will be permanently taken out of service after the December 31, 2005 compliance date to install continuous monitoring equipment, but prior to the April 1, 2006 compliance date for the site-wide caps in §115.722.

Section 115.729, Counties and Compliance Schedules

The proposed amendment to §115.729(1) would add pressure relief valves as applicable devices. Additionally, the proposed amendment to §115.729(1)(A) would specify that the compliance schedule applies to testing and monitoring of vent gas streams and pressure relief valves and that the results must be submitted to the Houston regional office. The proposed amendment to §115.729(1)(A) would also specify that for vent gas streams and pressure relief valves that become subject to the requirements of the division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into HRVOC service. The proposed amendment to §115.729(1)(B) would specify that the owner or operator shall demonstrate compliance with all other requirements of the division applicable to pressure relief valves in addition to vent gas streams as soon as practicable but no later than April 1, 2006.

The proposed amendment to §115.729(2) would correct a cross-reference, and would specify that for flares that become subject to the requirements of the division after December 31, 2005, testing and monitoring must be conducted as soon as practicable but no later than 60 days after being brought into HRVOC service.

Division 2, Cooling Towers

Section 115.760, Applicability and Cooling Tower Heat Exchanger System Definitions

The proposed amendment to §115.760 would include non-substantive language changes to §115.760(a) and (b).

Section 115.761, Site-wide Cap

The commission proposes to amend this section to allow sites the flexibility of compliance with the cooling tower heat exchange system control requirements of this division through compliance with the HRVOC emissions cap and trade program. The proposed amendment to §115.761(a) would change the long-term site-wide cap strategy to a calendar year basis instead of the existing 24-hour rolling average basis, and would state that owners or operators of a site subject to the HRVOC cooling tower heat exchange system rules shall comply with the HRVOC emissions cap and trade program in Chapter 101, Subchapter H, Division 6. The proposed amendment to §115.761(a) would also remove the reference to the site-cap limits in the tables of the SIP. The proposed amendment would reletter §115.761(b) to §115.761(d). Proposed new §115.761(b) would specify that all sites subject to this division or to Division 1 that are exempt from the HRVOC emissions cap and trade program in accordance with §101.392 are limited to ten tons of HRVOC emissions per calendar year. Proposed new §115.761(c) would provide a short-term, not-to-exceed limit, in pounds of HRVOC per one-hour block, for all sites subject to this division. The commission continues to evaluate the magnitude of the short-term limit, and the time period over which this short-term limit would be enforced. The commission solicits comment regarding the appropriate level for this short-term limit, and requests any supporting data regarding alternatives to the magnitude and time period. Proposed new §115.761(c)(3) would address how exceedances of the short-term limits should be calculated to determine compliance with the long-term cap.

Section 115.764, Monitoring and Testing Requirements

The proposed amendment to §115.764 would change the section title from "Monitoring Requirements" to "Monitoring and Testing Requirements" to reflect the proposed inclusion of the testing requirements formerly in §115.766. Merging the testing requirements of §115.766 with the monitoring requirements of §115.764 would provide more consistency with the rule structure of Subchapter H, Division 1.

The proposed amendment to §115.764(a) would remove the *de minimus* exemption for 100 parts per million, by weight (ppmw) of HRVOC in the process side fluid. The 100 ppmw *de minimus* exemption language is proposed to be incorporated into the appropriate exemptions in §115.767, Exemptions, formerly §115.768, to better facilitate interpretation of the rule.

The proposed amendment to §115.764(a)(2) would include the calibration requirements of the total strippable VOC monitoring system from §115.766(1). The proposed revisions to calibration requirements of the total strippable VOC monitor in §115.764(a)(2) would include changing the allowable monitor drift from 3.0% to 5.0%. Furthermore, the proposed amendment would remove the ten parts per billion, by weight detection limit requirement for the total strippable VOC monitor. Finally, the proposed amendment to §115.764(a)(2) would correct the citation to the air-stripping method in Appendix P.

The proposed amendment to §115.764(a)(3) would specify the calculation methodology to determine the percent measurement data availability, would provide consistency for the calculation of monitor uptime, and would specify that time needed for normal calibrations required by the rule is not counted as downtime. The proposed amendment to §115.764(a)(4) and (5) would replace the references to §115.766 with the specific reference to the air-stripping method in Appendix P.

The proposed amendment to §115.764(a)(6) would replace the reference to "speciation of strippable VOC in paragraphs (4) and (5)" with "speciation of strippable HRVOC in paragraphs (4) and (5)" because the requirements of §115.764(a)(4) and (5) are for the speciation of HRVOC only. Additionally, the proposed amendment would remove the requirement to comply with Section 8.2 of EPA Performance Specification 9. While the initial testing required under Section 8.2 of Performance Specification 9 is recommended to help establish proper setup and operation of the analyzer, the commission considers the calibration requirements specified in the proposed amendment to §115.764(a)(6) sufficient to quality assure the data generated by the analyzer, and that it is unnecessary to specifically require Section 8.2 in the rule. Furthermore, the proposed amendment to §115.764(a)(6) would change the frequency of the multipoint calibration check procedure in Section 10.1 of Performance Specification 9 from monthly to quarterly, because quarterly multipoint calibrations checks provide sufficient quality assurance of analyzer linearity and accuracy. The proposed amendment to §115.764(a)(6) would also include non-substantive language revisions to better facilitate interpretation of the monitoring requirements. Finally, the proposed amendment to §115.764(a)(6) would specify that periodic sampling during downtime of the continuous on-line analyzer will continue until the on-line analyzer is properly operating and within the required performance specifications.

The proposed amendment to §115.764(b) would remove the *de minimus* exemption for 100 ppmw of HRVOC in the process side fluid. The 100 ppmw *de minimus* exemption language is proposed to be incorporated into the appropriate exemptions provided in §115.767, formerly §115.768, to better facilitate interpretation of the rule. The proposed amendment to §115.764(b)(2) would replace the reference to §115.766 with the specific reference to the air-stripping method in Appendix P.

The proposed amendment to §115.764(b)(3) would add language specifying the calculation methodology for determining the percent measurement data availability to provide consistency for the calculation of monitor uptime and specify that the time required for normal calibrations as required by the rule is not counted as downtime. The proposed amendment to §115.764(b)(4) and (5) would replace references to §115.766 specific references to the air-stripping method in Appendix P. The proposed amendment to §115.764(b)(5) would specify that additional sampling to determine total strippable VOC, speciated and total HRVOC must continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw.

The proposed amendment to §115.764(b)(6) would remove the reference to "speciation of strippable VOC" and replace with "speciation of strippable HRVOC" because the requirements of §115.764(b)(4) and (5) are for speciation of HRVOC only. Additionally, the proposed amendment would remove the requirement to comply with Section 8.2 of EPA Performance Specification 9. While the initial testing required under Section 8.2 of Performance Specification 9 is recommended to help established proper setup and operation of the analyzer, the commission considers the calibration requirements specified in the proposed revision to §115.764(b)(6) sufficient to quality assure the data generated by the analyzer. Furthermore, the

proposed revisions to §115.764(b)(6) would change the frequency of the multipoint calibration check procedure in Section 10.1 of Performance Specification 9 from monthly to quarterly, because quarterly multipoint calibrations checks will provide sufficient quality assurance of analyzer linearity and accuracy. An additional proposed amendment to §115.764(b)(6) would include non-substantive language revisions to better facilitate interpretation of the monitoring requirements. Finally, the proposed revisions to §115.764(b)(6) would specify that periodic sampling during downtime of the continuous on-line analyzer will continue until the on-line analyzer is properly operating and within the required performance specifications.

The proposed amendment to §115.764(c) would incorporate language from the testing requirements in §115.766 that are proposed for repeal. The proposed amendment would remove the ten ppbw minimum detection limit requirement for strippable VOC and HRVOC monitoring that currently exists in §115.766(1). Removing the requirement would provide more flexibility for affected owners or operators in the selection of on-line monitoring systems and laboratories for analysis of periodic samples. However, the requirements in proposed new §115.766(a)(3) and (4) to use one-half the detection limit for HRVOC emission calculation purposes and the full detection limit for total strippable VOC concentrations will encourage owners or operators to use a monitoring system or laboratory analysis with sufficient detection capability appropriate for the specific cooling tower size and the amount of site-wide caps for the account.

The proposed amendment would delete §115.764(d), regarding requirements to submit QAPs for the monitoring systems required by §115.764, and move the requirements for the QAPs to proposed new §115.766(i) in the recordkeeping and reporting requirements. Also, the proposed amendment would reletter §115.764(e) to §115.764(d) and replace the reference to the testing requirements of §115.766 with the reference to the air-stripping method in Appendix P.

The proposed amendment would reletter §115.764(f), relating to alternatives to continuous flow monitoring, to §115.764(e), and would correct cross-references to account for other proposed amendments to the division.

The proposed amendment would reletter §115.764(g), relating to minor modifications and alternative monitoring, to §115.764(f), would correct cross-references, and would specify that the provisions for modifications or alternatives apply to testing as well as monitoring.

Proposed new §115.764(g) would specify that alternative monitoring locations may be used for cooling tower heat exchanger systems in which a single cooling tower services both HRVOC and non-HRVOC process units. The proposed new provisions would allow the owner or operator to monitor from locations that represent the flow and concentrations from HRVOC processes.

Proposed Repeal of Section 115.766, Testing Requirements

The commission proposes to repeal §115.766 and to incorporate specific testing requirements of §115.766 into the appropriate subsections in §115.764 to establish more consistency with Division 2 and to better facilitate interpretation of the proposed requirements.

Proposed Repeal of Section 115.767, Recordkeeping Requirements

The commission proposes to repeal §115.767 and to incorporate specific recordkeeping requirements of §115.767 into proposed new §115.766, Recordkeeping and Reporting Requirements, to establish more consistency with Division 1.

Section 115.766, Recordkeeping and Reporting Requirement

Proposed new §115.766 incorporates the recordkeeping and reporting requirements of §115.767 to establish more consistency with Division 1 and more accurately reflect the requirement of the §115.766. Proposed new §115.766(a)(2) would correct cross-references in existing §115.767(a)(2).

Proposed new §115.766(a)(3) would remove the requirement to maintain hourly records documenting the pound per hour mass emission rate for total strippable VOC in existing §115.767(a)(3). The testing and monitoring requirements in §115.764 for total strippable volatile organic compound, when applicable, do not require determining the mass emission rate of total strippable VOC. The recordkeeping requirements for total strippable VOC concentration are addressed in proposed new §115.766(a)(4). Proposed new §115.766(a)(3) would also correct cross-references and incorporate recordkeeping requirements for alternative monitoring provided for in §115.764(a)(6) or (b)(6). Proposed new §115.766(a)(3) would require owners or operators to use one-half the minimum detection limits for HRVOC emission calculations when concentrations are below detection.

Proposed new §115.766(a)(4) would require owner or operators to use the full minimum detection limit for total strippable VOC when concentrations are below detection. Removing the ten parts per billion detection limit requirement would provide more flexibility for affected owner or operators in the selection of on-line monitoring systems and laboratories for analysis of periodic samples. However, the requirements to use one-half the detection limit for HRVOC emission calculation purposes and the full detection limit for total strippable VOC concentrations will encourage owner or operators to use a monitoring system or laboratory analysis with sufficient detection capability appropriate for the specific size of cooling tower and the amount of the side-wide caps for the account.

Proposed new §115.766(a)(4) would specify recordkeeping requirements for the concentration of total strippable VOC in the cooling water for cooling tower heat exchanger systems monitored in accordance with §115.764(b)(2) or (d). Proposed new §115.766(a)(4) would further specify that if it concentration results for total strippable VOC are below the minimum detection limit, then the full detection limit will be used to calculate the average total strippable VOC concentration in the cooling water.

The proposed amendment to §115.766 would delete the requirements in existing §115.767(a)(5) regarding hourly recordkeeping requirements for the 24-hour rolling average HRVOC emissions in relation to the site wide cap. Provisions for recordkeeping to demonstrate compliance with the site-wide caps specified in §115.761 are provided in proposed new §115.766(g) and (h). The proposed amendment also deletes the requirements in existing §115.766(a)(6) regarding recordkeeping requirements for alternative monitoring performed in accordance with §115.764(a)(6) or (b)(6). As previously noted, new §115.766(a)(3) is proposed to incorporate these recordkeeping requirements.

Proposed new §115.766(a)(5) specifies that the owner or operator must maintain hourly records of the cooling water flow rate. Finally, proposed new §115.766(a)(6) would remove the term

"hourly" from the existing language of §115.767(a)(4) to specify that owner or operators must maintain records on a weekly basis.

The proposed amendment to §115.766 includes revisions to §115.766(b) to correct cross-references in the existing language of §115.767(b). The proposed language in new §115.767(c) is the same as the language in existing §115.767(c). Proposed new §115.766(d) includes existing language from §115.767(d)(1) and (2) to reflect proposed new §115.766(a) incorporating the recordkeeping requirements for testing performed in accordance with §115.764(d) and to better facilitate interpretation of the recordkeeping requirements.

Proposed new §115.766(e) and (f) would correct cross-references in existing §116.767(e) and (f).

Proposed new §115.766(g) and (h) would specify recordkeeping requirements to demonstrate compliance with §115.761. Proposed new §115.766(g) would specify recordkeeping requirements to demonstrate compliance with tons per calendar year emission limits in §115.761(a) and (b). Proposed new §115.766(h) would recordkeeping requirements to demonstrate compliance with pound per hour emission limits in §115.761(c).

Finally, proposed new §115.766(i) would incorporate the requirements for submitting QAPs for monitoring performed in accordance with §115.764. The requirements for submitting QAPs is proposed to be moved from §115.764(d) to the recordkeeping and reporting requirements in §115.766 to more appropriately represent the requirement and to be more consistent with the rule structure of Division 1. In addition, proposed new §115.766(i)(2) would change the requirement to submit the QAP at least 60 days prior to the cooling tower heat exchange system being placed into service to a requirement that the quality assurance plan must be submitted prior to the system being placed into HRVOC service. The proposed amendment would also remove the requirement in existing §115.764(d)(2) that specifies that the plan must be submitted prior to initiating a monitoring program to comply with the requirements of §115.764. The proposed amendment to move the quality assurance plan provisions to §115.766(i) would also remove the requirement in §115.764(d)(2) to define each compound that could potentially leak through the heat exchanger. Finally, proposed new §115.766(j) would specify that an owner or operator claiming exemption under §115.767(4) shall submit written notification at least 15 days prior to permanently removing a flare from service, but no later than December 31, 2005.

Section 115.767, Exemptions

The commission proposes to repeal §115.768 and to incorporate exemptions of §115.768 into the appropriate subsections in proposed new §115.767 to be consistent with the section numbering in Division 1. Proposed new §115.767(1) and (2) would specify that the exemptions apply to heat exchangers with greater than 100 ppmw HRVOC in the process side fluid. Also, the commission proposes to delete the exemption in existing §115.768(4), because emissions events are not exempt from §115.761 in this proposal. Proposed new §115.767(4) would specify that cooling tower heat exchange systems that will be permanently out of service by April 1, 2006, are exempt from the requirements of the division, except for the recordkeeping requirements of §115.766(j). The proposed new exemption will provide relief for owners or operators with cooling tower heat exchange systems that will be permanently taken out of service after the December 31, 2005 compliance date for installation of continuous monitoring equipment, but prior to the April 1, 2006 compliance date for the site-wide caps in §115.761.

Section 115.769, Counties and Compliance Schedules

The proposed amendment to §115.769 would update cross-references and add new §115.769(b) to address the compliance date requirements for cooling tower heat exchange systems that become subject to the requirements of the division after December 31, 2005.

Division 3, Fugitive Emissions

Section 115.780, Applicability

The proposed amendment to §115.780 would designate the first paragraph as subsection (a) and would add new §115.780(b) to specify that emission reduction credits or discrete emission reduction credits may not used in order to demonstrate compliance with the HRVOC fugitive emissions rules.

Section 115.781, General Monitoring and Inspection Requirements

The proposed amendment to §115.781(b)(1) would update a cross-reference to specify that the exemptions of §115.357(1) - (11) are not applicable to this division. The term "immediately" is proposed to be added to §115.781(b)(7)(A), to specify that if requested by staff of the Houston regional office or any air pollution control agency having jurisdiction, the owner or operator must provide the account's unsafe-to-monitor list within that business day. The proposed amendment to §115.781(b)(7)(B) would specify that difficult-to-monitor components include components that are located below flooring or deck grating that would require confined space entry as defined in 29 CFR §1910.146, concerning Permit-required confined spaces (December 1, 1998).

The proposed amendment to §115.781(b)(8) and (e) would specify that all pressure relief valves in gaseous service must be monitored with a hydrocarbon gas analyzer for fugitive leaks. The intent of the change is to specify that the body of the pressure relief valve should be monitored for fugitives on a quarterly basis and within 24 hours following actuation, and not to require the monitoring of the vent from the pressure relief valve. The emissions associated with the venting of the pressure relief valve due to a pressure exceedance in the process is addressed in the Subchapter H, Division 1 proposal. However, the quarterly monitoring or other required fugitive monitoring should include a check with a hydrocarbon gas analyzer to ensure that the relief mechanism has properly reseated.

Proposed new §115.781(g) would add language regarding data collection that is similar to data collection language in Subchapter D, §115.354(10). The language is proposed to be removed from §115.354(10) in concurrent rulemaking. These changes are being proposed at the request of industry. The commission seeks comment on these proposed changes.

Section 115.782, Procedures and Schedule for Leak Repair and Follow-up

The proposed amendment to §115.782(c) would specify that components on the delay of repair list that would require a shutdown to correct, must be repaired at the next scheduled process unit shutdown. The proposed amendment to §115.782(c)(1)(B)(i) would replace the current language with language requiring documentation of calculations in §115.782(c)(1)(B)(i) - (iii), and would renumber clause (ii) as clause (iv). The proposed language in §115.782(c)(1)(B)(i) - (iii) is similar to language that is proposed to be removed from

Subchapter D, §115.352(2)(A)(i) - (iii), in concurrent rulemaking, and the proposed amendment is at the request of industry. The commission seeks comment on these proposed changes.

The proposed amendment to §115.782(c)(2)(A)(i) would specify that extraordinary efforts must be taken within 14 or 30 calendar days after the leak is found (depending on the amount of the leak detected), instead of seven or 15 days of the valve being placed on the shutdown list. The proposed amendment does not allow any additional days nor reduce the number of days, but simply revises the language to a time frame that the owner or operator will more readily know from the information already in the databases.

Section 115.783, Equipment Standards

The proposed amendment to §115.783(2) would delete the language that recovery devices, flares, and other control devices that are used to control fugitive emissions must obtain a set control efficiency. This language is proposed to be deleted because the emissions from these types of sources are already being controlled or are proposed to be controlled by Subchapter B, Division 2 rules or by Subchapter H, Division 1 rules. The proposed amendment to §115.783(3) would delete the requirement that a pressure relief valve must be equipped with a pressure sensing device. This language is proposed to be deleted because the emissions from these types of sources would be controlled by Subchapter H, Division 1. The proposed amendment to §115.783 would renumber paragraphs (4) - (6) as paragraphs (3) - (5).

Proposed Repeal of §115.785, Testing Requirements

The commission proposes to repeal §115.785 because the section established a stack testing method for sources that control fugitive emissions. These sources are controlled or proposed to be controlled under Subchapter H, Division 1; therefore, these additional requirements are no longer necessary in the fugitive rules.

Section 115.786, Recordkeeping Requirements

The proposed amendment to §115.786(b)(3)(D) would specify that the flow through the bypass line is an estimated flow rate. The proposed amendment to §115.786(c) would specify the exact date that specific records must be submitted to the Houston regional office and any local air pollution control agency having jurisdiction.

The proposed amendment to §115.786(d) and (e) would specify that the type of records used to identify exempt components is the same as the type of records listed in §115.781. Proposed new §115.786(d)(1) and (2) would add similar language that is proposed to be removed from Subchapter D, §115.352(2)(F)(ix) and §115.356(3) in concurrent rulemaking. The proposed amendment to §115.786 would also reletter subsection (e) to subsection (f). The commission seeks comment on these proposed changes.

Section 115.787, Exemptions

The proposed amendment to §115.787(a) would correct a citation from §115.786(d) and (e) to §115.786(e) and (f), and the proposed amendment to §115.787(b) would correct a citation from §115.783(4) to §115.783(2).

The proposed amendment to §115.787(c)(4) would change the language "plant sites covered by a single account number" to "any account." The proposed amendment to §115.787(c)(6) and (7) would replace the phrase "which are in compliance with" with the phrase "that meet the requirements of" because the current language may be incorrectly interpreted as requiring direct compliance with the selected provisions of 40 CFR §63.166 or §63.169.

The commission proposes to delete §115.787(e), because the control of vents of pressure relief valves is being proposed in the amendments to Subchapter H, Division 1 and is no longer needed in this division. The proposed amendment to §115.787 would also reletter subsection (f) to subsection (e).

Proposed new §115.787(f) would reletter the subsection to §115.787(e), and correct a citation from §115.352(4) to §115.783(5).

Proposed new §115.787(f) would exempt any process unit with less than 50 components in HRVOC service from the third-party audit requirements of §115.788.

Section 115.788, Audit Provisions

The proposed amendment to §115.788(a) would change the time frame and number of process units for which the independent third-party audits must be conducted. The proposed amendment would change the requirement to conduct an audit of all process units every two years to a requirement to conduct an audit of at least one process unit at least once per calendar year. In addition, the amendment would require that all process units at an account must be audited at least once every five calendar years. Accounts with less than five process units but more than one process unit, should not audit the same unit two years in a row.

The proposed amendment to §115.788(a)(1) would require the independent third-party organization to verify that all components are properly tagged in accordance with §115.782(a). The proposed amendment to §115.788(a)(1)(B) and (d)(2) would remove the requirement for the audit to include a list of components that should have been monitored but were not on the list to be monitored. The reasoning for the proposed amendment is that the existing language would require the company conducting the audit to completely inspect the entire process unit, including, but not limited to, steam lines, water lines, and waste lines. The commission considers this requirement to be cost prohibitive for the results that would be obtained.

The proposed amendment to §115.788(a)(2) would state that independent third-party organization must perform a field survey to determine the representative percentage of leaking components in the audited process unit. The proposed amendment to §115.788(a)(2)(A) would also specify that the field survey must be started after the usual monitoring service has completed its monitoring of the process unit and that the field survey conducted by the auditing company must be completed by the end of the monitoring period (i.e., quarterly) in which the usual monitoring service conducted its monitoring. The proposed amendment to §115.788(a)(2)(B) would remove superfluous language.

The proposed amendment to §115.788(a)(2)(C) would replace the term, "audit" with the term, "field survey" and further specify that the field survey of a specific process unit must not include components from the most recent field survey of that process unit. Proposed new §115.788(a)(2)(D) specifies that the independent third-party organization must follow Test Method 21 in 40 CFR Part 60, Appendix A, while conducting the field survey.

The proposed amendment to §115.788(a)(3) would specify that the data generated by monitoring technicians must be reviewed by the independent third-party organization. The

proposed amendment to §115.788 would also consolidate the language in §115.788(a)(3)(A) and(B), and would move the language in §115.788(d)(4) to §115.788(a)(3)(A). The proposed amendment to §115.788(a)(3)(B) would require that the independent third-party organization review the records to verify proper calibration in accordance with Test Method 21. The proposed amendment to §115.788(a)(3)(C) would delete the term, "abnormal" and specify that the requirement is to identify data patterns indicative of failure to properly implement Test Method 21. The proposed amendment would delete §115.788(a)(3)(D) because the retention of field data from a datalogger is not specifically required.

The proposed amendment to §115.788(b) would make a grammatical correction to remove the term "means" and replace it with the term "is."

The proposed amendment to §115.788(c) would remove the requirement to provide the agency written notification that the audit has been completed. The requirement is unnecessary, because the owner or operator is already required to provide the results of the audit to the Houston regional office within 30 days after completion of the audit.

The proposed amendment to §115.788(d) would specify that the audit report should be submitted to the Houston regional office, instead of the more general description of the Office of Compliance and Enforcement or appropriate regional office. The proposed amendment to §115.788(d)(1) would specify that the list concerning the components that were not tagged but should have been, is based on the requirements of §115.782(a).

The proposed amendment to §115.788(d) would renumber paragraphs (3) and (4) to paragraphs (2) and (3), and the proposed amendment to renumbered §115.788(d)(2) would specify that the percentage of leaking components should be identified during the field survey.

The proposed amendment to renumbered §115.788(d)(3) would delete subparagraphs (A) - (C) and reference the categories specified in §115.788(a)(3)(A) - (C).

Proposed new §115.788(e) would require the owner or operator to submit a corrective action plan with the audit report if the results of the audit indicate deficiencies in the implementation of Test Method 21. Subsections (e) and (f) are also proposed to be relettered as subsections (f) and (g).

Finally, proposed new §115.788(h) would specify that the executive director may require additional corrective actions.

Section 115.789, Counties and Compliance Schedules

The proposed amendment to §115.789(3) would specify that the initial third-party audits required in §115.788 must be completed as soon as practicable, but no later than December 31, 2005. The proposed deletion of the current §115.789(4) would remove the compliance schedules for testing requirements, because the corresponding testing requirements in §115.785 are proposed to be repealed. The proposed amendment to §115.789 would renumber paragraphs (5) and (6) to paragraphs (4) and (5).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Appropriations Section, determined that for the first five-year period the proposed rulemaking is in effect, there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rulemaking.

The proposed rulemaking affects regulated entities in the HGA that conduct activities that emit HRVOC. State and local governments do not engage in these activities, so they are not affected by the proposed rulemaking.

The proposed rulemaking only affects the petrochemical, chemical, loading, and refinery companies in the HGA. The major impacts of the proposed rulemaking are as follows: 1) caps on HRVOC allowances are lowered, thereby requiring some companies to emit less HRVOC; 2) adds parameter monitoring requirements for pressure relief valves and vent gas streams not routed to a flare. Companies can decide which process parameters to monitor as long as the process parameters satisfy the proposed requirements; 3) includes alternative provisions for specific flare categories such as emergency flares, flares in temporary HRVOC service, and flares designed to receive and control liquid or dual phase streams. These provisions will reduce current monitoring costs; and 4) for companies with greater than two process units, reduces the number of independent, third-party audits of processes in HRVOC service that generate fugitive emissions.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be the reduction of HRVOC emissions in the HGA. This will allow Texas to comply with the SIP required by 42 USC and reduce the ozone levels in this nonattainment area to levels determined by the EPA to be necessary for a healthy and safe environment.

The commission anticipates fiscal impacts for businesses and individuals in the petrochemical, chemical, loading, and refining industries in the HGA; however, the commission anticipates that the changes in monitoring requirements would not result in significant fiscal implications. Provisions that reduce the HRVOC emissions for compliance with the site-wide cap in Harris County may have significant fiscal implications for these industries, depending upon the methodology used to reduce the HRVOC emissions.

Revised Monitoring Requirements

The proposed rulemaking reduces the requirements for independent, third-party audits of each process that generates fugitive emissions. The commission conservatively estimates that the current audit provision would require affected industries to pay for 400 to 500 audits every two years at a cost of approximately $5,000 - $10,000 per audit. The proposed rulemaking would require independent, third-party audits of a minimum of one process unit per year per account. Depending on the size of the account, the proposed rulemaking could present a significant cost savings to some accounts. For example, under the current rules an account with 40 process units would be required to perform all 40 audits within two years. The proposed rulemaking would require the 40 audits to be performed within a five-year period. The commission estimates that these audits would cost approximately $200,000 - $400,000 over a two-year period. In this example, the cost savings attributed to the proposed rulemaking would be approximately $120,000 - $240,000 during the two-year period. The commission anticipates that the cost savings from reducing the audit provisions would help mitigate any

costs associated with additional monitoring that the proposed rulemaking would require.

The proposed rulemaking adds parameter monitoring requirements for pressure relief valves and vent gas streams that are not routed to a flare. The proposed rulemaking provides flexibility on the process parameters that can be monitored as long as the process parameters satisfy the proposed requirements. Thus, companies have some control over the cost of the new monitoring requirements. The commission anticipates that in some cases, parameters that meet the proposed requirements may already be monitored. If a suitable parameter is already being monitored, but is not currently being recorded, companies may be able to make minor modifications to existing process monitoring to comply with the proposed monitoring requirements. Therefore, significant additional monitoring costs should not be incurred.

The proposed rulemaking adds alternatives to the continuous monitoring requirements for specific flare categories, such as emergency flares, flares in temporary HRVOC service, and flares designed to receive and control liquid or dual-phase streams. Under current rules, these flares are subject to the full continuous monitoring requirements including continuously measuring HRVOC. However, for these flare categories, such monitoring may be impractical due to the infrequent use or the nature of the streams sent to the flare. The proposed rulemaking would allow companies to use alternatives, such as process knowledge and engineering calculations, or process knowledge and engineering calculations combined with process parameter monitoring. These proposed alternatives will result in cost savings for owners or operators of the flare categories.

Emissions Compliance

The commission anticipates that HRVOC emissions reductions for compliance with the site-wide cap in Harris County will have a significant fiscal impact on the petrochemical, chemical, and refining industries. The proposed rulemaking would require an additional 57% reduction of HRVOC emissions in the site-wide cap for Harris County. Furthermore, the proposed rulemaking will include emissions in the cap from emission events and scheduled startup, shutdown, and maintenance activities.

At least 93 Harris County sites may incur significant costs when complying with the proposed cap. Because companies are given flexibility in how to achieve cap compliance, the commission staff is unable to provide a total cost estimate per process or per site. Costs will vary widely depending on the methodology each company employs to reduce their HRVOC emissions. If the additional reductions require a company to install an additional control device for previously uncontrolled vent gas streams, the estimated capital and annual operating costs for a control device could be approximately $600,000 and $360,000 respectively, based on fiscal information provided in the 2002 HRVOC rule proposal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission has been unable to identify any small or micro-businesses which would be affected by the proposed rulemaking. The majority of sites affected by the proposed rulemaking are large petrochemical and industrial businesses. If there are affected small or micro-businesses, the estimated capital and annualized cost in this fiscal note would be a reasonable cost estimate for small or micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking action and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action meets the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed rulemaking action to Chapter 115 and revisions to the SIP would improve implementation of the existing Chapter 115 by adding requirements to achieve reductions in HRVOC emissions in the HGA. The rules are intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on owners and operators of certain sources, in particular fugitives, flares, process vents, and cooling towers. Many of these sources are owned or operated by utilities, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This determination is based on the analysis provided elsewhere in this preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of this proposal. The remaining amendments in this rulemaking are intended to correct typographical errors, update cross-references, add flexibility and delete obsolete language, and these amendments are not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This proposed rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, ł2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The rulemaking implements requirements of 42 USC. Under 42 USC, §7410, states are required to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the primary national ambient air quality standards (NAAQS) in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as

the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code were amended by Senate Bill (SB) 633 during the 75th Legislature (1997). The intent of SB 633 was to require agencies to conduct an regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGA. The proposed rules, that will reduce ambient HRVOC and ozone in the HGA, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, controls on upsets and routine industrial VOC emissions are necessary to address some of the elevated ozone levels observed in the HGA; these controls will result in reductions in ozone formation in the HGA and help bring the HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. As discussed in Chapter 6 of the HGA SIP, this revision is another phase in the process of continued analysis and review of the science, and the data collected as a result of these revisions will further assist the commission as it develops its full reassessment of the attainment demonstration at the midcourse review. Therefore, the proposed rulemaking is a necessary component of and consistent with the HGA ozone attainment demonstration SIP required by 42 USC, §7410.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), *no writ*. *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft RIA determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The specific purposes of this rulemaking are to achieve reductions of HRVOC emissions and ozone formation in the HGA and help bring the HGA into compliance with the air quality standards established under federal law as NAAQS for ozone, as well as to improve implementation of the existing Chapter 115 by correcting typographical errors, updating cross-references, clarifying ambiguous language, adding flexibility, and deleting obsolete language. If adopted, certain sources located in the HGA will be required to install equipment

to monitor emissions and achieve HRVOC emission reductions in the HGA, and implement new reporting and recordkeeping requirements. Installation of the necessary equipment could conceivably place a burden on private, real property.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. Attainment of the ozone standard will eventually require reductions of HRVOC emissions, as well as substantial reductions in NO_x emissions. Any VOC reductions resulting from the current rulemaking are no greater than what scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the HGA exceeding the federal ozone NAAQS, that adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the HGA. Consequently, these proposed rules meet the exemption in §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the proposed rules do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking action and found that the proposal is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that under 31 TAC §505.22 the proposed rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of the proposed rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their sites.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times and locations: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearings to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before the hearings and will answer questions before and after the hearings.

Persons planning to attend the hearings who have special communication or other accommodation needs, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tceq.state.tx.us*. All comments should reference Rule Project Number 2004-037-115-AI. Comments must be received by 5:00 p.m., August 9, 2004. For further information, please contact Ashley Forbes of the Environmental Planning and Implementation Division at (512) 239-0493 or Alan Henderson, of the Policy and Regulations Division, at (512) 239-1510.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's

air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed amendments implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.10. Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, (also known as the Texas Clean Air Act) [~~the Texas Clean Air Act~~] or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the Texas Clean Air Act, the following terms, when used in this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), [~~shall~~] have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) Background--The ambient concentration of volatile organic compounds [~~(VOC)~~] in the air, determined at least one meter upwind of the component to be monitored. Test Method 21 (40 Code of Federal Regulations Part [~~(CFR)~~] 60, Appendix A) shall be used to determine the background.

(2) (No change.)

(3) Capture efficiency--The amount of volatile organic compounds (VOC) [~~VOC~~] collected by a capture system that [~~which~~] is expressed as a percentage derived from the weight per unit time of VOCs [~~VOC~~] entering a capture system and delivered to a control device divided by the weight per unit time of total VOCs [~~VOC~~] generated by a source of VOCs [~~VOC~~].

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

(6) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, connectors, and pressure relief valves, which has the potential to leak volatile organic compounds [~~VOC~~].

(7) - (11) (No change.)

(12) Emergency flare--A flare that only receives emissions during an upset event or unscheduled maintenance, startup, or shutdown activity.

(13) [~~(12)~~] External floating roof--A cover or roof in an open-top tank which rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them. For the purposes of this chapter, an external floating roof storage tank that [~~which~~] is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(14) [~~(13)~~] Fugitive emission--Any volatile organic compound [~~VOC~~] entering the atmosphere that [~~which~~] could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(15) [~~(14)~~] Gasoline bulk plant--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput less than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period. A motor vehicle fuel dispensing facility is not a gasoline bulk plant.

(16) [~~(15)~~] Gasoline terminal--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput equal to or greater than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period.

(17) [~~(16)~~] Heavy liquid--Volatile organic compounds that [~~VOCs which~~] have a true vapor pressure equal to or less than 0.044 pounds per square inch absolute [~~(psia)~~] (0.3 kiloPascal [~~kPa~~]) at 68 degrees Fahrenheit (20 degrees Celsius).

(18) [~~(17)~~] Highly-reactive volatile organic compound [~~(HRVOC)~~]--As follows.

(A) In Harris County, one or more of the following volatile organic compounds (VOCs) [~~VOCs~~]: 1,3-butadiene; all isomers of butene (e.g., isobutene (2-methylpropene or isobutylene), alpha-butylene (ethylethylene), and beta-butylene (dimethylethylene, including both cis- and trans- isomers)); ethylene; and propylene.

(B) In Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, one or more of the following VOCs: ethylene and propylene.

(19) [~~(18)~~] Houston/Galveston area--Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(20) [~~(19)~~] Incinerator--For the purposes of this chapter, an enclosed control device that combusts or oxidizes volatile organic compound [~~VOC~~] gases or vapors.

(21) [~~(20)~~] Internal floating cover--A cover or floating roof in a fixed roof tank that [~~which~~] rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell. For the purposes of this chapter, an external floating roof storage tank that [~~which~~] is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(22) [~~(21)~~] Leak-free marine vessel--A marine vessel with [~~whose~~] cargo tank closures (hatch covers, expansion domes, ullage openings, butterworth covers, and gauging covers) that were inspected prior to cargo transfer operations and all such closures were properly secured such that no leaks of liquid or vapors can be detected by sight, sound, or smell. Cargo tank closures must [~~shall~~] meet the applicable rules or regulations of the marine vessel's classification society or flag state. Cargo tank pressure/vacuum valves must [~~shall~~] be operating within the range specified by the marine vessel's classification society or flag state and seated when tank pressure is less than 80% of set point pressure such that no vapor leaks can be detected by sight, sound, or smell. As an alternative, a marine vessel operated at negative pressure is assumed to be leak-free for the purpose of this standard.

(23) [~~(22)~~] Light liquid--Volatile organic compounds that [~~VOCs which~~] have a true vapor pressure greater than 0.044 pounds per square inch absolute [~~psia~~] (0.3 kiloPascal [~~kPa~~]) at 68 degrees Fahrenheit (20 degrees Celsius), and are a liquid at operating conditions.

(24) [~~(23)~~] Liquefied petroleum gas--Any material that is composed predominantly of any of the following hydrocarbons or mixtures of hydrocarbons: propane, propylene, normal butane, isobutane, and butylenes.

(25) [~~(24)~~] Low-density polyethylene--A thermoplastic polymer or copolymer comprised of at least 50% ethylene by weight and having a density of 0.940 grams per cubic centimeter [~~(g/cm^3)~~] or less.

(26) [~~(25)~~] Marine loading facility--The loading arm(s), pumps, meters, shutoff valves, relief valves, and other piping and valves that are part of a single system used to fill a marine vessel at a single geographic site. Loading equipment that is physically separate (i.e., does not share common piping, valves, and other loading equipment) is considered to be a separate marine loading facility.

(27) [~~(26)~~] Marine loading operation--The transfer of oil, gasoline, or other volatile organic liquids at any affected marine terminal, beginning with the connections made to a marine vessel and ending with the disconnection from the marine vessel.

(28) [~~(27)~~] Marine terminal--Any marine facility or structure constructed to transfer oil, gasoline, or other volatile organic liquid bulk cargo to or from a marine vessel. A marine terminal may include one or more marine loading facilities.

(29) [~~(28)~~] Metal-to-metal seal--A connection formed by a swage ring that [~~which~~] exerts an elastic, radial preload on narrow sealing lands, plastically deforming the pipe being connected, and maintaining sealing pressure indefinitely.

(30) [~~(29)~~] Natural gas/gasoline processing--A process that extracts condensate from gases obtained from natural gas production and/or fractionates natural gas liquids into component products, such as ethane, propane, butane, and natural gasoline. The following facilities shall be included in this definition if, and only if, located on the same property as a natural gas/gasoline processing operation previously defined: compressor stations, dehydration units, sweetening units, field treatment, underground storage, liquified natural gas units, and field gas gathering systems.

(31) [~~(30)~~] Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(32) [~~(31)~~] Polymer or resin manufacturing process--A process that produces any of the following polymers or resins: polyethylene, polypropylene, polystyrene, and styrenebutadiene latex.

(33) [~~(32)~~] Pressure relief valve--A safety device used to prevent operating pressures from exceeding the maximum allowable working pressure of the process equipment. A pressure relief valve is automatically actuated by the static pressure upstream of the valve, but does not include:

(A) a rupture disk; or

(B) a conservation vent or other device on an atmospheric storage tank that is actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch gauge [~~(psig)~~].

(34) [~~(33)~~] Printing line--An operation consisting of a series of one or more printing processes and including associated drying areas.

(35) [~~(34)~~] Process drain--Any opening (including a covered or controlled opening) that [~~which~~] is installed or used to receive or convey wastewater into the wastewater system.

(36) [~~(35)~~] Process unit--The smallest set of process equipment that can operate independently and includes all operations necessary to achieve its process objective.

(37) [~~(36)~~] Rupture disk--A diaphragm held between flanges for the purpose of isolating a volatile organic compound [~~VOC~~] from the atmosphere or from a downstream pressure relief valve.

(38) [~~(37)~~] Shutdown or turnaround--For the purposes of this chapter, a work practice or operational procedure that stops production from a process unit or part of a unit during which time it is technically feasible to clear process material from a process unit or part of a unit consistent with safety constraints, and repairs can be accomplished.

(A) The term shutdown or turnaround does not include a work practice that would stop production from a process unit or part of a unit:

(i) for less than 24 hours; or

(ii) for a shorter period of time than would be required to clear the process unit or part of the unit and start up the unit.

(B) Operation of a process unit or part of a unit in recycle mode (i.e., process material is circulated, but production does not occur) is not considered shutdown.

(39) [~~(38)~~] Startup--For the purposes of this chapter, the setting into operation of a piece of equipment or process unit for the purpose of production or waste management.

(40) [~~(39)~~] Strippable volatile organic compound (VOC)--Any VOC in cooling tower heat exchange system water that [~~which~~] is emitted to the atmosphere when the water passes through the cooling tower. [~~An estimate of total and speciated strippable VOC is acceptable when measured by:~~]

[~~(A) the method in Appendix P of the Texas Commission on Environmental Quality (commission) Sampling Procedures Manual, January 2003;~~]

[~~(B) a method approved by the executive director that can produce equivalent results as compared to the method in Appendix P; or~~]

[~~(C) a method approved by the executive director that determines VOCs emitted from the cooling tower by VOC mass balance across the cooling tower.~~]

(41) [~~(40)~~] Synthetic organic chemical manufacturing process--A process that produces, as intermediates or final products, one or more of the chemicals listed in 40 Code of Federal Regulations §60.489 (October 17, 2000).

(42) [~~(41)~~] Tank-truck tank--Any storage tank having a capacity greater than 1,000 gallons, mounted on a tank-truck or trailer. Vacuum trucks used exclusively for maintenance and spill response are not considered to be tank-truck tanks.

(43) [~~(42)~~] Transport vessel--Any land-based mode of transportation (truck or rail) [~~that is~~] equipped with a storage tank having a capacity greater than 1,000 gallons that [~~which~~] is used to transport oil, gasoline, or other volatile organic liquid bulk cargo. Vacuum trucks used exclusively for maintenance and spill response are not considered to be transport vessels.

(44) [~~(43)~~] True partial pressure--The absolute aggregate partial pressure [~~(psia)~~] of all volatile organic compounds [~~VOC~~] in a gas stream.

(45) [~~(44)~~] Vapor balance system--A system that [~~which~~] provides for containment of hydrocarbon vapors by returning displaced vapors from the receiving vessel back to the originating vessel.

(46) [(45)] Vapor control system or vapor recovery system--Any control system that [which] utilizes vapor collection equipment to route volatile organic compounds (VOC) [VOC] to a control device that reduces VOC emissions.

(47) [(46)] Vapor-tight--Not capable of allowing the passage of gases at the pressures encountered except where other acceptable leak-tight conditions are prescribed in this chapter.

(48) [(47)] Waxy, high pour point crude oil--A crude oil with a pour point of 50 degrees Fahrenheit (10 degrees Celsius) or higher as determined by the American Society for Testing and Materials Standard D97-66, "Test for Pour Point of Petroleum Oils."

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404255
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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SUBCHAPTER H. HIGHLY-REACTIVE VOLATILE ORGANIC COMPOUNDS
DIVISION 1. VENT GAS CONTROL

30 TAC §§115.720, 115.722, 115.725 - 115.727, 115.729

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed amendments implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.720. Applicability and Definitions.

(a) Applicability. In the Houston/Galveston area, as defined in §115.10 of this title (relating to Definitions), any account with a controlled or uncontrolled vent gas stream containing highly-reactive volatile organic compounds (HRVOC), as defined in §115.10 of this title, or a flare that emits or has the potential to emit HRVOC is subject to this division (relating to Vent Gas Control) in addition to the applicable requirements of Subchapter B, Divisions 2 and 6 of this chapter (relating to Vent Gas Control; and Batch Processes) and Subchapter D, Division 1 of this chapter (relating to Process Unit Turnaround and Vacuum-Producing Systems in Petroleum Refineries).

(b) Definitions. The following terms, when used in this division, [shall] have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions).

(1) Degassing safety device--A device other than a flare used to prevent the release of unburned organic vapors from a geologic storage facility resulting from either equipment or containment failure.

(2) [(1)] Supplementary fuel--Natural gas or fuel gas added to the gas stream to increase the net heating value to the minimum required value.

(3) [(2)] Pilot gas--Gas that is used to ignite or continually ignite flare gas.

§115.722. Site-wide Cap and Control Requirements.

(a) The owner or operator of a site subject to this division shall additionally comply with the requirements of Chapter 101, Subchapter H, Division 6 of this title (relating to Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program). [Emissions of highly-reactive volatile organic compounds (HRVOC) at each account subject to this division (relating to Vent Gas Control) or Division 2 of this subchapter (relating to Cooling Tower Heat Exchange Systems) are limited to a 24-hour rolling average as specified in Table 6-2.1, Initial HRVOC Site-Cap Allocations: Harris County, and Table 6-2.2, Initial HRVOC Site-Cap Allocations: Seven Surrounding Counties, of the *Post-1999 Rate-of-Progress and Attainment Demonstration Follow-up SIP for the Houston/Galveston Ozone Nonattainment Area* adopted on December 13, 2002.]

(b) All sites subject to this division or Division 2 of this subchapter (relating to Cooling Tower Heat Exchange Systems) that are exempt from the highly-reactive volatile organic compound (HRVOC) emissions cap and trade program, in accordance with §101.392 of this title (relating to Exemptions), are limited to ten tons of HRVOC emissions per calendar year.

(c) Each site subject to this division is subject to the following emission limitations.

(1) HRVOC emissions at each site located in Harris County that is subject to this division or Division 2 of this subchapter must not exceed 1,200 pounds of HRVOC per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(2) HRVOC emissions at each site located in the Houston/Galveston ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), excluding Harris County, that is subject to this division or Division 2 of this subchapter must not exceed 1,200 pounds of HRVOC per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(3) For any exceedance of the HRVOC emission limits specified in paragraph (1) or (2) of this subsection, the emission limits specified in paragraph (1) or (2) of this subsection must be used to determine compliance with subsection (a) or (b) of this section instead of the total amount of actual emissions.

(d) [(b)] All flares must [shall] continuously meet the requirements of 40 Code of Federal Regulations §60.18(c)(2) - (6) and (d) [§60.18(c) - (f)] as amended through October 17, 2000 (65 FR 61744)

when vent gas containing volatile organic compounds is being routed to the flare.

(1) Average net heating value over a one-hour block period will be used to demonstrate compliance with the minimum net heating value requirements.

(2) The exit velocity averaged over a one-hour block period must be used to demonstrate compliance with the maximum exit velocity requirements.

(e) [~~(c)~~] An owner or operator may not use emission reduction credits or discrete emission reduction credits in order to demonstrate compliance with this division.

§115.725. Monitoring and Testing Requirements.

(a) Except for pressure relief valves as defined in §115.10 of this title (relating to Definitions), each [~~Each~~] vent gas stream that is not controlled by a flare at an account must be tested by applying the appropriate reference method tests and procedures specified in §115.125 of this title (relating to Testing Requirements) to establish maximum potential highly-reactive volatile organic compound (HRVOC) hourly emission data expected during any operation not defined as an emissions event or a scheduled maintenance, startup, or shutdown activity under §101.1 of this title (relating to Definitions). The data shall be used in accordance with the test plan required under §115.726 of this title (relating to Recordkeeping and Reporting Requirements) to demonstrate compliance with the control requirement of §115.722(a) - (c) [~~§115.722(a)~~] of this title (relating to Site-wide Cap and Control Requirements). For cyclic or batch processes, the HRVOC emissions shall be considered as zero during non-operational periods other than startup, shutdown, or maintenance activities.

(1) For each uncontrolled vent subject to the requirements of this subsection, the owner or operator shall:

(A) select an operational parameter or parameters that directly correlates to the HRVOC emissions from the vent;

(B) install, calibrate, maintain, and operate according to manufacturer's recommendations, a continuous monitoring system to monitor and record the parameter or parameters selected under subparagraph (A) of this paragraph; and

(C) establish operating limits for the selected parameter or parameters as the hourly average of the parameter or parameters during the HRVOC emission test required under this subsection.

(2) For each vent subject to the requirements of this subsection that is controlled by a control device other than a flare, the owner or operator shall:

(A) select an operational parameter or parameters that directly correlates to the HRVOC emissions directed to the control device;

(B) select an operational parameter or parameters of the control device that directly correlates to the control efficiency of the control device;

(C) install, calibrate, maintain, and operate according to manufacturer recommendations, continuous monitoring systems to monitor and record the parameters selected under subparagraphs (A) and (B) of this paragraph; and

(D) establish operating limits for the selected parameters required under subparagraphs (A) and (B) of this paragraph as the hourly averages of the parameters during the HRVOC emission test required under this subsection.

(3) To demonstrate compliance with the control requirements of §115.722(a) - (c) of this title during emission events and scheduled startup, shutdown, and maintenance activities, the owner or operator shall determine the HRVOC emissions from each vent using one of the following:

(A) Testing using the appropriate reference methods and procedures specified in this section; or

(B) Process knowledge and engineering calculations. If process knowledge and engineering calculations are used to determine HRVOC emissions during emission events and scheduled startup, shutdown, and maintenance activities, the monitoring plans required under paragraph (4) of this subsection must also include all process information and calculations used to calculate the HRVOC emissions.

(4) The owner or operator shall develop, implement, and follow a written monitoring plan for the continuous monitoring systems required in paragraphs (1) and (2) of this subsection prior to performing the monitoring and testing under this subsection. Upon written request by the executive director, the monitoring plans shall be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements. At a minimum, monitoring plans shall include:

(A) specifications for all monitors used in the continuous monitoring systems;

(B) process and control device information supporting the selection of parameters;

(C) actual testing or manufacturer data documenting the control efficiency of the control device; and

(D) schedule of quarterly inspections of the continuous monitoring systems to insure proper operation;

(5) After the initial HRVOC emission test required under this subsection, the owner or operator may perform additional emission testing to update the data used to demonstrate compliance with the control requirements of §115.722(a) - (c) of this title. Test plans for additional testing must be submitted to the executive director at least 45 days prior to testing.

(6) Testing using the appropriate reference methods and procedures specified in §115.125 of this title that was conducted before approval of the test plan required under §115.726(a) of this title may be used in lieu of conducting the testing specified in this subsection, provided that:

(A) the owner or operator of the affected source obtains approval for the testing report and data from the executive director; and

(B) the testing establishes maximum potential HRVOC emissions data expected during any operation that is not defined as an emissions event or a scheduled maintenance, startup, or shutdown activity under §101.1 of this title.

(C) if the monitoring system required under paragraphs (1) or (2) of this subsection was not installed at the time of testing, the monitoring plan required under paragraph (4) of this subsection must include sufficient documentation to demonstrate that the monitoring system accurately reflects the parameter operating limits established during testing. If the executive director approves the prior testing under this paragraph, then the owner or operator shall comply with the monitoring system and written monitoring plan requirements of this subsection by no later than the compliance schedule in §115.729 of this title (relating to Counties and Compliance Schedules) instead of the time required in paragraph (4) of this subsection.

(7) The executive director may waive testing for no more than one-half of the vents that are identical in design and operation if the owner or operator demonstrates that all the vents are identical in design and operation, and the emissions from all of the vents can be expected to be identical.

(A) The request for a waiver shall be submitted with the test plan required under §115.726(a) of this title. Information required to support the waiver request shall include, but is not limited to, the following:

(i) identification of each vent expected to be identical;

(ii) each specific vent to be tested;

(iii) a detailed technical explanation demonstrating that the measured emissions from the selected vents can be expected to be representative of emissions from all vents;

(iv) specific technical information for each vent and the process associated with each vent demonstrating that the vents and associated processes are identical in design and operation;

(v) maintenance records for each vent and associated process demonstrating the vents and associated processes have been maintained in a similar manner; and

(vi) any additional information or data requested by the executive director necessary to demonstrate that the emissions from the vents can be expected to be identical.

(B) The executive director shall review the request for waiver and may provide a temporary waiver authorizing testing of no more than one-half of the vents. The results of the tests must be submitted to the executive director no later than 45 days after the date of written authorization of the temporary waiver. The executive director will determine if any further testing is required based on the review of the test results.

(b) The following alternatives may be used in lieu of [~~Alternatives to~~] the testing requirements of subsection (a) of this section, for vent gas streams that are not controlled by a flare or are not pressure relief valves. The vent gas stream shall comply with the process parameter monitoring requirements of subsection (a) of this section:[~~, include the following.~~]

(1) The vent gas stream may be equipped with a continuous emissions monitoring system (CEMS), provided that:

(A) (No change.)

(B) the monitor shall initially and at a minimum quarterly [~~annually~~] thereafter be subjected to a cylinder gas audit per 40 CFR Part 60, Appendix B, Performance Specification 2, Section 16 to assess system bias and ensure accuracy; and

(C) (No change.)

(2) Process knowledge, including scientific calculations and other process monitoring data sufficient to demonstrate compliance status, may be used to determine maximum potential HRVOC hourly emission data. Types of processes that may use process knowledge in lieu of testing are:

(A) (No change.)

[~~(B) pressure relief valves~~]

(B) [~~(C)~~] steam system vents; [~~or~~]

(C) [~~(D)~~] vent gas streams where there is no HRVOC present except during emissions events; or [~~.~~]

(D) degassing safety devices, as defined in §115.720 of this title (relating to Applicability and Definitions).

(c) Affected pressure relief valves not controlled by a flare shall be monitored as follows:

(1) Install, calibrate, maintain, and operate according to manufacturer's recommendations, a continuous monitoring system on the pressure relief valve or in the associated process systems sufficient to determine;

(A) the time and duration of each pressure relief event;

(B) the status of the pressure relief valve as either:

(i) open or closed to the atmosphere; or

(ii) the percentage the valve is open to the atmosphere; and

(C) the volumetric flow rate during a pressure relief event.

(i) If volumetric flow rate is not monitored directly, the owner or operator must determine through engineering calculations, manufacturer's information, or actual testing the correlation between the monitored parameter and the percentage the pressure relief valve is open to the atmosphere to the volumetric flow rate.

(ii) If the monitoring system only indicates an open or closed status as specified in subparagraph (B)(i) of this paragraph, the owner or operator must assume the pressure relief valve is 100% open during a pressure relief event for purposes of calculating volumetric flow rate.

(2) For purposes of determining compliance with the control requirement of §115.722(a) - (c) of this title during pressure relief events, the owner or operator may use process knowledge, including scientific calculations and other process monitoring data, to determine HRVOC emission rates. The volumetric flow rate determined in accordance with paragraph (1)(C) of this subsection shall be used in combination with the process knowledge to determine HRVOC emission rates.

(3) The owner or operator shall develop, implement, and follow a written monitoring plan to satisfy the requirements of paragraphs (1) and (2) of this subsection. The monitoring plan must include:

(A) specifications for all monitors used to satisfy the requirements of paragraphs (1) and (2) of this subsection;

(B) all engineering calculations, manufacturer's information, or actual testing supporting the correlation of the monitored parameters to actual volumetric flow rate specified in paragraph (1)(C)(i) of this subsection;

(C) supporting documentation of the actual testing or process knowledge used to determine HRVOC emissions as provided in paragraph (2) of this subsection;

(D) at a minimum, quarterly inspections of all pressure relief valves and associated monitors to insure proper operation per the manufacturer's specifications; and

(E) a list identifying all pressure relief valves in HRVOC service subject to the requirements of this subsection);

(4) Upon written request by the executive director, the monitoring plan required under paragraph (3) of this subsection must be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements.

[(c) Testing using the appropriate reference methods and procedures specified in §115.125 of this title which was conducted before approval of the test plan required under §115.726(a) of this title may be used in lieu of conducting the testing specified in subsection (a) of this section, provided that:]

[(1) the owner or operator of the affected source obtains approval for the testing report and data from the executive director; and]

[(2) the testing establishes maximum potential HRVOC emissions data expected during any operation that is not defined as an emissions event or a scheduled maintenance, startup, or shutdown activity under §101.1 of this title.]

(d) Except as specified in subsections (e) - (i) [subsection (e)] of this section, the owner or operator of an affected flare must [shall] conduct continuous monitoring, to demonstrate compliance with §115.722(a) - (d) of this title as follows:

(1) install, calibrate, maintain, and operate a continuous flow monitoring system capable of measuring the flow rate over the full potential range of operation. The executive director may approve alternative means of determining the flare flow rate for a period of time not to exceed 1.0% of the annual operating time of the flare. The monitoring system must [shall] be capable of measuring the entire gas stream flow to the flare (i.e., all vent gas and supplemental fuel sources) and may consist of one or more flow measurements at one or more header locations. For correcting flow rate to standard conditions (defined as 68 degrees Fahrenheit and 760 millimeters of mercury (mm Hg)), temperature and pressure in the main flare header must [shall] be monitored continuously. The monitors must [shall] be calibrated to meet accuracy specifications as follows:

(A) the temperature monitor must [shall] be calibrated annually to within ±2.0% at absolute temperature;

(B) the pressure monitor must [shall] be calibrated annually to within ±5.0 mm Hg; and

(C) the flow monitor, or velocity monitor used to determine flow rate, must [shall] be initially calibrated, prior to installation, to demonstrate accuracy to within 5.0% at flow rates equivalent to 30%, 60%, and 90% of monitor full scale. After installation, the flow monitor or velocity monitor must [shall] be calibrated annually according to manufacturer's specifications;

(2) install, calibrate, maintain, and operate an on-line analyzer system capable of determining HRVOC at least once every 15 minutes. The on-line analyzer system must [shall] also be capable of measuring, at least once every 15 minutes, other potential constituents (e.g., hydrogen, nitrogen, methane, and carbon dioxide, and volatile organic compounds (VOC) other than HRVOCs) sufficient to determine the molecular weight and net heating value of the gas combusted in the flare to within 5.0%. Samples must [shall] be collected from a location on the main flare header such that the measured constituents, including any supplementary fuel, is representative of the combined gas combusted in the flare system. Net heating value of the gas combusted in the flare must be calculated according to the equation given in 40 CFR §60.18(f)(3) as amended through October 17, 2000 (65 FR 61744). The samples must be used to demonstrate continuous compliance with the requirements of §115.722(a) - (d) of this title. Pilot gas may not be included in the determination of the net heating value.

(A) Calibration of the on-line analyzer shall be as follows:

(i) for the HRVOC constituents, follow the procedures and requirements of Section 10.0 of 40 CFR Part 60, Appendix B, Performance Specification 9, as amended through October 17, 2000 (65 FR 61744), except that the multi-point calibration procedure in Section 10.1 of Performance Specification 9 must [shall] be performed at least once every calendar quarter instead of once every month, and the mid-level calibration check procedure in Section 10.2 of Performance Specification 9 must [shall] be performed at least once every calendar week instead of once every 24 hours. The calibration gases used for calibration procedures must [shall] be in accordance with Section 7.1 of Performance Specification 9;[. Net heating value of the gas combusted in the flare shall be calculated according to the equation given in 40 CFR §60.18(f)(3) as amended through October 17, 2000 (65 FR 61744). The samples shall be used to continuously meet the minimum net heating value requirements of 40 CFR §60.18 and the site-wide cap of §115.722 of this title. Pilot gas shall not be included in the determination of the net heating value;]

(ii) for the constituents monitored to determine of net heating value and molecular weight, the owner or operator may elect to follow either the calibration procedures specified for HRVOC constituents in clause (i) of this subparagraph or the calibration procedures recommended by the analyzer manufacturer. If the owner or operator elects to follow manufacturer's recommended procedures;

(I) those calibration procedures must include, at a minimum, single point calibration checks at least once every calendar week to meet the acceptance criteria specified in Section 10.2 of Performance Specification 9 with certified standards of the top two non-HRVOC constituents affecting molecular weight and net heating value, and,

(II) the owner or operator shall submit with the quality assurance plan (QAP) required under §115.726(a) of this title, manufacturer's information and data to demonstrate the accuracy and reliability of the analyzer for those monitored constituents for which routine calibration checks are not performed.

(iii) the range of calibration standards for the HRVOCs and other constituents may be based on the typical concentrations observed rather than the full potential range of concentrations. Data must be submitted with the QAP required under §115.726(a) of this title to demonstrate the accuracy of the analyzer at maximum potential concentrations outside of the proposed calibration range; and

(iv) the executive director may specify additional calibration requirements during approval of the QAP under §115.726(a)(1)(C) of this title.

(B) In lieu of monitoring constituents for net heating value in accordance with this paragraph, the owner or operator may install an online calorimeter to determine the net heating value. The calorimeter must be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units/standard cubic foot of the gas.

(3) continuously operate each monitoring system as required by this section at least 95% of the time when the flare is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total flare operating hours for which valid quality-assured data was recorded divided by the total flare operating hours. Time required for normal calibration checks required under paragraphs (1) and (2) of this subsection is not considered downtime for purposes of this calculation.[;]

(4) during any period of monitor downtime of the on-line analyzer specified in paragraph (2) of this subsection exceeding eight consecutive hours, take a sample daily, starting within ten [24] hours of the initial on-line analyzer malfunction. The sampling location must be

such that the measured constituents, including any supplementary fuel, is representative of all of the major constituents going to the flare system. For determining the HRVOC concentrations in the flare header gas, the samples must [~~shall~~] be analyzed for the concentrations of HRVOC according to the procedures in 40 CFR Part 60, Appendix A, Method 18 as amended through October 17, 2000 (65 FR 61744). Samples must [~~shall~~] also be analyzed by American Standard of Testing Materials Standard D1946-77 to determine other potential constituents (e.g., hydrogen, nitrogen, methane, and carbon dioxide, and VOCs other than HRVOCs) sufficient to determine the molecular weight and net heating value of the gas combusted in the flare to within 5.0%. Net heating value of the gas combusted in the flare must [~~shall~~] be calculated according to the equation given in 40 CFR §60.18(f)(3). During periods of monitor downtime, these samples must [~~shall~~] be used to demonstrate continuous compliance with the requirements of §115.722(a) - (d) of this title [~~that the minimum net heating value requirements of 40 CFR §60.18 and the site-wide cap of §115.722 of this title~~] are met;

(5) every 15 minutes, calculate the net heating value of the gas combusted in the flare according to the equation given in 40 CFR §60.18(f)(3). Pilot gas must [~~shall~~] not be included in the determination of the net heating value. [~~Average net heating value over an one-hour block period will be used to demonstrate compliance with the minimum net heating value requirements of §115.722(b) of this title;~~]

(6) calculate the actual exit velocity of the flare every 15 minutes based on continuous flow rate, temperature, and pressure monitor data, according to 40 CFR §60.18(f)(4); and

(7) [~~(6)~~] calculate the HRVOC hourly average mass emission rates from the flare using the data gathered according to paragraphs (1) - (6) [~~(1) - (4)~~] of this subsection, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the heating value and exit velocity requirements of 40 CFR 60.18. During each 15-minute period when the flare is not in compliance with the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% shall be assumed to calculate HRVOC mass emission rates.[~~;~~]

[~~(7) calculate the actual exit velocity of the flare every 15 minutes based on continuous flow rate, temperature, and pressure monitor data, according to 40 CFR §60.18(f)(4). Average exit velocity over an one-hour block period shall be used to demonstrate compliance with the maximum exit velocity requirements of §115.722 (b) of this title; and~~]

[~~(8) submit for approval by the executive director any minor modifications to these monitoring methods. Monitoring methods other than those specified in paragraphs (1) and (2) of this subsection may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Test Method 301 (December 29, 1992). For the purposes of this paragraph, substitute "executive director" in each place that Test Method 301 references "administrator."~~]

(e) Flares used solely for abatement of HRVOC emissions from loading operations for marine vessels or transport vessels [~~or temporary portable flares used solely for the abatement of emissions from scheduled maintenance or startup or shutdown activities~~] are not required to comply with the monitoring requirements of subsection (d) of this section, provided the following specific requirements are satisfied.

[~~(1) Flares used solely for abatement of emissions from loading operations for transport vessels shall satisfy all of the following requirements.~~]

(1) [~~(A)~~] To demonstrate compliance with the minimum net heating value requirements of §115.722(d) of this title, a [~~A~~] calorimeter must [~~shall~~] be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units/standard cubic foot of the gas.

[~~(B) Records of each loading activity are maintained, including, but not limited to:~~]

[~~*(i)* the type of vessel being loaded;~~]

[~~*(ii)* the start time and the end time for each vessel loaded;~~]

[~~*(iii)* the compounds loaded, in addition to the compounds loaded into the vessel immediately previous to the current loading operation, if the vessel being loaded is not clean;~~]

[~~*(iv)* the quantity of material loaded;~~]

[~~*(v)* the loading rate in gallons per minute;~~]

[~~*(vi)* the method of loading, such as submerged fill, bottom fill, or splash loading; and~~]

[~~*(vii)* additional parameters as needed for emissions calculations.~~]

(2) [~~(C)~~] The flare's actual exit velocity for each loading activity must [~~shall~~] be calculated every 15 minutes, based on the maximum loading rate and the supplemental fuel rate corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4) to demonstrate compliance with the exit velocity requirements of §115.722(d) of this title.

(3) [~~(D)~~] The HRVOC hourly average mass emission rates from the flare must [~~shall~~] be calculated to demonstrate compliance with the site-wide cap in §115.722 of this title, using total HRVOC sent to the flare calculated based on loading emission calculations [~~approved by the commission~~], and the speciated composition of the material being sent to the flare, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18 [~~60.18~~]. During each 15-minute period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must [~~shall~~] be assumed to calculate HRVOC mass emission rates.

(4) For flares that receive greater than 98% of an individual HRVOC at all times, the owner or operator may use process knowledge to determine net heating value and HRVOC concentration for demonstrating compliance with §115.722(a) - (d) of this title.

[~~(2) Temporary portable flares used solely for abatement of emissions from scheduled maintenance or startup or shutdown activities shall satisfy all of the following requirements.~~]

[~~(A) The flare is designed to be and capable of being carried or moved from one location to another by means including, but not limited to, wheels, skids, dolly, trailer, or platform.~~]

[~~(B) The flare shall be located and operated for no more than 14 days at the plant site in any 12 consecutive months.~~]

[~~(C) A calorimeter shall be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units per standard cubic foot of the gas.~~]

~~[(D) Records shall be maintained, including, but not limited to:]~~

~~*[(i)* the date, start time, and end time for each flaring event;]~~

~~*[(ii)* the flow rate of the gas routed to the flare, in standard cubic feet per minute, calculated based on process knowledge or actual measurement; and]~~

~~*[(iii)* all supporting supplemental information on which the flow rate calculation was based.]~~

~~[(E) The flare's actual exit velocity for each activity shall be calculated every 15 minutes, based on the calculated flow rate and the supplemental fuel rate corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4).]~~

(f) Flares used solely for abatement of emissions from scheduled maintenance, startup, or shutdown activities must comply with the continuous monitoring requirements in subsection (d) of this section, or satisfy all of the following requirements:

(1) A single flare must not be operated in HRVOC service for more than 14 days at an account in any 12 consecutive months.

(2) The total number of days for which an account may send HRVOCs temporarily to multiple flares as described in this subsection must not exceed 28 days in 12 consecutive months.

(3) To demonstrate compliance with the minimum net heating value requirements of §115.722(d) of this title, a calorimeter must be calibrated, installed, operated, and maintained, in accordance with manufacturer recommendations, to continuously measure and record the net heating value of the gas sent to the flare, in British thermal units per standard cubic foot of the gas.

(4) The flow rate of the gas routed to the flare, in standard cubic feet per minute must be determined by either:

(A) complying with the monitoring requirements of subsection (d)(1) of this section, or

(B) using process knowledge and engineering calculations.

(5) The flare's actual exit velocity for each activity must be calculated on a block 15-minute average basis, corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4). The HRVOC hourly average mass emission rates from the flare must be calculated to demonstrate compliance with §115.722(a) - (c) of this title, using total HRVOC sent to the flare calculated based on process knowledge or actual measurement, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18. During each 15-minute period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must be assumed to calculate HRVOC mass emission rates.

(6) For flares that at all times receive greater than 98% of an individual HRVOC, the owner or operator may use process knowledge to determine net heating value and HRVOC concentration for demonstrating compliance with §115.722(a) - (d) of this title.

(g) For an emergency flare, as defined in §115.10 of this title, subject to the requirements of this division, the owner or operator shall:

(1) comply with the continuous monitoring requirements in subsection (d) of this section, or;

(2) use process knowledge and engineering calculations to determine compliance with the requirements of §115.722(a) - (d) of this title during an upset event or unscheduled maintenance, startup, or shutdown activity. If this option is selected the owner or operator shall comply with the following:

(A) for emergency flares equipped with physical seal (e.g., a water seal) that prevents emissions from being sent to the flare except during an upset event or unscheduled maintenance, startup, or shutdown activity, the owner or operator shall install, calibrate, operate, and maintain, according to manufacturer's specifications, a continuous monitoring system that:

(i) monitors the status of the physical seal to ensure that emissions are not directed to the flare except during an upset event or unscheduled maintenance, startup, or shutdown activity;

(ii) automatically records the time and duration of each event when emissions are sent to the flare; and

(iii) verifies that the physical seal has been restored after each event;

(B) for emergency flares not equipped with a physical seal that prevents emissions from being sent to the flare except during an upset event or unscheduled maintenance, startup, or shutdown activity, the owner or operator shall;

(i) install, calibrate, operate, and maintain, according to manufacturers' specifications, a flow monitoring or indicating system to determine and record the time and duration of each event when emissions are sent to the flare; and

(ii) determine through process knowledge, engineering calculations, or actual testing, the baseline flow rate from any purge/sweep gas and the minimum flow rate indicative of an upset event or unscheduled maintenance, startup, or shutdown activity;

(C) the owner or operator shall develop, implement, and follow a written monitoring plan to satisfy the requirements of subparagraph (A) or (B) of this paragraph. The monitoring plan must include:

(i) specifications for all monitors used to satisfy the requirements of subparagraph (A) or (B) of this paragraph;

(ii) the engineering calculations and process information used to determine volumetric flow rate, flare tip exit velocity, net heating value, HRVOC emissions for compliance with §115.722(a) - (d) of this title; and

(iii) at a minimum, quarterly inspections of the continuous monitoring system to ensure proper operation.

(D) Upon written request by the executive director, the monitoring plans required in accordance with subparagraph (C) of this paragraph shall be submitted within 30 days for review. The executive director may require additional or alternative monitoring requirements.

(E) The flare's actual exit velocity for each activity must be calculated on a block 15-minute average basis, corrected to standard temperature and pressure and the unobstructed (free) cross-sectional area of the flare tip, according to 40 CFR §60.18(f)(4). The HRVOC hourly average mass emission rates from the flare must be calculated, using total HRVOC sent to the flare calculated based on process knowledge or actual measurement, assuming a 99% destruction efficiency for ethylene and propylene and a 98% destruction efficiency for all other HRVOCs when the flare meets the net heating value and exit velocity requirements of 40 CFR §60.18. During each 15-minute period when the flare does not meet the net heating value or exit velocity requirements of 40 CFR §60.18, a destruction efficiency of 93% must be assumed to calculate HRVOC mass emission rates.

(h) Flares other than emergency flares that temporarily receive HRVOC emissions during any operation that is not a scheduled maintenance, startup, or shutdown activity as defined in §101.1 of this title must satisfy the following requirements:

(1) The flare must not be operated in HRVOC service for more than 14 days at the plant site in any 12 consecutive months.

(2) The total number of days for which an account may send HRVOCs temporarily to multiple flares as described in this subsection must not exceed 28 days in 12 consecutive months.

(3) In lieu of the flow monitoring requirements of subsection (d)(1) of this section, the owner or operator may use one of the following to demonstrate compliance with §115.722(a) - (d) of this title:

(A) process knowledge;

(B) actual measurement; or

(C) for flares that temporarily receive HRVOC emissions from flare systems that are monitored in accordance with subsection (d) of this section, the flow monitoring data from the monitored flare system may be used as data substitution. Maximum flow rate, excluding data from startups, shutdowns, maintenance, or emissions events, from the previous 30 operational days must be used to determine compliance with §115.722(a) - (d) of this title.

(4) In lieu of implementing the continuous monitoring requirements specified in subsection (d)(2) of this section, the owner operator may use one of the following to demonstrate compliance with §115.722(a) - (d) of this title:

(A) for all flares in temporary HRVOC service, daily sampling in accordance with subsection (d)(4) of this section to determine net heating value and HRVOC concentrations; or

(B) for flares that temporarily receive HRVOC emissions for less than 72 consecutive hours from flare systems that are monitored in accordance with subsection (d) of this section, the monitoring data from the monitored flare system may be used as data substitution to satisfy compliance with §115.722(a) - (d) of this title. Maximum HRVOC concentrations and minimum net heating value, excluding data from scheduled startups, shutdowns, maintenance, or emissions events, from the previous 30 operational days shall be used to determine compliance with §115.722(a) - (d) of this title.

(5) If an emissions event as defined in §101.1 of this title occurs while HRVOC emissions are being routed to a flare temporarily under this subsection, the owner or operator shall demonstrate compliance with the requirements of §115.722(a) - (d) of this title using process knowledge and engineering calculations in accordance with subsection (g)(2)(E) of this section.

(i) For flares specifically designed to receive and control liquid or dual phase streams containing HRVOCs, process knowledge and engineering calculations must be used to determine compliance with the requirements of §115.722(a) - (d) of this title in accordance with subsection (g)(2)(E) of this section.

(j) [~~(f)~~] Minor modifications [~~Modifications~~] to either test methods or monitoring [~~alternative test~~] methods may be approved by the executive director. Test methods other than those specified in [~~subsections (a) - (c) and (e) of~~] this section may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Test Method 301 (December 29, 1992). For the purposes of this subsection, substitute "executive director" in each place that Test Method 301 references "administrator."

(k) Upon written request by the executive director, the owner or operator shall submit the engineering calculations and process information used to determine volumetric flow rate, flare tip exit velocity, net heating value, and HRVOC emissions for compliance with the requirements of §115.722(a) - (d) of this title where applicable under the requirements of this section. The information must be submitted within 30 days for review.

[~~(g) The executive director may waive testing for no more than one-half of the vents that are identical in design and operation if the owner or operator demonstrates that all the vents are identical in design and operation, and the emissions from all of the vents can be expected to be identical.~~]

[~~(1) The request for a waiver shall be submitted with the test plan required under §115.726(a)(2) of this title. Information required to support the waiver request shall include, but is not limited to, the following:~~]

[~~(A) identification of each vent expected to be identical;~~]

[~~(B) each specific vent to be tested;~~]

[~~(C) a detailed technical explanation demonstrating that the measured emissions from the selected vents can be expected to be representative of emissions from all vents;~~]

[~~(D) specific technical information for each vent and the process associated with each vent demonstrating that the vents and associated processes are identical in design and operation;~~]

[~~(E) maintenance records for each vent and associated process demonstrating the vents and associated processes have been maintained in a similar manner; and~~]

[~~(F) any additional information or data requested by the executive director necessary to demonstrate that the emissions from the vents can be expected to be identical.~~]

[~~(2) The executive director shall review the request for waiver and may provide a temporary waiver authorizing testing of no more than one-half of the vents. The results of the tests shall be submitted to the executive director no later than 45 days after the date of written authorization of the temporary waiver. The executive director will determine if any further testing is required based on the review of the test results.~~]

§115.726. Recordkeeping and Reporting Requirements.

(a) To satisfy the requirements of §115.725 of this title (relating to Monitoring and Testing Requirements), the owner or operator of each affected flare or vent gas stream shall submit to the executive director for [~~review and~~] approval a test plan for testing and a quality assurance plan (QAP) for the monitoring requirements (including installation, calibration, operation, and maintenance of continuous emissions monitoring systems) of this division (relating to Vent Gas Control) and subsequently comply with the conditions outlined in the approved test plan or QAP as follows:

(1) for the monitoring requirements of §115.725(d) of this title:

(A) for flares and vent gas streams existing on or before December 31, 2005, the QAP must be submitted no later than April 30, 2005;

(B) for flares/vent gas streams that become subject to the requirements of this division after December 31, 2005, the QAP must be submitted prior to the flares or vent gas streams being placed in a highly-reactive organic compound (HRVOC) service [~~at least 60~~

~~days prior to being placed in highly-reactive volatile organic compound (HRVOC) service~~]; and

(C) (No change.)

(2) for the testing requirements of §115.725(a) of this title:

(A) for flares and vent gas streams existing on or before December 31, 2005, the test plan must be submitted no later than April 30, 2005;

(B) for flares and vent gas streams that become subject to the requirements of this division after December 31, 2005, the test plan must be submitted at least 60 days prior to being placed in HRVOC service; [~~and~~]

(C) the executive director shall issue written approval of, or detail deficiencies and/or direct additional requirements to be added to, each test plan within 45 days of receipt of a test plan for a vent gas stream to be tested as required by §115.725(a) of this title. The owner or operator shall submit a corrected test plan within 45 days of the date of the deficiency and/or additional requirements letter. If an approval or detailed deficiency and/or directed additional requirements letter is not issued within 45 days of receipt by the executive director, then the test plan is approved by default provided the testing is to be conducted in accordance with the appropriate reference methods and procedures specified in §115.125 of this title (relating to Testing Requirements) without deviation; and [~~.~~]

(D) The operational parameters selected in accordance with §115.725(a)(1)(A) and (2)(A) and (B) of this title must be identified in the test plan.

(b) The owner or operator of a vent gas stream subject to the requirements of §115.725(a) of this title shall comply with the following recordkeeping requirements as applicable: [~~maintain a record of the results of all testing conducted in accordance with §115.725 of this title.~~]

(1) maintain records of all testing conducted in accordance with §115.725(a) of this title to determine HRVOC emission rates on a pounds-per-hour basis for each affected vent gas stream;

(2) maintain hourly records of the parameter monitoring in accordance with §115.725(a)(1) or (2) of this title;

(3) maintain records of the monitoring plans required under §115.725(a)(4) of this title;

(4) maintain hourly records of HRVOC emission rates on a pound-per-hour basis for each affected vent gas stream monitored in accordance with §115.725(b)(1) of this title;

(5) maintain records of all continuous emissions monitoring system calibrations and cylinder gas audits performed in accordance with §115.725(b)(1)(A) and (B) of this title;

(6) maintain records of all process information and calculations used to determine vent gas flow rate as specified in §115.725(b)(1)(C) of this title; and

(7) maintain records of all process information, actual testing, process monitoring data, and calculations used to comply with §115.725(a) of this title under the alternatives to the testing requirements in §115.725(b)(2) of this title;

(c) The owner or operator of a pressure relief valve subject to the requirements of §115.725(c) of this title shall comply with the following recordkeeping requirements:

(1) maintain records of the date, time, duration, volumetric flow rate, and speciated and total HRVOC emission rates on a pounds-per-hour basis for each pressure relief event;

(2) maintain hourly records of the parameter monitoring in accordance with §115.725(c)(1) of this title;

(3) maintain records of all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data as specified in §115.725(c)(2) of this title; and

(4) maintain records of the monitoring plans required under §115.725(c)(3) of this title.

(d) [~~(c)~~] The owner or operator of a flare at an account that is subject to §115.722 of this title (relating to Site-wide Cap and Control Requirements) or the continuous monitoring requirements of §115.725 [~~§115.725(d) or (e)~~] of this title shall comply with the following recordkeeping requirements:

(1) maintain hourly records of the speciated and total HRVOC emission rates on a pounds-per-hour basis for each affected flare in order to demonstrate compliance with §115.722 of this title;

(2) maintain records of all monitoring, testing, and calibrations performed in accordance with the provisions of §115.725 of this title;

(3) maintain records on a weekly basis that detail all corrective actions made to the continuous monitoring systems during monitor downtimes, and any delay in corrective action[~~,~~] taken by documenting the dates, reasons, and durations of such occurrences; [~~and~~]

(4) maintain records of each 15-minute average calculated net heating value of the gas stream routed to the flare and each 15-minute average calculated exit velocity at the flare tip, determined in accordance with the provisions of §115.725 of this title; and [~~.~~]

(5) for flares subject to the monitoring requirements of §115.725(e) of this title, maintain records of each loading activity including, but not limited to:

(A) the size of vessel being loaded;

(B) the start time and the end time for each vessel loaded;

(C) the compounds loaded, in addition to the compounds loaded into the vessel immediately previous to the current loading operation, if the vessel being loaded is not clean;

(D) the quantity of material loaded;

(E) the loading rate in gallons per minute;

(F) the method of loading, such as submerged fill, bottom fill, or splash loading; and

(G) all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data.

(6) for flares used solely for the abatement of emissions from scheduled maintenance, startup, or shutdown activities in §115.725(f) of this title, the owner or operator shall maintain records, including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the flow rate of the gas routed to the flare, in standard cubic feet per minute; and

(C) all process information, monitored data, and calculations used to determine volumetric flow rate and HRVOC hourly emission data.

(7) for emergency flares subject to the requirements of §115.725(g) of this title, maintain records including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the volumetric flow rate of the gas routed to the flare, in standard cubic feet per minute;

(C) all process information, monitored data, and calculations used to determine net heating value, volumetric flow rate, and HRVOC hourly emission data.

(D) hourly records of the parameter monitoring in accordance with §115.725(g)(2)(A) or (B) of this title; and

(E) records of the monitoring plans required under §115.725(g)(2)(C) of this title;

(8) for flares subject to the requirements of §115.725(h) or (i) of this title, maintain records including, but not limited to:

(A) the date, time, and duration for each flaring event;

(B) the volumetric flow rate of the gas routed to the flare, in standard cubic feet per minute; and

(C) all process information, monitored data, and calculations used to determine net heating value, volumetric flow rate, and HRVOC hourly emission data.

(e) [~~(d)~~] Records for exemptions in §115.727(a) - (e) of this title (relating to Exemptions) shall include the following.

(1) The owner or operator of any account claiming exemption under §115.727(a) of this title [~~(relating to Exemptions)~~] shall maintain records to document that each vent gas stream that is routed to a flare contains less than 5.0% by weight HRVOC at all times and each vent gas stream not routed to a flare does not exceed 100 parts per million by volume HRVOC at any time.

(2) The owner or operator of any flare claiming exemption under §115.727(b) of this title shall maintain records that [~~which~~] document that the HRVOC content of the gas stream that is routed to the flare does not exceed 5.0% by weight at any time.

(3) The owner or operator of any vent gas stream or flare claiming exemption under §115.727 of this title shall comply with the following recordkeeping requirements:

(A) for vent gas streams, maintain records that [~~which~~] demonstrate continuous compliance with the exemption criteria of §115.727(c) [~~§115.727(e)~~] of this title; or

(B) for flares, maintain records that [~~which~~] demonstrate continuous compliance with the exemption criteria of §115.727(d) [~~§115.727(f)~~] of this title.

(f) The owner or operator claiming an exemption under §115.727(e) of this title shall submit written notification to the executive director at least 15 days prior to permanently removing a flare from service, but no later than December 31, 2005.

(g) [~~(e)~~] The owner or operator of each account subject to §115.722 of this title shall maintain daily records to demonstrate compliance with the tons per calendar year emissions limits specified in §115.722(a) and (b) of this title, including [~~that update hourly the 24-hour rolling average HRVOC emissions which include~~]:

(1) cooling tower emissions from cooling towers that [~~which~~] are subject to Division 2 of this subchapter (relating to Cooling Tower Heat Exchange Systems); and

(2) all emissions from flares, vents, and pressure relief valves subject to the requirements of §115.725 of this title. [~~continuously monitored vent gas and flare emissions; and~~]

[~~(3) the maximum potential emission rate from vent gas streams and flares which are not continuously monitored.~~]

(h) The owner or operator of each account subject to §115.722 of this title shall maintain hourly records to demonstrate compliance with the one-hour block emissions limits specified in §115.722(c) of this title, including:

(1) cooling tower emissions from cooling towers that are subject to Division 2 of this subchapter; and

(2) all emissions from flares, vents, and pressure relief valves subject to the requirements of §115.725 of this title.

(i) [~~(f)~~] The owner or operator shall maintain on-site, all records required in this division and other records as necessary to demonstrate continuous compliance and records of periodic measurements for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency [~~EPA~~], or any local air pollution control agency with jurisdiction.

§115.727. Exemptions.

(a) Any account for which all individual gas streams routed to a flare contain less than 5.0% by weight of highly-reactive volatile organic compounds HRVOCs [~~(HRVOC)~~] at all times and all individual vent gas streams not routed to a flare contain less than 100 parts per million by volume (ppmv) HRVOCs [~~HRVOC~~] at all times is exempt from the requirements of §115.722(a) of this title (relating to Site-wide Cap and Control Requirements).

(b) For a flare that at no time receives a gas stream containing 5.0% or greater HRVOCs [~~HRVOC~~]:

(1) the gas stream directed to the flare shall be treated as a vent gas stream for purposes of determining compliance with §115.722(a) - (c) [~~the site-wide cap of §115.722(a)~~] of this title; and

(2) the flare is exempt from the continuous monitoring requirements of §115.726(d) [~~§115.725(d) and (e)~~] of this title (relating to Recordkeeping and Reporting [~~Monitoring and Testing~~] Requirements) and §115.726(d) [~~§115.726(c)~~] of this title and is therefore not required to submit a quality assurance plan under §115.726(a) of this title.

[~~(c) Emissions from scheduled maintenance, startup, or shutdown activities in compliance with §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements) are exempt from the requirements of §115.722(a) of this title.~~]

[~~(d) Emissions from emissions events in compliance with §101.201 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) are exempt from the requirements of §115.722(a) of this title.~~]

(c) [~~(e)~~] For [~~The following~~] vent gas streams that are not routed to a flare, the following [~~stream~~] exemptions may apply:[~~.~~]

(1) A vent gas stream that has no potential to emit HRVOCs [~~HRVOC~~] is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.726(e)(3)(A) [~~§115.726(d)(3)~~] of this title.

(2) A vent gas stream that has the potential to emit HRVOCs [~~HRVOC~~], but that has an HRVOC concentration less than 100 ppmv at all times or has a maximum potential flow rate equal to or less than 100 dry standard cubic feet per hour [~~, excluding emissions events,~~] is exempt from this division with the exception of the recordkeeping requirements of §115.726(e)(3)(A) [~~§115.726(d)(3)~~] of this title. The[~~, provided that the~~] maximum potential HRVOC emissions for the sum of all vent gas streams claimed under this exemption, in pounds per hour, must be[~~is~~] less than 5.0% of the HRVOC cap for the account specified in §115.722(a) or (b) of this title.

(3) Vent gas streams from the following sources are exempt from the requirements of this division with the exception of the recordkeeping requirements of §115.726(e)(3)(A) [~~§115.726(d)(3)~~] of this title:

(A) vent gas streams resulting from the combustion of less than 5.0% by weight HRVOC in boilers, furnaces, engines, turbines, incinerators, and heaters;

(B) pressure tanks that [~~which~~] maintain working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere;

(C) laboratory vent hoods;

(D) instrumentation air systems;

(E) atmospheric storage tanks;

(F) wastewater system vents;

(G) cooling towers; and

(H) equipment leak fugitive components, except for vents from pressure relief valves occurring when the process pressure is sufficient to overcome the preset pressure relief point of the pressure relief valve and emissions are either released directly to the atmosphere or routed to a control device.

(d) [~~(f)~~] Any flare that at no time receives a total gas stream with greater than 100 ppmv HRVOC is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.726(c)(3)(B) [~~§115.726(d)(3)~~] of this title.

(e) Any flare that will be permanently out of service by April 1, 2006 is exempt from the requirements of this division, with the exception of the recordkeeping requirements in §115.726(f) of this title.

§115.729. Counties and Compliance Schedules.

Each owner or operator in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with the requirements of this division (relating to Vent Gas Control) in accordance with the following schedule.

(1) Vent gas and pressure relief valves.

(A) The testing and monitoring required by §115.725 of this title (relating to Monitoring and Testing Requirements) must [~~shall~~] be completed and the results submitted to the Houston [~~appropriate~~] regional office and any local air pollution control agency with jurisdiction as soon as practicable, but no later than December 31, 2005 for existing vent gas streams and pressure relief valves. For vent gas streams and pressure relief valves that become subject to the requirements of this division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into highly-reactive volatile organic compound service.

(B) The owner or operator shall demonstrate compliance with all other requirements of this division applicable to vent gas streams and pressure relief valves as soon as practicable, but no later than April 1, 2006.

(2) Flares. The owner or operator of each flare shall demonstrate compliance with all sections of this division as soon as practicable, but no later than December 31, 2005, with the exception of §115.722(a) - (c) [~~the site-wide cap in §115.722~~] of this title (relating to Site-wide Cap and Control Requirements) for which the owner or operator shall demonstrate compliance as soon as practicable, but no later than April 1, 2006. For flares that become subject to the requirements of this division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into highly-reactive volatile organic compound service.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404256
Stephanie Bergeron
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Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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DIVISION 2. COOLING TOWER HEAT EXCHANGE SYSTEMS

30 TAC §§115.760, 115.761, 115.764, 115.766, 115.767, 115.769

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments and new sections are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed amendments and new sections implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.760. Applicability and Cooling Tower Heat Exchange System Definitions.

(a) Applicability. Any account with a cooling tower heat exchange system in the Houston/Galveston area, as defined in §115.10 of this title (relating to Definitions), that [~~which~~] emits or has the potential to emit a highly-reactive volatile organic compound, as defined in §115.10 of this title, is subject to the requirements of this division

(relating to Cooling Tower Heat Exchange Systems) in addition to the applicable requirements of any other division in this subchapter or any other subchapter in this chapter.

(b) Definitions. The following term, when used in this division, [~~shall~~] have the following meaning, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §§3.2, 101.1, and 115.10 of this title (relating to Definitions). Cooling tower heat exchange system--Cooling towers, associated heat exchangers, pumps, and ancillary equipment where water is used as a cooling medium and the heat from process fluids is transferred to cooling water. This does not include fin-fan coolers. This also does not include comfort cooling tower heat exchange systems (i.e., those [~~which are~~] used exclusively in cooling, heating, ventilation, and air conditioning systems).

§115.761. Site-wide Cap.

(a) The owner or operator of a site subject to this division shall additionally comply with the requirements of Chapter 101, Subchapter H, Division 6 of this title (relating to Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program). [~~Emissions of highly-reactive volatile organic compounds at each account subject to this division (relating to Cooling Tower Heat Exchange Systems) and Division 1 of this subchapter (relating to Vent Gas Control) are limited to a 24-hour rolling average as specified in Table 6-2.1, Initial HRVOC Site-Cap Allocations: Harris County, and Table 6-2.2, Initial HRVOC Site-Cap Allocations: Seven Surrounding Counties, of the *Post-1999 Rate-of-Progress and Attainment Demonstration Follow-up SIP for the Houston/Galveston Ozone Nonattainment Area* adopted on December 13, 2002.~~]

(b) All sites subject to this division or Division 1 of this subchapter (relating to Vent Gas Control) that are exempt from the highly-reactive volatile organic compound (HRVOC) emissions cap and trade program, in accordance with §101.392 of this title (relating to Exemptions), are limited to ten tons of HRVOC emissions per calendar year.

(c) Each site subject to this division is subject to the following emission limitations:

(1) HRVOC emissions at each site located in Harris County that is subject to this division or Division 1 of this subchapter (relating to Vent Gas Control) must not exceed 1,200 pounds of HRVOCs per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(2) HRVOC emissions at each site located in the Houston/Galveston ozone nonattainment area as defined in §101.1 of this title (relating to Definitions), excluding Harris County, that is subject to this division or Division 1 of this subchapter must not exceed 1,200 pounds of HRVOCs per one-hour block period from any flare, vent, pressure relief valve, cooling tower, or any combination.

(3) For any exceedance of the HRVOC emission limits specified in paragraph (1) or (2) of this subsection, the emission limits specified in paragraph (1) or (2) of this subsection must be used to determine compliance with subsection (a) or (b) of this section instead of the total amount of actual emissions.

(d) [~~(b)~~] An owner or operator may not use emission reduction credits or discrete emission reduction credits [~~DERC~~] in order to demonstrate compliance with this division.

§115.764. Monitoring and Testing Requirements.

(a) The owner or operator of a cooling tower heat exchange system with [~~greater than 100 parts per million by weight (ppmw) of highly-reactive volatile organic compounds (HRVOC) in the process side fluid and~~] a design capacity to circulate 8,000 gallons per minute (gpm) or greater of cooling water shall:

(1) (No change.)

(2) install, calibrate, operate, and maintain a system to continuously determine the total strippable volatile organic compound (VOC) concentration at each inlet of each cooling tower. The continuous monitor must be calibrated with methane or a VOC that best represents potential leakage into the cooling tower system and the emissions from the system. Calibration must be checked weekly or more frequently, as necessary, to maintain a monitor drift of less than 5.0%. During out-of-order periods of the VOC monitor(s), a sample must [~~shall~~] be collected for total VOC analysis according to the air-stripping method in Appendix P of the Texas Commission on Environmental Quality Sampling Procedures Manual (January 2003) [~~Texas Commission on Environmental Quality (commission) air-stripping method (Appendix P, Sampling Procedures Manual, January 2003)~~]. This sample must [~~shall~~] be collected at least three times per calendar week, with an interval of no less than 36 hours between samples;

(3) continuously operate each monitoring system as required by this section at least 95% of the time when the cooling tower is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total operating hours of the cooling tower heat exchange system for which valid quality-assured data was recorded divided by the total operating hours of the cooling tower heat exchange system. Time required for normal calibration checks required under this subsection is not considered downtime for purposes of this calculation;

(4) determine the speciated strippable highly-reactive volatile organic compound (HRVOC) [~~HRVOC~~] concentration by collecting samples from each inlet of each cooling tower at least once per month in accordance with the air-stripping method in Appendix P [~~appropriate methods in §115.766 of this title (relating to Testing Requirements)~~];

(5) if the concentration of total strippable VOC is equal to or greater than 50 parts per billion by weight (ppbw) in the cooling tower water for more than a one-hour block of time, collect an additional sample to determine speciated and total HRVOC in accordance with the air-stripping method in Appendix P [~~§115.766 of this title~~] from each inlet of the affected cooling tower at least once daily. The additional sampling to determine speciated and total HRVOC shall continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw; and

(6) in lieu of the monitoring in paragraph (2) of this subsection and the sampling for speciation of strippable HRVOC [~~VOC~~] in paragraphs (4) and (5) of this subsection, a continuous on-line monitor capable of providing total HRVOC and speciated HRVOCs in ppbw may be installed. The continuous on-line monitor system must satisfy the requirements of Sections 8.3, 10, 13.1, and 13.2 [~~Subsections 8.2 and 8.3, Section 10, and Subsections 13.1 and 13.2~~] of 40 Code of Federal Regulations (CFR) Part 60, Appendix B, Performance Specification 9, as amended through October 17, 2000 (65 FR 61744). The multi-point calibration procedure in Section 10.1 of Performance Specification 9 must be performed at least once every calendar quarter instead of once every month. During out-of-order periods of the on-line HRVOC monitor(s), sampling must be performed [~~a sample shall be collected~~] for total and speciated HRVOC analysis according to the air-stripping method in [~~the commission's Sampling Procedures Manual,~~] Appendix P. Sampling must [~~This sample shall~~] be performed [~~collected~~] at least three times per calendar week, with an interval of no less than 36 hours between sampling times, until the continuous on-line monitor is properly operating and within the required performance specifications [~~samples~~].

(b) The owner or operator of a cooling tower heat exchange system with [greater than 100 ppmw of HRVOC in the process side fluid and] a design capacity to circulate less than 8,000 gpm of cooling water shall:

(1) install, calibrate, operate, and maintain a continuous flow monitor on each inlet of each cooling tower. Each monitor must [shall] be calibrated on an annual basis to within ±5.0% accuracy. When the cooling tower flow monitor is down, flow measurements must [shall] be used for the most recent 24-hour period in which the flow measurements are representative of cooling tower operations during monitor downtime;

(2) determine the total strippable VOC concentration by collecting samples from each inlet of each cooling tower at least twice per week in accordance with the air-stripping method in Appendix P [appropriate methods in §115.766 of this title,] with an interval of not less than 48 hours between samples;

(3) operate each monitoring system [shall be operated] as required by this section at least 95% of the time when the cooling tower is operational, averaged over a calendar year. The percent measurement data availability must be calculated as the total operating hours of the cooling tower heat exchange system for which valid quality-assured data was recorded divided by the total operating hours of the cooling tower heat exchange system. Time required for normal calibration checks required under this subsection is not considered downtime for purposes of this calculation;

(4) determine the speciated strippable HRVOC concentration by collecting samples from each inlet of each cooling tower at least once per month in accordance with the air-stripping method in Appendix P [appropriate methods in §115.766 of this title];

(5) if the concentration of [calculated] total strippable VOC [concentration] is equal to or greater than 50 ppbw in the cooling tower water, collect an additional sample [samples] to determine total strippable VOC, speciated HRVOC, and total HRVOC[, in accordance with §115.766 of this title] from each inlet of the affected cooling tower at least once daily in accordance with the air-stripping method in Appendix P. The additional sampling to determine total strippable VOC, speciated [HRVOC,] and total HRVOC must [shall] continue on a daily basis until the concentration of total strippable VOC drops below 50 ppbw; and

(6) in lieu of the monitoring in paragraph (2) of this subsection and the sampling for speciation of strippable HRVOC [VOC] in paragraphs (4) and (5) of this subsection, a continuous on-line monitor capable of providing total HRVOC and speciated HRVOCs in ppbw may be installed. The continuous on-line monitor system must satisfy the requirements of Sections 8.3, 10, 13.1, and 13.2 [Subsections 8.2 and 8.3, Section 10, and Subsections 13.1 and 13.2] of 40 CFR Part 60, Appendix B, Performance Specification 9. The multi-point calibration procedure in Section 10.1 of Performance Specification 9 must be performed at least once every calendar quarter instead of once every month. During out-of-order periods of the on-line HRVOC monitor(s), sampling must be performed [a sample shall be collected] for total and speciated HRVOC analysis according to the air-stripping method in [the commission's Sampling Procedures Manual,] Appendix P. Sampling must [This sample shall] be performed [collected] at least twice per calendar week, with an interval of no less than 72 hours between sampling times, until the continuous on-line monitor is properly operating and within the required performance specifications [samples].

(c) When periodic sampling is required, the [The] owner or operator of the cooling tower heat exchange system shall determine the speciated HRVOC concentration as soon as this information is available, but no later than seven days after the sample(s) have been collected. Samples collected in a Tedlar™ bag must be analyzed no later than 72 hours after the samples have been collected. The samples must be analyzed according to the procedures in Test Method 18, 40 CFR Part 60, Appendix A, and/or Method TO-14A, published in "U.S. EPA Compendium for Determination of Toxic Organic Compounds in Ambient Air (1996)," United States Environmental Protection Agency Document Number 625/R96/010B.

[(d) The owner or operator of an affected cooling tower heat exchange system shall submit for review and approval by the executive director a quality assurance plan (QAP) for the installation, calibration, operation, and maintenance for the monitoring equipment required by this division as follows:]

[(1) for cooling towers existing on or before December 31, 2005, no later than April 30, 2005;]

[(2) for cooling tower heat exchange systems that become subject to the requirements of this division after December 31, 2005, at least 60 days prior to being placed in service. This plan shall be submitted prior to initiating a monitoring program to comply with the requirements of subsections (a) and (b) of this section. Additionally, the plan must define each compound which could potentially leak through the heat exchanger and therefore directly impact the emissions of the cooling water system; and]

[(3) the executive director shall issue written approval of, or detail deficiencies and/or direct additional requirements to be added to, each QAP within 180 days of receipt of a complete QAP that details the owner or operator's plans for installation, calibration, operation, and maintenance of the cooling tower heat exchange system monitoring. The owner or operator shall submit a corrected QAP within 60 days of the date of the deficiency and/or additional requirements letter. If an approval or detailed deficiency and/or directed additional requirements letter is not issued within 180 days of receipt by the executive director, then the QAP is approved by default.]

(d) [(e)] In lieu of subsections (a)(2) - (5) and (b)(2) - (5) of this section, the owner or operator of cooling tower heat exchange systems in which no individual heat exchanger has 5.0% or greater HRVOC in the process-side fluid, shall determine total strippable VOC and the HRVOC concentration in the cooling tower water at least once per month, with an interval of not less than 20 days between samples, according to the air-stripping method in Appendix P [in accordance with appropriate methods in §115.766 of this title]. If the total strippable VOC concentration in the cooling tower water is 50 ppbw or greater, the owner or operator shall determine the total strippable VOC weekly and the HRVOC concentration weekly. The additional sampling for the total strippable VOC concentration and HRVOC concentration [shall] continue until the total strippable VOC concentration drops below 50 ppbw.

(e) [(f)] In lieu of using a continuous flow monitor as described in subsections (a)(1) and (b)(1) of this section, the owner or operator of a cooling tower heat exchange system [systems] may:

(1) use the maximum potential flow rate based on manufacturer's pump performance data, assuming no back pressure; or

(2) install, calibrate, operate, and maintain, in accordance with the manufacturer's recommendations, a monitor to continuously measure and record each cooling water pump discharge pressure to establish the total dynamic head of the cooling water system. The owner or operator of the cooling water system must establish, use, and demonstrate in the QAP required in §115.766(i) of this title (relating to Recordkeeping and Reporting Requirements [subsection (d) of this

~~section~~], a calculation methodology that [~~which~~] will provide, on a continuous basis, the cooling water circulation flow rate (in gpm) based on the following: cooling water discharge pressure for each pump; the manufacturer's certified pump performance data; and the number of pumps in operation. This calculated flow rate will then be used to determine the hourly emission rate in pounds per hour, as required by §115.766(a)(3) [~~§115.767(a)(3)~~] of this title [~~(relating to Recordkeeping Requirements)~~].

(f) [~~(g)~~] Minor modifications to the [~~these~~] monitoring and testing methods in this section may be approved by the executive director. Monitoring and testing methods other than those specified in subsections (a) - (e) [~~(a), (b), (c), and (f)~~] of this section may be used if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Test Method 301 (December 29, 1992). For the purposes of this subsection, substitute "executive director" in each place that Test Method 301 references "administrator."

(g) In lieu of using the monitor location described in subsections (a) and (b) of this section, the owner or operator of cooling tower heat exchange systems in which a single cooling tower services both HRVOC and non-HRVOC process units may:

(1) install a flow monitor, meeting the requirements of subsections (a)(1) and (b)(1) of this section at a point that represents the flow of cooling water from only the HRVOC-containing process units; and

(2) monitor the total strippable VOC or HRVOC concentration, in accordance with subsection (a), (b), or (d) of this section at a point leaving the HRVOC-containing process unit and prior to mixing with cooling tower water from other units.

§115.766. Recordkeeping and Reporting Requirements.

(a) The owner or operator of any cooling tower heat exchange system subject to §115.761 of this title (relating to Site-wide Cap) shall comply with the following recordkeeping requirements:

(1) establish and maintain a process diagram of the cooling tower heat exchange system, including the locations at which the system will be monitored and sampled such that the cooling water is not exposed to the atmosphere prior to sampling;

(2) maintain records of all monitoring, testing, and calibrations performed in accordance with the provisions of §115.764 of this title (relating to Monitoring and Testing Requirements);

(3) maintain hourly records that document the emission rate in pounds per hour (lb/hr) for each hour for speciated highly-reactive volatile organic compounds (HRVOC) and total HRVOC from the cooling water for each cooling tower heat exchange system as required by §115.764(a), (b), or (d) of this title. The flow rate of the cooling water in conjunction with the most recently monitored concentration of the speciated HRVOC or total HRVOC in the cooling tower water, shall be used to calculate the respective emission rate in lb/hr. If the concentration results of the speciated HRVOC or total HRVOC analyses are below the minimum detection limit (i.e., non-detected), then half the detection limit(s) must be used to calculate HRVOC emissions;

(4) maintain hourly records of the total strippable VOC concentration in the cooling water for cooling tower heat exchanger systems monitored in accordance with §115.764(a)(2) of this title, and maintain records of each test for total strippable VOC concentration performed in accordance with §115.764(b)(2) or (d) of this title. If the concentrations results of the total strippable VOC testing or monitoring are below the minimum detection limit, then the full detection limit must be used to calculate average total strippable VOC concentration;

(5) maintain hourly records of the cooling water flow rate; and

(6) maintain records on a weekly basis that detail all corrective actions and any delay in corrective action taken by documenting the dates, reasons, and durations of such occurrences and the estimated quantity of all HRVOC emissions during such activities;

(b) The owner or operator of any cooling tower heat exchange system claiming an exemption under §115.767 of this title (relating to Exemptions) shall comply with the following recordkeeping requirements:

(1) maintain records of the heat exchanger pressure differential to document continuous compliance with the exemption criteria of §115.767(1) of this title; or

(2) maintain records of the content of the process side fluid in each heat exchanger to demonstrate continuous compliance with the exemption criteria of §115.767(2) of this title.

(c) The owner or operator shall maintain all records necessary to demonstrate continuous compliance and records of periodic measurements for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

(d) The owner or operator of any cooling tower heat exchange system using the alternate periodic monitoring available under §115.764(d) of this title shall maintain sufficient records to demonstrate that no individual heat exchanger has 5.0% or greater HRVOC in the process-side fluid.

(e) The owner or operator of any cooling tower heat exchange system using manufacturer's pump performance data to determine the maximum potential flow rate, as specified in §115.764(e)(1) of this title, shall maintain the following records for each pump:

(1) the manufacturer's certified pump performance test;

(2) the operating status of each pump;

(3) the motor manufacturer, model number, and rated brake horsepower;

(4) the impeller manufacturer, model number, size, and design;

(5) any change to a cooling tower heat exchange system pump or pumping system in which the change would modify the basis for design pumping capacity; and

(6) the effect of any change on the maximum potential flow rate.

(f) The owner or operator of any cooling tower heat exchange system using a system to monitor cooling water pump discharge pressure to determine the continuous flow rate for each cooling tower, as specified in §115.764(e)(2) of this title, shall maintain the following records for each pump:

(1) the continuous measurement of cooling water pump discharge pressure;

(2) the manufacturer's certified pump performance test;

(3) the operating status of each pump;

(4) the motor manufacturer, model number, and rated brake horsepower;

(5) the impeller manufacturer, model number, size, and design;

(6) any change to a cooling tower heat exchange system pump or pumping system in which the change would modify the basis for design pumping capacity; and

(7) the effect of any change on the maximum potential flow rate.

(g) The owner or operator of each account subject to §115.761 of this title shall maintain daily records to demonstrate compliance with the tons per calendar year emissions limits specified in §115.761(a) and (b) of this title, including:

(1) flare, vent gas, and pressure relief valve emissions that are subject to Division 1 of this subchapter (relating to Vent Gas Control); and

(2) all cooling towers subject to the requirements of §115.764 of this title.

(h) The owner or operator of each account subject to §115.761 of this title shall maintain hourly records to demonstrate compliance with the one-hour block emissions limits specified in §115.761(c) of this title, including:

(1) flare, vent gas, and pressure relief valve emissions that are subject to Division 1 of this subchapter; and

(2) all cooling towers subject to the requirements of §115.764 of this title.

(i) The owner or operator of an affected cooling tower heat exchange system shall submit for review and approval by the executive director a quality assurance plan (QAP) for the installation, calibration, operation, and maintenance for the monitoring equipment required by this division as follows:

(1) for cooling towers existing on or before December 31, 2005, the QAP must be submitted no later than April 30, 2005;

(2) for cooling tower heat exchange systems that become subject to the requirements of this division after December 31, 2005, the QAP must be submitted prior to being placed in HRVOC service; and

(3) the executive director shall issue written approval of, or detail deficiencies and/or direct additional requirements to be added to, each QAP within 180 days of receipt of a complete QAP that details the owner or operator's plans for installation, calibration, operation, and maintenance of the cooling tower heat exchange system monitoring. The owner or operator shall submit a corrected QAP within 60 days of the date of the deficiency and/or additional requirements letter. If an approval or detailed deficiency and/or directed additional requirements letter is not issued within 180 days of receipt by the executive director, then the QAP is approved by default.

(j) The owner or operator claiming an exemption under §115.767(4) of this title shall submit written notification to the executive director at least 15 days prior to permanently removing a cooling tower heat exchange system from service, but not later than December 31, 2005.

§115.767. Exemptions.

The following exemptions apply.

(1) Any cooling tower heat exchange system in which each individual heat exchanger with greater than 100 parts per million by weight (ppmw) highly-reactive volatile organic compounds (HRVOC) in the process side fluid is operated with the minimum pressure on the cooling water side at least five pounds per square inch, gauge (psig) greater than the maximum pressure on the process side, as demonstrated by continuous pressure monitoring and recording at all heat exchangers with greater than 100 ppmw HRVOC in the process side fluid, is exempt from the requirements of this division (relating to Cooling Tower Heat Exchange Systems), with the exception of the recordkeeping requirements of §115.766(b) and (c) of this title (relating to Recordkeeping and Reporting Requirements).

(2) Any cooling tower heat exchange system in which no individual heat exchanger has greater than 100 ppmw HRVOCs in the process side fluid is exempt from the requirements of this division, with the exception of the recordkeeping requirements of §115.766(b) and (c) of this title.

(3) Any account for which no stream directed to a cooling tower heat exchange system contains 5.0% or greater by weight HRVOC is exempt from the requirements of §115.761 of this title (relating to Site-wide Cap).

(4) Any cooling tower heat exchange system that will be permanently out of service by April 1, 2006 is exempt from the requirements of this division, with the exception of the recordkeeping requirements in §115.766(j) of this title.

§115.769. Counties and Compliance Schedules.

(a) The owner or operator of each cooling tower heat exchange system in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with this division (relating to Cooling Tower Heat Exchange Systems) as soon as practicable, but no later than December 31, 2005, with the exception of §115.761(a) - (c) [~~the site-wide cap in §115.761~~] of this title (relating to Site-wide Cap) for which the owner or operator shall demonstrate compliance as soon as practicable, but no later than April 1, 2006.

(b) For cooling tower heat exchange systems that become subject to the requirements of this division after December 31, 2005, testing and monitoring must be conducted as soon as practicable, but no later than 60 days after being brought into highly-reactive volatile organic compound service.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404257
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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30 TAC §§115.766 - 115.768

(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 Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under

Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed repeals implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.766. Testing Requirements.

§115.767. Recordkeeping Requirements.

§115.768. Exemptions.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404258
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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DIVISION 3. FUGITIVE EMISSIONS

30 TAC §§115.780 - 115.783, 115.786 - 115.789

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed amendments implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.780. Applicability.

(a) Any process unit or process within a petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in the Houston/Galveston area, as defined in §115.10 of this title (relating to Definitions), in which a highly-reactive volatile organic compound [~~(VOC)~~], as defined in §115.10 of this title, is a raw material, intermediate, final product, or in a waste stream is subject to the requirements of this division (relating to Fugitive Emissions) in addition to the applicable requirements of Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas).

(b) An owner or operator may not use emission reduction credits or discrete emission reduction credits in order to demonstrate compliance with this division.

§115.781. General Monitoring and Inspection Requirements.

(a) The owner or operator shall identify the components of each process unit in highly-reactive volatile organic compound (HRVOC) service that [~~which~~] is subject to this division (relating to Fugitive Emissions). Such identification must allow for ready identification of the components, and distinction from any components that [~~which~~] are not subject to this division. The components must be identified by one or more of the following methods:

(1) - (6) (No change.)

(b) Each component in the process unit must be monitored according to the requirements of Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that the following additional requirements apply.

(1) The exemptions of §115.357(1) - (11) [~~§115.357(1) - (9)~~] of this title (relating to Exemptions) do not apply.

(2) (No change.)

(3) The emissions from blind flanges, caps, or plugs at the end of a pipe or line containing HRVOC; connectors; heat exchanger heads; sight glasses; meters; gauges; sampling connections; bolted manways; hatches; agitators; sump covers; junction box vents; covers and seals on volatile organic compound [~~(VOC)~~] water separators; and process drains shall be monitored each calendar quarter (with a hydrocarbon gas analyzer).

(4) (No change.)

(5) All process drains equipped with water seal controls, as defined in §115.140 of this title (relating to Industrial Wastewater Definitions), shall be inspected weekly to ensure that the water seal controls are effective in preventing ventilation, except that daily inspections are required for those seals that have failed three or more inspections in any 12-month period. Upon request by the executive director, United States Environmental Protection Agency [~~EPA~~], or any local program with jurisdiction, the owner or operator shall demonstrate (e.g., by visual inspection or smoke test) that the water seal controls are properly designed and restrict ventilation.

(6) All process drains not equipped with water seal controls shall be inspected monthly to ensure that all gaskets, caps, and/or plugs are in place and that there are no gaps, cracks, or other holes in the gaskets, caps, and/or plugs. In addition, all caps and plugs shall be inspected monthly to ensure that they are tightly fitting [~~tightly-fitting~~].

(7) An unsafe-to-monitor or difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored as follows.

(A) An unsafe-to-monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of conducting quarterly monitoring. Components that [~~which~~] are unsafe to monitor shall be identified in a list made immediately available upon request. If an unsafe-to-monitor component is not considered safe to monitor within a calendar year, then it shall be monitored as soon as possible during safe-to-monitor times.

(B) A difficult-to-monitor component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that is below floors or deck gratings requiring confined space entry as defined in 29 Code of Federal Regulations §1910.146. A difficult-to-monitor component for which quarterly monitoring is specified may instead be monitored annually.

(8) All pressure relief valves in gaseous service [~~which are not vented to a closed-vent system~~] shall be monitored for fugitive leaks each calendar quarter (with a hydrocarbon gas analyzer).

(9) - (10) (No change.)

(c) - (d) (No change.)

(e) Any pressure relief device that [~~which~~] has vented to the atmosphere shall be monitored for fugitive leaks (with a hydrocarbon gas analyzer) and inspected within 24 hours after actuation and the results reported in accordance with §115.786 of this title (relating to Recordkeeping Requirements).

(f) (No change.)

(g) Except as provided in paragraph (2) of this subsection, the owner or operator shall use dataloggers and/or electronic data collection devices during all monitoring required by this section. The owner or operator shall use best efforts to transfer, on a daily basis, electronic data from electronic datalogging devices to the database required by §115.356 of this title (relating to Monitoring and Recordkeeping Requirements).

(1) For all monitoring events in which an electronic data collection device is used, the collected monitoring data must include the identification of each component and each calibration run, the maximum screening concentration detected, the time of monitoring (i.e., the time that the organic vapor concentration is read or recorded for each component), a date stamp, an operator identification, an instrument identification, and calibration gas concentrations and certification dates. The acceptable rate for recording data must be determined individually by each owner or operator considering such factors including, but not limited to, the size of the equipment, the equipment type, the accessibility of the equipment, the number of leakers being found, and the skill of the monitoring technicians. Each owner or operator shall have a documented auditing process in place to assure proper calibration, identify response time failures, and assess pace anomalies.

(2) The owner or operator may use paper logs where necessary or more feasible (e.g., small rounds (less than 100 components), re-monitoring following component repair, or when dataloggers are broken or not available), and shall record, at a minimum, the information required in paragraph (1) of this subsection. For audio, visual, and olfactory inspections, the owner or operator shall record, at a minimum, the identification of the person conducting the inspection, the date, and the area that was inspected. The owner or operator shall transfer any manually recorded monitoring data to the database required by §115.356 of this title within seven days of monitoring.

(3) Each change to the database regarding the monitored concentration, date and time read, repair information, addition or deletion of components, or monitoring schedule must be detailed in a log or inserted as a notation in the database. All such changes must include the name of the person who made the change, the date of the change, and an explanation to support the change.

§115.782. Procedures and Schedule for Leak Repair and Follow-up.

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

(c) Delay of repair.

(1) For all components (except valves [~~which are~~] specified in paragraph (2) of this subsection), repair may be delayed beyond the period designated in subsection (b) of this section for any of the following reasons:

(A) (No change.)

(B) if the repair of a component within seven or 15 days (as specified in subsection (b) of this section) after the leak is detected would require a process unit shutdown that [~~which~~] would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown, provided that:

(i) the owner or operator maintains, and makes available upon request, documentation to authorized representatives of the United States Environmental Protection Agency (EPA), the executive director, and any local air pollution control agency having jurisdiction which includes a calculation of: [~~the owner or operator complies with the requirements of §115.352(2)(A) of this title (relating to Control Requirements); and~~]

(I) the expected mass emissions resulting from the next scheduled process unit shutdown, clearing, and subsequent startup of the unit, including the basis for the calculation and all assumptions made;

(II) the mass emission rates from each leaking component in the process unit for which delay of repair is sought as determined by using the methods in the EPA correlation approach in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates," (EPA-453/R-95-017, November, 1995) alone or in combination with the mass emission sampling approach in Chapter 4 of the guidance document (EPA-453/R-95-017, November, 1995). To use the EPA correlation approach, the estimated hourly mass emission rate for each component shall be based on the average of the component's current screening concentration and the previous screening concentration using Test Method 21 for the days between the two monitoring efforts, and the last screening concentration shall be used for the days following that last monitoring through the date of the planned process unit shutdown. Where the monitoring instrument is not calibrated to read past the leak definition or 100,000 ppmv, the pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates" shall be used as appropriate. Leaking components in heavy liquid service shall be assigned the appropriate screening range leak rate for greater than 10,000 ppmv as defined in Section 2.3.2 of the guidance document. As an alternative, the heavy liquid component may be monitored using Test Method 21, and the actual screening concentration may be used to calculate the mass emission rate using the correlations in Section 2.3.3 of the guidance document. If the mass emission sampling approach is used, it replaces the estimated emissions rate of the EPA correlation approach in the calculation;

(III) the cumulative mass emissions from each leaking component in HRVOC service in the process unit for which delay of repair is sought, from the date the leak is found through the date of the next planned process unit shutdown; and

(IV) the total cumulative mass emissions in the process unit from the calculations made in subclause (III) of this clause for leaking components in HRVOC service in the unit for which delay of repair is sought; and

(ii) the total cumulative mass emissions from leaking components in HRVOC service in the process unit for which delay of repair is sought as determined in clause (i)(IV) of this subparagraph, assessed from the time that each additional leaking component is identified or at the time of any other changes to the emissions estimates, from the date of the change forward, will be less than the mass emissions resulting from shutdown, clearing, and subsequent startup of the unit as determined in clause (i)(I) of this subparagraph; or

(iii) as an alternative to the requirements of clause (i) and (ii) of this subparagraph, delay of repair is allowed for each leaking component for which the owner or operator has chosen to undertake "extraordinary efforts" to repair the leak. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 22 calendar days after the leak is found; however, the owner or operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 37 calendar days after the leak is found. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required.

(iv) [~~(ii)~~] repair or replacement of the component occurs at the next shutdown. The executive director, at his discretion, may require an early process unit shutdown, or other appropriate action, based on the number and severity of leaks awaiting a shutdown; or

(C) (No change.)

(2) For valves that [~~which~~] are not pressure relief valves or automatic control valves, repair may only be delayed beyond the period designated in subsection (b) of this section if:

(A) repair or replacement of these valves occurs at the next scheduled process unit shutdown; and

(i) the owner or operator has undertaken "extraordinary efforts" to repair the leaking valve. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 14 calendar days after the leak is found [~~seven days of the valve being placed on the shutdown list~~]; however, the owner or operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 15 days of the first extraordinary effort attempt. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar [~~15~~] days after the leak is found [~~of the valve being placed on the shutdown list~~], and a second extraordinary effort attempt is not required; or

(ii) the owner or operator maintains, and makes available upon request, documentation to authorized representatives of EPA, the executive director, and any local air pollution control agency having jurisdiction that [~~which~~] demonstrates that there is a safety, mechanical, or major environmental concern posed by repairing the leak by using "extraordinary efforts"; or

(B) (No change.)

§115.783. Equipment Standards.

The following equipment standards [~~shall~~] apply.

(1) (No change.)

(2) Whenever highly-reactive volatile organic compound [~~(HRVOC)~~] emissions are vented to a closed-vent system, control device, or recovery device used to comply with the provisions of this chapter, such system or control device are subject to the requirements of Division 1 of this subchapter (relating to Vent Gas Control) [~~must be operating properly~~].

[~~(A) Recovery devices (e.g., condensers and absorbers) used to comply with this paragraph must be designed and operated to recover the HRVOC emissions vented to them with an efficiency of 95% or greater.~~]

[~~(B) Flares used to comply with this paragraph must meet the requirements of:~~]

[~~*(i)* Division 1 of this subchapter (relating to Vent Gas Control); and~~]

[~~*(ii)* 40 Code of Federal Regulations §60.18 (b) or §63.11(b).~~]

[~~(C) All other control devices used to comply with this paragraph must reduce HRVOC emissions with a control efficiency of at least 98% or to an HRVOC concentration of no more than 20 parts per million by volume (on a dry basis corrected to 3.0% oxygen for combustion devices).~~]

[~~(3) Each pressure relief valve in gaseous HRVOC service that vents to atmosphere which is installed in series with a rupture disk, pin, second relief valve, or other similar leak-tight pressure relief component, shall be equipped with a pressure sensing device or an equivalent device or system between the pressure relief valve and the other pressure relief component to monitor for leakage past the first component. When leakage is detected past the first component, that component shall be repaired or replaced as soon as practicable, but no later than 30 calendar days after the failure is detected. As an alternative, the owner or operator may repair or replace that component at the next planned process unit shutdown, but the emissions are considered to be vent gas emissions and are subject to the site-wide cap in §115.722 of this title (relating to Site-wide Cap and Control Requirements).~~]

(3) [~~(4)~~] Pumps, compressors, and agitators installed on or after July 1, 2003 shall be equipped with a shaft sealing system that prevents or detects emissions of volatile organic compounds [~~VOC~~] from the seal.

(A) Acceptable shaft sealing systems include:

(i) seals equipped with piping capable of transporting any leakage from the seal(s) back to the process;

(ii) seals with a closed-vent system capable of transporting to a control device any leakage from the seal or seals;

(iii) dual seals with a heavy liquid or non-volatile organic compounds [~~non-VOC~~] barrier fluid or gas at higher pressure than process pressure; and

(iv) seals with an automatic seal failure detection and alarm system.

(B) The executive director may approve shaft sealing systems different from those specified in subparagraph (A) of this paragraph. The executive director:

(i) shall consider on a case-by-case basis the technological circumstances of the individual pump, compressor, or agitator; and

(ii) must determine that the alternative shaft sealing system will result in the lowest emissions level that the pump, compressor, or agitator is capable of meeting after the application of best available control technology before approving the alternative shaft sealing system.

(C) Any owner or operator affected by the executive director's decision to deny a request for approval of an alternative shaft sealing system may file a motion to overturn the executive director's decision. The requirements of §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) apply. Executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by the United States Environmental Protection Agency [~~EPA~~] in cases where specified criteria for determining equivalency have not been clearly identified in this section.

(4) [~~(5)~~] The following equipment standards shall apply to process drains.

(A) If water seal controls, as defined in §115.140 of this title (relating to Industrial Wastewater Definitions), are used:

(i) the only acceptable alternative to water as the sealing liquid in a water seal is the use of ethylene glycol, propylene glycol, or other low vapor pressure antifreeze, that [~~which~~] may be used only during the period of November through February; and

(ii) as an alternative to the weekly water seal inspections of §115.781(b)(5) of this title (relating to General Monitoring and Inspection Requirements), the owner or operator may choose to equip the process drain with:

(I) an alarm that alerts the operator if the water level in the vertical leg of the drain falls below 50% of the maximum level, and a device that continuously records the status of the water level alarm, including the time period for which the alarm has been activated; or

(II) a flow-monitoring device indicating either positive flow from a main to a branch water line supplying a trap or water being continuously dripped into the trap; and a device that continuously records the status of water flow into the trap.

(B) For process drains not equipped with water seal controls, the process drain shall be equipped with:

(i) a gasketed seal; or

(ii) a tightly-fitting cap or plug.

(5) [~~(6)~~] No valves shall be installed or operated at the end of a pipe or line containing highly-reactive volatile organic compounds [~~HRVOC~~] unless the pipe or line is sealed with a second valve, a blind flange, or a tightly-fitting plug or cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve shall be closed first.

§115.786. Recordkeeping Requirements.

(a) (No change.)

(b) If securing the bypass line valve in the closed position to comply with §115.783(1)(B) of this title, the owner or operator shall:

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

(3) maintain a record of each time the bypass line valve was opened, including:

(A) - (C) (No change.)

(D) the estimated flow rate through the valve; and

(E) the resulting [~~speciated~~] emissions, including the basis for the emissions estimate.

(c) Records of all non-repairable components subject to §115.782(c) [~~§115.782(e)~~] of this title (relating to Procedures and Schedule for Leak Repair and Follow-up) must [~~shall~~] be maintained. [~~and~~] Reports must be submitted by January 31st and July 31st of each year [~~semiannually~~] to [~~the Office of Compliance and Enforcement,~~] the Houston [~~appropriate~~] regional office[~~,~~] and any local air pollution control agency having jurisdiction. The report shall contain:

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

(d) The owner or operator shall maintain records in accordance with §115.356 of this title (relating to Monitoring and Recordkeeping Requirements), including records identifying, by one or more of the methods specified in §115.781(a)(1) - (6) of this title (relating to General Monitoring and Inspection Requirements), and justifying each exemption claimed exempt under §115.787 of this title (relating to Exemptions). Except that the following additional requirements also apply:

(1) the calculation showing the estimated volatile organic compound (VOC) emission rates of the component as required by §115.782(c)(1)(B)(i)(II) of this title if extraordinary efforts are not going to be initiated; and

(2) records for each process unit with leaking components, updated each day after a leaking component is determined to require a process unit shutdown to repair and where extraordinary efforts to repair the component will not be pursued, including the following:

(A) the date, calculations, and estimated VOC emissions as required by §115.782(c)(1)(B)(i)(III) of this title;

(B) the date, calculations, and comparison of VOC emissions as required by §115.782(c)(1)(B)(i)(IV) of this title; and

(C) the date of each process unit shutdown required due to VOC emissions of leaking components exceeding the expected VOC emissions from the shutdown.

(e) The owner or operator shall maintain a record of the results of all monitoring and inspections conducted in accordance with §115.781 of this title.

(f) [~~(e)~~] The owner or operator shall maintain all records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency, or local air pollution control agencies with jurisdiction.

§115.787. Exemptions.

(a) Components that contact a process fluid containing [~~that contains~~] less than 5.0% highly-reactive volatile organic compounds by weight on an annual average basis are exempt from the requirements of this division (relating to Fugitive Emissions), except for §115.786(d) and (f) [~~§115.786(d) and (e)~~] of this title (relating to Recordkeeping Requirements).

(b) The following are exempt from the shaft sealing system requirements of §115.783(2) [~~§115.783(4)~~] of this title (relating to Equipment Standards):

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

(c) The following components are exempt from the requirements of this division:

(1) conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch[~~,~~] gauge (psig);

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

(4) any account [~~plant sites covered by a single account number~~] with less than 250 components in volatile organic compound [~~compounds~~] (VOC) service;

(5) components that [~~which~~] are insulated, making them inaccessible to monitoring with a [~~an~~] hydrocarbon gas analyzer;

(6) sampling connection systems, as defined in 40 Code of Federal Regulations (CFR) §63.161 (January 17, 1997), that meet the requirements of [~~which are in compliance with~~] 40 CFR §63.166(a) and (b) (June 20, 1996); and

(7) instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet the requirements of [~~which are in compliance with~~] 40 CFR §63.169 (June 20, 1996).

(d) (No change.)

[~~(e) Each pressure relief valve equipped with a rupture disk is exempt from the requirements of §115.781(b)(8) of this title, provided that the pressure relief valve complies with §115.783(3) of this title.~~]

(e) [~~(f)~~] The following valves are exempt from the requirements of §115.783(5) [~~§115.352(4)~~] of this title:

(1) pressure relief valves;

(2) open-ended valves or lines in an emergency shutdown system that [~~which~~] are designed to open automatically in the event of an emissions event;

(3) open-ended valves or lines containing materials that [~~which~~] would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(4) valves rated greater than 10,000 psig.

(f) Any process unit with less than 50 components in highly-reactive volatile organic compound service is exempt from §115.788 of this title (relating to the Audit Provision).

§115.788. Audit Provisions.

(a) At least once every [~~two~~] calendar year [~~years~~], the owner or operator of the petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation shall retain the services of an independent third-party organization to conduct an audit of at least one [~~each~~] process unit subject to highly-reactive volatile organic compound (HRVOC) monitoring in this division. For accounts with greater than five process units in HRVOC service, all process units in HRVOC service must be audited at least once every five calendar years. The independent third-party organization must [~~(relating to Fugitive Emissions), including~~]:

(1) verify that all components are properly tagged in accordance with §115.782(a) of this title (relating to Procedures and Schedule for Leak Repair and Follow-up); [~~which:~~]

[~~(A) were not tagged, but which should have been tagged; or~~]

[~~(B) were not included in the list of components to be monitored (with a hydrocarbon gas analyzer) or visually inspected, but which should have been included on that list;~~]

(2) perform a field survey to determine the representative percentage of leaking components in the audited process unit [~~the leak/no-leak status and measured volatile organic compound (VOC) concentration for all components for which monitoring (with a hydrocarbon gas analyzer) or visual inspection is required that monitoring period,~~] as follows.[~~:~~]

(A) The field survey must [~~the monitoring/inspection audit shall~~] begin after [~~when~~] the owner or operator's contracted or usual monitoring service has completed [~~begins~~] monitoring components for that monitoring period . The audit must be completed by the end of the monitoring period.[~~;~~]

(B) The [~~the~~] following graph must [~~shall~~] be used to determine the number of components required to be monitored in the field survey. [~~audit out of the total number of components in each process unit which are required to be monitored by §115.781 of this title (relating to General Monitoring and Inspection Requirements), based on an average of the most recent four quarters; and~~]
Figure: 30 TAC §115.788(a)(2)(B) (No change.)

(C) The field survey of a specific process unit must [~~the audit shall~~] not include components that [~~which~~] were included in the most recent field survey of that process unit. [~~either of the most recent two audits, unless unavoidable due to the shutdown of process units not included in either of the most recent two audits, or for other reasons agreed upon in advance by the appropriate regional office and any local air pollution control agency having jurisdiction; and~~]

(D) the independent third-party organization shall perform the field survey in accordance with Test Method 21 (40 Code of Federal Regulations Part 60, Appendix A).

(3) conduct a review of all data generated by monitoring technicians in the previous quarter. This review must [~~shall~~] include:

(A) a review of the number of components monitored per technician and the time between monitoring events to validate the sampling procedures accurately reflect the requirements of Test Method 21 including identification of specific instances that a monitoring technician recorded data faster than was physically possible due to the hydrocarbon gas analyzer response time and/or the time required for the technician to move to the next component;

(B) a review of records to verify that the calibration requirements of Test Method 21 have been properly implemented [~~a review of the time between monitoring events~~];and

(C) identification of [~~abnormal~~] data patterns indicative of failure to properly implement Test Method 21.[~~; and~~]

[~~(D) identification of any discrepancies between the data in the electronic database required by §115.356(2) of this title (relating to Monitoring and Recordkeeping Requirements) and the data in the datalogger and/or field notes of §115.354(10)(A) and (B) of this title (relating to Inspection Requirements), respectively.~~]

(b) For purposes of this section, an independent third-party organization is [~~means~~] an organization in which the owner or operator (including any subsidiary, parent company, sister company, or joint venture) of the petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation has no ownership or other financial interest. If the owner or operator's routine monitoring is done by a contractor rather than by in-house monitoring, then the independent

third-party organization must be a different contractor from that ordinarily used for those services.

(c) The owner or operator shall submit a verbal notification to the Houston [~~appropriate~~] regional office and any local air pollution control agency having jurisdiction that provides the date that the independent third-party organization is scheduled to begin the audit. The notification must be submitted at least 30 days prior to the start date of the audit. [~~as follows:~~]

[~~(1) verbal notification of the date that the independent third-party organization is scheduled to begin the audit at least 30 days prior to such date; and~~]

[~~(2) written notification within 15 days after the audit is completed.~~]

(d) The owner or operator shall furnish the Houston [~~Office of Compliance and Enforcement, the appropriate~~] regional office[~~,~~] and any local air pollution control agency having jurisdiction a copy of the results of each audit authored by the independent third-party organization within 30 days after completion of the audit. The report must include: [~~, including~~]

(1) the number of components that [~~which~~] were not tagged, but [~~which~~] should have been tagged in accordance with §115.782(a) of this title;

[~~(2) the number of components which were not included in the list of components to be monitored (with a hydrocarbon gas analyzer) or visually inspected, but which] should have been included on that list;~~]

(2) [~~(3)~~] the number of components monitored, the number of leaking components, and the percentage of leaking components identified by the independent third-party organization during the field survey and by the owner or operator's contracted or usual monitoring service in each of the following categories:

(A) valves (excluding pressure relief valves);

(B) pressure relief valves;

(C) pumps;

(D) compressors; and

(E) connectors; [~~and~~]

(3) [~~(4)~~] a summary of the independent third-party organization's review of all data generated by monitoring technicians in the previous quarter by the owner or operator's contracted or usual monitoring service for each of the [~~following~~] categories[~~:~~] specified in subsection (a)(3)(A) - (C) of this section.

[~~(A) the number of components monitored per technician;~~]

[~~(B) the time between monitoring events, including identification of specific instances in which a monitoring technician recorded data faster than was physically possible due to the hydrocarbon gas analyzer response time and/or the time required for the technician to move to the next component; and~~]

[~~(C) identification of abnormal data patterns~~].

(e) If the results of the independent third-party audit indicate deficiencies in the implementation of Test Method 21, the owner or operator shall submit a corrective action plan with the audit report to the Houston regional office or any local air pollution control agency having jurisdiction.

(f) [~~(e)~~] Authorized representatives of the executive director, United States Environmental Protection Agency [~~EPA~~], or any local air pollution control agency with jurisdiction may conduct an audit of the owner or operator's leak detection and repair program.

(g) [~~(f)~~] In lieu of complying with subsections (a) - (d) of this section, an owner or operator may request approval from the executive director of an alternative method that [~~which~~] demonstrates equivalency with the independent third-party audit, provided that the request:

(1) includes a detailed explanation of how the equivalency will be demonstrated, including the appropriate recordkeeping and reporting requirements that will be implemented that [~~which~~] are sufficient to demonstrate compliance with the alternative method; and

(2) demonstrates that it is a replicable procedure and details how the equivalency will be demonstrated.

(h) Upon review of the audit results, the executive director may specify additional corrective actions beyond any potential corrective actions submitted in the documentation required under subsection (e) of this section.

§115.789. Counties and Compliance Schedules.

The owner or operator of each petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall demonstrate compliance with the requirements of this division (relating to Fugitive Emissions) in accordance with the following schedule.

(1) The initial monitoring of all components for which monitoring is required under this division, but [~~which~~] are not required to be monitored under Subchapter D, Division 3 of this chapter (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), must [~~shall~~] occur as soon as practicable, but no later than March 31, 2004, except that:

(A) the schedule in §115.781(f) of this title (relating to General Monitoring and Inspection Requirements) applies [~~shall apply~~] to blind flanges, caps, or plugs at the end of a pipe or line containing highly-reactive volatile organic compounds, sight glasses, meters, gauges, connectors, bolted manways, heat exchanger heads, hatches, and sump covers for which the owner or operator has notified the appropriate regional office and any local air pollution control program with jurisdiction that §115.781(f) of this title will be used to establish the monitoring schedule for these components; and

(B) (No change.)

(2) All equipment upgrades required by §115.783 of this title (relating to Equipment Standards) must be made as soon as practicable, but no later than March 31, 2004, except that flares used to comply with the requirements of §115.783(2)(B) of this title must [~~shall~~] be in compliance in accordance with §115.729(2) of this title (relating to Counties and Compliance Schedules).

(3) The initial independent third-party audit required by §115.788 of this title (relating to Audit Provisions) shall be completed and the results of the audit submitted to the executive director [~~for at least 50% of the process units or processes at an account as soon as practicable, but no later than December 31, 2004. The remainder of the process units or processes at the account that are subject to §115.788 of this title shall be audited~~] as soon as practicable, but no later than December 31, 2005.

[(4) The testing required by §115.785 of this title (relating to Testing Requirements) shall be conducted as soon as practicable, but no later than December 31, 2005.]

(4) [(5)] Compliance with the recordkeeping required by §115.786 of this title (relating to Recordkeeping Requirements) must [shall] be implemented and made available upon request to authorized representatives of the executive director, United States Environmental Protection Agency [EPA], or any local air pollution control agency having jurisdiction as soon as practicable, but no later than March 31, 2004.

(5) [(6)] The initial monitoring of pump seals and compressor seals using a leak definition of 500 parts per million by volume, as required by §115.781(b)(9) of this title, must [shall] begin as soon as practicable, but no later than March 31, 2004.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404259
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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30 TAC §115.785

(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 Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, that authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed repeal implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.785. Testing Requirements.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404260
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER D. PETROLEUM REFINING, NATURAL GAS PROCESSING, AND PETROCHEMICAL PROCESSES

DIVISION 3. FUGITIVE EMISSION CONTROL IN PETROLEUM REFINING, NATURAL GAS/GASOLINE PROCESSING, AND PETROCHEMICAL PROCESSES IN OZONE NONATTAINMENT AREAS

30 TAC §§115.352, 115.354 - 115.357, 115.359

The Texas Commission on Environmental Quality (commission) proposes amendments to §§115.352, 115.354 - 115.357, and 115.359.

The amended sections are proposed to be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The proposed amendments to §§115.352(2), (2)(A) and (E), 115.354(10), 115.356(2)(D) and (F)(ix) and (3), and 115.359(2) and (3) are at the request of industry. The commission is also proposing changes to §§115.352, 115.354 - 115.357, and 115.359 to better explain the intent of these sections.

SECTION BY SECTION DISCUSSION

General Administrative Rule Language Changes

The commission proposes to change the word "shall" to "must" and the word "which" to "that" in numerous locations in the rule language to conform to the drafting rules in the *Texas Legislative Council Drafting Manual*, October 2002.

The commission proposes to spell out acronyms the first time they are used in a section and to delete acronyms that are only used once in a section. The acronym "EPA" is proposed to be spelled out as "United States Environmental Protection Agency" in §§115.352, 115.354, 115.356, 115.357, and 115.359. The term "Code of Federal Regulations" is proposed to be acronymed to "CFR" in §115.352 and the acronym "CFR" is proposed to be spelled out in §115.355. The acronym "HRVOC" is proposed to be spelled out as "highly-reactive volatile organic

compound" in 115.352. The acronym "API" is proposed to be deleted in §115.355. The acronym "VOC" is proposed to be deleted in §115.356. The acronym "kPa" is proposed to be spelled out as "kiloPascals" in §115.357.

Section 115.352, Control Requirements

The proposed amendment to §115.352(2) would restore the language as it was prior to the amendments that were published in the January 3, 2003 *Texas Register* (28 TexReg 9835) with the exception of subparagraph (C) and the first sentence of subparagraph (D). Subparagraphs (A), (B), and (E) would be deleted. The current language specifies the procedure that must be used to demonstrate that emissions from leaking components that cannot be repaired without a process unit shutdown are less than the emissions that a shutdown would generate. The commission proposes to remove this language from the general fugitive rules in Subchapter D (concerning Petroleum Refining, Natural Gas Processing, and Petrochemical Processes) and move the language to Subchapter H, Division 3 (concerning Fugitive Emissions), so that it would apply only to components in HRVOC service. These changes are being proposed at the request of industry. The commission seeks comment on these proposed changes.

The proposed amendment to §115.352(7) would revise the definition of a "nonaccessible component" to be consistent with the definition of a "difficult to monitor" component in Chapter 115, Subchapter H. The proposed change would also expand the definition to include components that are below floors or deck gratings such that they would require confined space entry as defined in 29 Code of Federal Regulations (CFR) §1910.146 (concerning Permit-required confined spaces). Components that cannot be accessed for monitoring without confined space entry should be allowed the same reduction in monitoring frequency as elevated components.

The proposed amendment to §115.352(8) would move the requirement to monitor new and reworked piping connections to §115.354(11) so that it will be located in the same section with other monitoring requirements. Language would also be added to specify that joined fittings that are welded completely around the circumference of the interface are not subject to this monitoring requirement. The definition of "connector" in 30 TAC §115.10 (concerning Definitions) specifically excludes such welded connections because of the low potential for leaks.

Section 115.354, Inspection Requirements

The commission proposes to change the title of §115.354 from "Inspection Requirements" to the more descriptive "Monitoring and Inspection Requirements" because the section contains requirements for monitoring and inspection of fugitive components. The language in the opening sentence would also be changed to state that affected persons must conduct a monitoring and inspection program to more clearly describe the requirements of the section.

The proposed amendment to §115.354(1)(A) would specify that only process drains that receive or contact wastewater that is defined as an "affected volatile organic compound (VOC) wastewater stream" in Industrial Wastewater Subchapter B, Division 4 of this chapter (concerning Industrial Wastewater) are required to conduct the yearly hydrocarbon gas analyzer monitoring. This addition would specify that drains with little or no potential for VOC emissions would not be subject to the annual monitoring requirement.

The proposed amendment to §115.354(1)(B) and (C) would specify that only those nonaccessible and unsafe to monitor components that would otherwise be subject to more frequent monitoring would be subject to annual monitoring. Amendments published in the November 7, 2003 *Texas Register* (28 TexReg 9835) replaced the term "valves" with the more general term "components." The resulting language could be interpreted to mean that all nonaccessible and unsafe to monitor components would be subject to annual monitoring, even though some components (such as flanges) would not be subject to monitoring even if they were not nonaccessible or unsafe to monitor. The proposed change would add language specifying that annual monitoring for nonaccessible and unsafe to monitor components is required only if the component would otherwise be subject to more frequent monitoring under §115.354(2).

The proposed amendment to §115.354(3) would exempt flanges from weekly visual, audio, olfactory inspections if the flanges are monitored at least once each calendar year using EPA Test Method 21 as found in 40 CFR Part 60, Appendix A (October 17, 2000). The current language in §115.354(3) exempts flanges from these inspections if the flanges are monitored using Test Method 21 as required by the HRVOC rules in Chapter 115, Subchapter H, Division 3. Flanges that are monitored at the same frequency and with the same methodology for other reasons should be allowed the same exemption from weekly inspections as flanges that are monitored under the HRVOC rules. The proposed amendment to §115.354(3) would also specify that those flanges that cannot be inspected safely would not be subject to the weekly inspection requirement, but must be inspected as soon as possible during a time it is safe to inspect. Flanges that are unsafe to inspect must be identified in a list made available upon request.

The proposed amendment to §115.354(5) would allow nonaccessible leaking components to be identified by reference tagging. A leaking component may be detected by audio, visual, or olfactory inspection, but physically attaching a tag to the component may be extremely difficult. The proposed change would allow such leaks to be tagged at grade level with a reference to the elevated component.

The commission proposes to delete §115.354(10) from the general fugitive rules in Subchapter D and move the requirement to Subchapter H, Division 3, so that it would apply only to components in HRVOC service. This change is being proposed at the request of industry. The commission seeks comment on this proposed change.

Paragraph (11) is proposed to be renumbered as paragraph (10) because of the proposed deletion of existing paragraph (10).

Proposed §115.354(11) contains the requirement to monitor new and reworked piping connections that was previously located in §115.352(8). The requirement is proposed to be moved to §115.354 so that it will be located in the same section as other monitoring requirements. Language would also be added to specify that joined fittings welded completely around the circumference of the interface are not subject to this monitoring requirements. The definition of "connector" in §115.10 specifically excludes such welded connections because of their low potential for leaks.

Section 115.355, Approved Test Methods

The most recent date of Test Method 21 of October 17, 2000 is proposed to be added to the CFR citation in §115.355.

Section 115.356, Monitoring and Recordkeeping Requirements

The commission proposes to change the title of §115.356 from "Monitoring and Recordkeeping Requirements" to "Recordkeeping Requirements" to better reflect the content of the section.

The proposed amendment to §115.356(2) would delete subparagraph (D) and reletter as appropriate. Subparagraph (D), that requires maintenance of records of the weekly flanges inspections required by §115.354(3), is proposed to be deleted from the general fugitive rules in Subchapter D. The proposed change would require records of flange inspections only if a leak is detected. This change is being proposed at the request of industry. The commission seeks comment on this proposed change.

The proposed amendment would reletter §115.356(2)(F) as §115.356(2)(E) and add the words "if applicable." This subparagraph lists the items for which records are required to be maintained for leaking components. Some of these required data elements are not applicable for all components. The wording change is proposed to specify that only those records applicable for a particular leaking component need to be maintained. The commission proposes to add the CFR citation for Test Method 21 in proposed §115.356(2)(E). The commission proposes to delete language in proposed §115.356(2)(E)(viii) that references a requirement that is also proposed to be deleted. The commission also proposes to delete existing §115.356(2)(F)(ix). This requirement to maintain a record of the estimated VOC emission rate of the component is proposed to be deleted from Subchapter D and moved to Subchapter H so that it will be applicable only to components in HRVOC service. This change is being proposed at the request of industry. The commission seeks comment on this proposed change. The commission proposes to reletter §115.356(2)(G) to §115.356(2)(F) because of the proposed deletion of §115.356(2)(E).

The proposed amendment would delete §115.356(3). The requirement to maintain records of estimated VOC emissions from leaking components would be deleted from Subchapter D and moved to Subchapter H so that it will be applicable only to components in HRVOC service. This change is being proposed at the request of industry. The commission seeks comment on this proposed change. Paragraphs (4) and (5) in §115.356 are proposed to be renumbered as paragraphs (3) and (4), respectively.

The commission proposes to change the word "valve" in renumbered paragraph (3) to the more general term "component." The current language requires records to identify unsafe and nonaccessible valves, but not other such components. The change would require that records identifying components other than valves that are unsafe to monitor or nonaccessible be maintained. Additionally, the proposed changes to §115.356(3)(A) would require that records be maintained to identify and justify each unsafe to inspect flange.

Section 115.357, Exemptions

The proposed amendment to §115.357(2), (5) - (7), (10), and (11) would specify that the affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas must comply with the recordkeeping requirements of §115.356(3)(C) to identify exempt components and justify the exemptions claimed.

The proposed amendment to §115.357(1) would require that components in heavy liquid service that are exempt from instrument monitoring be inspected by visual, auditory, and/or olfactory means according to the same schedule. The current wording refers only to visual monitoring. The proposed change would make the inspection requirements for unmonitored heavy liquid components consistent with inspection requirements for unmonitored flanges.

Proposed new §115.357(11) would provide a *de minimis* vapor pressure cutoff of 0.002 pounds per square inch, absolute at 68 degrees Fahrenheit. Components with a VOC vapor pressure equal to or below this cutoff would be exempt from the requirements in this division. This cutoff is consistent with the policy of the commission's Air Permits Division that fugitive emissions from compounds with a vapor pressure below this level do not need to be calculated. Existing §115.357(11) is proposed to be renumbered as §115.357(12).

Section 115.359, Counties and Compliance Schedules

The proposed amendment to §115.359 would remove the reference to §115.356(2)(D), because that requirement is proposed to be deleted and would change the reference to the title of 115.356. The proposed amendment to §115.359(3) would delete the reference to paragraph (4) because existing §115.356(3) is proposed for deletion and existing §115.356(4) is proposed to be renumbered to paragraph (3).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst with Strategic Planning and Appropriations, determined that for each year of the first five-year period the proposed amendments are in effect, there will be no fiscal implications to the commission or any other unit of state or local government due to administration or enforcement of the proposed amendments. The commission anticipates no fiscal implications for any other unit of state or local government to comply with the proposed amendments because none of the sources required to comply with the proposed amendments are owned or operated by units of state or local government.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments would be increased compliance with air emission standards because the rules are more understandable.

The commission estimates that there are approximately 140 - 215 privately-owned and operated facilities in Brazoria, Chambers, Collin, El Paso, Dallas, Denton, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties that would be subject to the proposed amendments.

The proposed amendments will not impose any new requirements on individuals or businesses required to comply with the rules. The purposes of the proposed amendments are to better explain the intent of the existing rules, and to remove certain requirements for sources in general VOC service and make the requirements applicable only to sources in HRVOC service. The proposed amendments are also intended to make a variety of changes that correct typographical errors, update cross-references, add flexibility, and amend requirements to achieve the intended emission reductions of the program. The commission

does not anticipate any adverse fiscal implications resulting from the implementation of the proposed amendments.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission has been unable to identify any small or micro-businesses that would be affected by the proposed amendments. The majority of sites affected by the proposed amendments are large petrochemical and industrial businesses. If there are affected small or micro-businesses; however, the commission does not anticipate any adverse fiscal implications as a result of the implementation of the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking action and determined that a local employment impact statement is not required, because the proposed amendments would not adversely affect a local economy in a material way for the first five years that the proposed amendments are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendments to Chapter 115 and revisions to the SIP would improve implementation of Chapter 115 by making minor changes to language and organization to better explain the intent of the rules. The proposed amendments would also delete certain requirements from Subchapter D and move them to Subchapter H so that they will be applicable only to sources in HRVOC in the Houston/Galveston ozone nonattainment area (HGA). The proposed amendments will not have adverse effects as a result of enforcement and administration of the amendments, because the proposed amendments do not impose any new requirements. Many of these sources are owned or operated by utilities, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. This is based on the analysis provided elsewhere in this preamble, including the discussion in the PUBLIC BENEFITS AND COSTS section of this proposal. The remaining amendments in this rulemaking are intended to correct typographical errors, update cross-references, add flexibility and delete obsolete language. These amendments are not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendments do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed amendments implement requirements of 42 United States Code (USC). Under 42 USC, §7410, states are required to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the primary national ambient air quality standard (NAAQS) in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of the 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct an regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions

reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as the HGA. The proposed rules, that will reduce ambient VOC and ozone in the HGA, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, controls on upsets and routine industrial VOC emissions are necessary to address some of the elevated ozone levels observed in the HGA; these controls will result in reductions in ozone formation in the HGA and help bring the HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. As discussed in Chapter 6 of the HGA SIP, this revision is another phase in the process of continued analysis and review of the science, and the data collected as a result of these revisions will further assist the commission as it develope its full reassessment of the attainment demonstration at the midcourse review. Therefore, the proposed amendments are necessary components of and consistent with the ozone attainment demonstrations SIP for the HGA, as required by 42 USC, §7410.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), *no writ*. *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.-Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed earlier in this preamble, this rulemaking implements requirements of 42 USC. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. Therefore, the proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are adopted solely under the general powers of the agency. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Health and Safety Code and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code (also known as the Texas Clean Air Act), §§382.011, 382.012, 382.014, 382.016, 382.017, 382.021, and 382.034. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed amendments do not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The proposed amendments will not impose any new requirements on individuals or businesses required to comply with the rules. The purposes of the proposed amendments are to better explain the intent of the existing rules, and to remove certain requirements for sources in general VOC service and make the requirements applicable only to sources in HRVOC service. The proposed amendments are also intended to make a variety of changes that correct typographical errors, update cross-references, add flexibility, and amend requirements to achieve the intended emission reductions of the program. The commission does not anticipate any adverse fiscal implications resulting from the implementation of the proposed amendments, and the proposed amendments will not place a burden on private, real property.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the HGA area exceeding the federal ozone NAAQS, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in the HGA. Consequently, these proposed amendments meet the exemption in §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the proposed amendments do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking action and found that the proposal is an action identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect

an action/authorization identified in §505.11, and therefore will require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission determined that under 31 TAC §505.22 the proposed rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and ozone levels will be reduced as a result of these proposed amendments. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 115 is an applicable requirement under 30 TAC Chapter 122; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their sites.

ANNOUNCEMENT OF HEARINGS

Public hearings for this proposed rulemaking have been scheduled for the following times and locations: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; and August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A four-minute time limit may be established at the hearings to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before the hearings and will answer questions before and after the hearings.

Persons planning to attend the hearings who have special communication or other accommodation needs, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tceq.state.tx.us*. All comments should reference Rule Project Number 2004-052-115-AI. Comments must be received by 5:00 p.m., August 9, 2004. For further information, please contact Ashley Forbes of the Environmental Planning and Implementation Division at (512) 239-0493 or Alan Henderson, of the Policy and Regulations Division, at (512) 239-1510.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and §382.016, concerning Monitoring Requirements Examination of Records, which authorizes the commission to prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants.

The proposed amendments implement Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017.

§115.352. Control Requirements.

For the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas as defined in §115.10 of this title (relating to Definitions), no person shall operate a petroleum refinery; a synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation, as defined in §115.10 of this title, without complying with the following requirements.

(1) Except as provided in paragraph (2) of this section, no component shall be allowed to have a volatile organic compound (VOC) leak for more than 15 calendar days after the leak is found that [~~which~~] exceeds the following:

(A) for all components except pump seals and compressor seals, a screening concentration greater than 500 parts per million by volume (ppmv) above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound; and

(B) for pump seals and compressor seals, a screening concentration greater than 10,000 ppmv above background as methane, or the dripping or exuding of process fluid based on sight, smell, or sound.

(2) A first attempt at repair must [~~shall~~] be made no later than five calendar days after the leak is found and the component must [~~shall~~] be repaired no later than 15 calendar days after the leak is found, unless the repair of the component would require a unit shutdown that would create more emissions than the repair would eliminate [~~except as provided in subparagraphs (A) - (C) of this paragraph~~]. A component in gas/vapor or light liquid service is considered to be repaired when it is monitored with an instrument using United States Environmental Protection Agency [~~EPA~~] Test Method 21 in 40 Code of Federal Regulations (CFR), Part 60, Appendix A (October 17, 2000) and shown to no longer have a leak after adjustments or alterations to the component. A component in heavy liquid service is considered to be repaired when it is inspected by audio, visual, and olfactory means and shown to no longer have a leak after adjustments or alterations to the component.

[(A) If the repair of a component within 15 days after the leak is detected would require a process unit shutdown which would create more emissions than the repair would eliminate, the repair may be delayed until the next scheduled process unit shutdown, provided that:]

[(i) the owner or operator maintains, and makes available upon request, documentation to authorized representatives of EPA, the executive director, and any local air pollution control agency having jurisdiction which includes a calculation of:]

[(I) the expected mass emissions resulting from the next scheduled process unit shutdown, clearing, and subsequent startup of the unit, including the basis for the calculation and all assumptions made;]

[(II) the mass emission rates from each leaking component in the process unit for which delay of repair is sought as determined by using the methods in the EPA correlation approach in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates," (EPA-453/R-95-017, November, 1995) alone or in combination with the mass emission sampling approach in Chapter 4 of the guidance document (EPA-453/R-95-017, November, 1995). To use the EPA correlation approach, the estimated hourly mass emission rate for each component shall be based on the average of the component's current screening concentration and the previous screening concentration using Test Method 21 for the days between the two monitoring efforts, and the last screening concentration shall be used for the days following that last monitoring through the date of the planned process unit shutdown. Where the monitoring instrument is not calibrated to read past the leak definition or 100,000 ppmv, the pegged emission rate values in Tables 2-13 and 2-14 in Section 2.3.3 of the EPA guidance document "Protocol for Equipment Leak Emission Estimates" shall be used as appropriate. Leaking components in heavy liquid service shall be assigned the appropriate screening range leak rate for greater than 10,000 ppmv as defined in Section 2.3.2 of the guidance document. If the mass emission sampling approach is used, it replaces the estimated emissions rate of the EPA correlation approach in the calculation;]

[(III) the cumulative mass emissions from each leaking component in the process unit for which delay of repair is sought, from the date the leak is found through the date of the next planned process unit shutdown; and]

[(IV) the total cumulative mass emissions in the process unit from the calculations made in subclause (III) of this clause for leaking components in the unit for which delay of repair is sought; and

[(ii) the total cumulative mass emissions from leaking components in the process unit for which delay of repair is sought as determined in clause (i)(IV) of this subparagraph, assessed from the time that each additional leaking component is identified or at the time of any other changes to the emissions estimates, from the date of the change forward, will be less than the mass emissions resulting from shutdown, clearing, and subsequent startup of the unit as determined in clause (i)(I) of this subparagraph; or]

[(iii) as an alternative to the requirements of clause (i) and (ii) of this subparagraph, delay of repair is allowed for each leaking component for which the owner or operator has chosen to undertake "extraordinary efforts" to repair the leak. For purposes of this subparagraph, "extraordinary efforts" is defined as nonroutine repair methods (e.g., sealant injection) or utilization of a closed-vent system to capture and control the leaks by at least 90%. For leaks detected over 10,000 ppmv, extraordinary efforts shall be undertaken within 22 calendar days after the leak is found; however, the owner or operator may keep the leaking valve on the shutdown list only after two unsuccessful attempts to repair a leaking valve through extraordinary efforts, provided that the second extraordinary effort attempt is made within 37 calendar days after the leak is found. For all other leaks, extraordinary efforts shall be undertaken within 30 calendar days after the leak is found, and a second extraordinary effort attempt is not required.]

[(B) Process unit shutdown and component repairs are required within 15 days of the day that leaks are determined to exceed the requirement of subparagraph (A)(ii) of this paragraph for components that were not subjected to extraordinary efforts, and except as provided in subparagraph (C) of this paragraph, each component for which repair has been delayed must be repaired or replaced at the next process unit shutdown.]

(A) [(C)] Delay of repair beyond a process unit shutdown will be allowed for a component if that component is isolated from the process and does not remain in VOC service.

(B) [(D)] Valves that can be safely repaired without a process unit shutdown may not be placed on the shutdown list. [However, the use of "extraordinary efforts," as described in subparagraph (A)(iii) of this paragraph, is not required for a valve to be eligible for the shutdown list.]

[(E) All components in gas/vapor or light liquid service for which a repair attempt was made during a shutdown shall be monitored (with a hydrocarbon gas analyzer) and inspected for leaks within 30 days after startup is completed following the process unit shutdown. All components in heavy liquid service for which a repair attempt was made during a shutdown shall be inspected for leaks within 30 days after startup is completed following the process unit shutdown.]

(3) All leaking components, as defined in paragraph (1) of this section, that [which] cannot be repaired until a process unit shutdown must [shall] be identified for such repair by tagging. The executive director, at his discretion, may require an early process unit shutdown or other appropriate action based on the number and severity of tagged leaks awaiting a process unit shutdown.

(4) No valves shall be installed or operated at the end of a pipe or line containing VOC unless the pipe or line is sealed with a second valve, a blind flange, or a tightly-fitting plug or cap. The sealing device may be removed only while a sample is being taken or during maintenance operations, and when closing the line, the upstream valve must [shall] be closed first.

(5) Construction of new and reworked piping, valves, and pump and compressor systems must [shall] conform to applicable American National Standards Institute, American Petroleum Institute, American Society of Mechanical Engineers, or equivalent codes.

(6) New and reworked underground process pipelines must [shall] contain no buried valves such that fugitive emission monitoring is rendered impractical.

(7) To the extent that good engineering practice will permit, new and reworked components must [shall] be so located to be reasonably accessible for leak-checking during plant operation. A nonaccessible component is a component that cannot be inspected without elevating the monitoring personnel more than two meters above a permanent support surface or that is below floors or deck gratings requiring confined space entry as defined in 29 CFR §1910.146 (December 1, 1998). [Components elevated more than two meters above a support surface will be considered nonaccessible.] Nonaccessible components must [shall] be identified in a list to be made available upon request.

(8) New and reworked piping connections must [shall] be welded, flanged, or consist of pressed and permanently formed metal-

to-metal seals. Screwed connections are permissible only on new piping smaller than two inches in diameter. [~~All new connections shall be checked for leaks within 30 days of being placed in VOC service by monitoring with a hydrocarbon gas analyzer for components in light liquid and gas service and by using visual, audio, and/or olfactory means for components in heavy liquid service.~~]

(9) For pressure relief valves installed in series with a rupture disk, pin, second relief valve, or other similar leak-tight pressure relief component, a pressure gauge or an equivalent device or system must [~~shall~~] be installed between the relief valve and the other pressure relief component to monitor for leakage past the first component. When leakage is detected past the first component, that component must [~~shall~~] be repaired or replaced at the earliest opportunity, but no later than the next process unit shutdown. Equivalent devices or systems must [~~shall~~] be identified in a list to be made available upon request and must have been approved by the methods required by §115.353 of this title (relating to Alternate Control Requirements).

(10) Any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in the Houston/Galveston area in which a highly-reactive volatile organic compound [~~HRVOC~~], as defined in §115.10 of this title, is a raw material, intermediate, final product, or in a waste stream is subject to the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) in addition to the applicable requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas).

§115.354. Monitoring and Inspection Requirements.

All affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas must [~~shall~~] conduct a monitoring and inspection program consistent with the following provisions.

(1) Measure yearly (with a hydrocarbon gas analyzer) the emissions from all:

(A) process drains that receive or contact affected volatile organic compound wastewater streams as defined in Subchapter B, Division 4 of this chapter (relating to Industrial Wastewater);

(B) nonaccessible components as identified in §115.352(7) of this title (relating to Control Requirements) that would otherwise be subject to more frequent monitoring under paragraph (2) of this section; and

(C) unsafe to monitor components that would otherwise be subject to more frequent monitoring under paragraph (2) of this section. An unsafe to monitor component is a component that the owner or operator determines is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph (2) of this section. Components that [~~which~~] are unsafe to monitor must [~~shall~~] be identified in a list made available upon request. If an unsafe to monitor component is not considered safe to monitor within a calendar year, then it must [~~shall~~] be monitored as soon as possible during safe to monitor times.

(2) Measure each calendar quarter (with a hydrocarbon gas analyzer) the screening concentration from all:

(A) compressor seals;

(B) pump seals;

(C) accessible valves; and

(D) pressure relief valves in gaseous service.

(3) Inspect weekly, by visual, audio, and/or olfactory means, all flanges, excluding flanges [~~in the Houston/Galveston area~~] that are monitored at least once each calendar year using United States Environmental Protection Agency [~~EPA~~] Test Method 21 in 40 Code of Federal Regulations, Part 60, Appendix A (October 17, 2000) and excluding flanges that are unsafe to inspect [~~as required by §115.781(b)(3) of this title (relating to General Monitoring and Inspection Requirements)~~]. Flanges that are unsafe to inspect must be identified in a list made available upon request. If an unsafe to inspect flange is not considered safe to inspect within the calendar quarter, then it must be inspected as soon as possible during a time that it is safe to inspect.

(4) Measure (with a hydrocarbon gas analyzer) emissions from any relief valve that [~~which~~] has vented to the atmosphere within 24 hours.

(5) Upon the detection of a leaking component, affix to the leaking component a weatherproof and readily visible tag, bearing an identification number and the date the leak was detected. This tag must [~~shall~~] remain in place until the leaking component is repaired. Tagging of nonaccessible leaking components may be done by reference tagging. The reference tag should be located as close as possible to the leaking component and should clearly identify the leaking component and its location.

(6) The monitoring schedule of paragraphs (1) - (3) of this section may be modified to require an increase in the frequency of monitoring in a given process area if the executive director determines that there is an excessive number of leaks in that process area.

(7) After completion of the required quarterly valve monitoring for a period of at least two years, the operator of a petroleum refinery; synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process; or a natural gas/gasoline processing operation may request in writing to the executive director that the valve monitoring schedule be revised based on the percent of valves leaking. The percent of valves leaking must [~~shall~~] be determined by dividing the sum of valves leaking during current monitoring and valves for which repair has been delayed (including valves that [~~which~~] have been classified as non-repairable under §115.357(8) of this title (relating to Exemptions)) by the total number of valves subject to the requirements. This request must [~~shall~~] include all data that have been developed to justify the following modifications in the monitoring schedule.

(A) After two consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip one of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(B) After five consecutive quarterly leak detection periods with the percent of valves leaking equal to or less than 2.0%, an owner or operator may begin to skip three of the quarterly leak detection periods for the valves in gas/vapor and light liquid service.

(8) Alternate monitoring schedules approved before November 15, 1996, under §§115.324(a)(8)(A), 115.334(3)(A), and 115.344(3)(A) of this title (relating to Inspection Requirements), as in effect December 3, 1993, are approved monitoring schedules for the purposes of paragraph (7) of this section.

(9) All component monitoring must [~~shall~~] occur when the component is in contact with process material and the process unit is in service. If a unit is not operating during the required monitoring period but a component in that unit is in contact with process fluid that [~~which~~] is circulating or under pressure, then that component is considered to be in service and is required to be monitored. Valves must be in gaseous or

light liquid service to be considered in the total valve count for alternate valve monitoring schedules of paragraph (7) of this section.

[(10) Except as provided in subparagraph (B) of this paragraph, the owner or operator shall use dataloggers and/or electronic data collection devices during all monitoring required by this section. The owner or operator shall use best efforts to transfer, on a daily basis, electronic data from electronic datalogging devices to the database required by §115.356(2) of this title (relating to Monitoring and Recordkeeping Requirements).]

[(A) For all monitoring events in which an electronic data collection device is used, the collected monitoring data shall include the identification of each component and each calibration run, the maximum screening concentration detected, the time of monitoring (i.e., the time that the organic vapor concentration is read or recorded for each component), a date stamp, an operator identification, an instrument identification, and calibration gas concentrations and certification dates. The acceptable rate for recording data shall be determined individually by each owner or operator considering such factors including, but not limited to, the size of the equipment, the equipment type, the accessibility of the equipment, the number of leakers being found, and the skill of the monitoring technicians. Each owner or operator shall have a documented auditing process in place to assure proper calibration, identify response time failures, and assess pace anomalies.]

[(B) The owner or operator may use paper logs where necessary or more feasible (e.g., small rounds (less than 100 components), re-monitoring following component repair, or when dataloggers are broken or not available), and shall record, at a minimum, the information required in subparagraph (A) of this paragraph. For audio, visual, and olfactory inspections, the owner or operator shall record, at a minimum, the identification of the person conducting the inspection, the date, and the area that was inspected. The owner or operator shall transfer any manually recorded monitoring data to the database required by §115.356(2) of this title within seven days of monitoring.]

[(C) Each change to the database regarding the monitored concentration, date and time read, repair information, addition or deletion of components, or monitoring schedule shall be detailed in a log or inserted as a notation in the database. All such changes shall include the name of the person who made the change, the date of the change, and an explanation to support the change.]

(10) [(11)] Monitored screening concentrations must be recorded for each component in gaseous or light liquid service. Notations such as "pegged," "off scale," "leaking," "not leaking," or "below leak definition" may not be substituted for hydrocarbon gas analyzer results. For readings that are higher than the upper end of the scale (i.e., pegged) even when using the highest scale setting or a dilution probe, record a default pegged value of 100,000 parts per million by volume.

(11) All new connections must be checked for leaks within 30 days of being placed in volatile organic compound service by monitoring with a hydrocarbon gas analyzer for components in light liquid and gas service and by using visual, audio, and/or olfactory means for components in heavy liquid service. Joined fittings welded completely around the circumference of the interface are not subject to this requirement.

(12) All exemptions for valves with a nominal size of two inches or less expired on July 31, 1992 (final compliance date).

§115.355. Approved Test Methods.

For all affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, compliance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) must [shall] be determined by applying the following test methods, as appropriate:

(1) Test Method 21 (40 Code of Federal Regulations, Part [CFR] 60, Appendix A (October 17, 2000)) for determining volatile organic compound leaks;

(2) determination of true vapor pressure using American Society for Testing and Materials Test Methods D323-89, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for 68 degrees Fahrenheit (20 degrees Celsius) in accordance with American Petroleum Institute [(API)] Publication 2517, Third Edition, 1989;

(3) minor modifications to these test methods approved by the executive director; or

(4) equivalent determinations using published vapor pressure data or accepted engineering calculations.

§115.356. [Monitoring and] Recordkeeping Requirements.

All affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas must [shall] have the following recordkeeping requirements, maintained either electronically or in hard copy form:

(1) records identifying each process unit subject to fugitive monitoring in accordance with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) including, at a minimum, the following information:

(A) the name of each process unit;

(B) a scale plot plan showing the location of each process unit;

(C) process flow diagrams for each process unit showing the general process streams and major equipment on which the components are located; and

(D) the expected volatile organic compound [(VOC)] emissions if the process unit is shut down for repair of components or other equipment, including:

(i) the total emissions;

(ii) the calculations used; and

(iii) engineering assumptions applied;

(2) records on components and process areas that contain, at a minimum, the following data:

(A) the name of the process unit where the component is located;

(B) the type of component (e.g., pump, compressor, valve, pressure relief valve, etc.;

(C) all data required to be collected by the monitoring and inspection requirements of §115.354 of this title (relating to Monitoring and Inspection Requirements) for each component required to be monitored with a hydrocarbon gas analyzer;

[(D) the weekly audio, visual, and olfactory inspections of flanges, including, at a minimum, the identification of the person conducting the inspection and the area that was inspected. Flanges in the Houston/Galveston area that are monitored using Test Method 21 as required by §115.781(b)(3) of this title (relating to General Monitoring and Inspection Requirements) are excluded from this recordkeeping requirement;]

(D) [~~(E)~~] the calibration of the monitoring instrument [~~data required in §115.354(10) of this title~~];

(E) [~~(F)~~] if a component is found leaking, if applicable:

(i) the component identification and method of leak determination (Test Method 21 in 40 Code of Federal Regulations, Part 60, Appendix A (October 17, 2000), sight/sound/smell, or inert gas or hydraulic testing);

(ii) the date that [~~on which~~] a leaking component is discovered;

(iii) the date that [~~on which~~] a first attempt at repair was made to a leaking component;

(iv) the date that [~~on which~~] a leaking component is repaired;

(v) the date and instrument reading of the recheck procedure after a leaking component is repaired;

(vi) the dates and nature of each extraordinary effort to repair the leaking component;

(vii) the date that [~~on which~~] the leaking component is placed on the shutdown list; and

(viii) the date that [~~on which~~] the leaking component was taken out of service [~~as allowed by §115.352(2)(C) of this title (relating to Control Requirements)~~]; and

~~*(ix)* the calculation showing the estimated VOC emission rates of the component as required by §115.352(2)(A)(i)(II) of this title if extraordinary efforts are not going to be initiated; and~~]

(F) [~~(G)~~] maintain records of any audio, visual, and olfactory inspections of connectors, but only if a leak is detected;

~~[(3) records for each process unit with leaking components, updated each day after a leaking component is determined to require a process unit shutdown to repair and where extraordinary efforts to repair the component will not be pursued, including the following:]~~

~~[(A) the date, calculations, and estimated emissions of VOC as required by §115.352(2)(A)(i)(III) of this title;]~~

~~[(B) the date, calculations, and comparison of emissions of VOC as required by §115.352(2)(A)(i)(IV) of this title; and]~~

~~[(C) the date of each process unit shutdown required due to VOC emissions of leaking components exceeding the expected VOC emissions from the shutdown;]~~

(3) [~~(4)~~] records by process unit identifying and justifying each:

(A) unsafe to monitor component and unsafe to inspect flange [~~valve~~];

(B) nonaccessible (difficult to monitor) component [~~valve~~]; and

(C) each exemption by component claimed under §115.357 of this title (relating to Exemptions); and

(4) [~~(5)~~] maintain all monitoring records for at least five years and make them available for review upon request by authorized representatives of the executive director, United States Environmental Protection Agency [~~EPA~~], or local air pollution control agencies with jurisdiction, except that the five-year record retention requirement does not apply to records generated before December 31, 2000.

§115.357. Exemptions.

For all affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/ Galveston areas, the following exemptions [~~shall~~] apply.

(1) Components that contact a process fluid containing volatile organic compounds (VOCs) having a true vapor pressure equal to or less than 0.044 pounds per square inch, absolute (psia) (0.3 kiloPascals [~~kPa~~]) at 68 degrees Fahrenheit (20 degrees Celsius) are exempt from the instrument monitoring (with a hydrocarbon gas analyzer) requirements of §115.354(1) and (2) of this title (relating to Monitoring and Inspection Requirements) if the components are inspected by visual, audio, and/or olfactory means [~~visually~~] according to the inspection schedules specified in §115.354(1) and (2) of this title.

(2) Conservation vents or other devices on atmospheric storage tanks that are actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch, gauge (psig), pressure relief valves equipped with a rupture disk or venting to a control device, components in continuous vacuum service, and valves that are not externally regulated (such as in-line check valves) are exempt from the requirements of this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas), except that each pressure relief valve equipped with a rupture disk must [~~shall~~] comply with §115.352(9) and §115.356(3)(C) of this title (relating to Control Requirements and Recordkeeping Requirements).

(3) Compressors in hydrogen service are exempt from the requirements of §115.354 of this title if the owner or operator demonstrates that the percent hydrogen content can be reasonably expected to always exceed 50.0% by volume.

(4) All pumps and compressors that [~~which~~] are equipped with a shaft sealing system that prevents or detects emissions of VOC from the seal are exempt from the monitoring requirement of §115.354 of this title. These seal systems may include, but are not limited to, dual pump seals with barrier fluid at higher pressure than process pressure, seals degassing to vent control systems kept in good working order, or seals equipped with an automatic seal failure detection and alarm system. Submerged pumps or sealless pumps (including, but not limited to, diaphragm, canned, or magnetic driven pumps) may be used to satisfy the requirements of this paragraph.

(5) Reciprocating compressors and positive displacement pumps used in natural gas/gasoline processing operations are exempt from the requirements of this division except §115.356(3)(C) of this title.

(6) Components at a petroleum refinery or synthetic organic chemical, polymer, resin, or methyl-tert-butyl ether manufacturing process, that [~~which~~] contact a process fluid that contains less than 10% VOC by weight and components at a natural gas/gasoline processing operation that [~~which~~] contact a process fluid that contains less than 1.0% VOC by weight are exempt from the requirements of this division except §115.356(3)(C) of this title.

(7) Plant sites covered by a single account number with less than 250 components in VOC service are exempt from the requirements of this division except §115.356(3)(C) of this title.

(8) Components in ethylene, propane, or propylene service, not to exceed 5.0% of the total components, may be classified as non-repairable beyond the second repair attempt at 500 parts per million by volume (ppmv). These components will remain in the fugitive monitoring program and be repaired no later than 15 calendar days after the concentration of VOC detected via United States Environmental Protection Agency [~~EPA~~] Test Method 21 in 40

Code of Federal Regulations (CFR), Part 60, Appendix A (October 17, 2000) exceeds 10,000 ppmv. For the purposes of this division, components that [~~which~~] contact a process fluid with greater than 85% ethylene, propane, or propylene by weight are considered in ethylene, propane, or propylene service, respectively.

(9) The following valves are exempt from the requirements of §115.352(4) of this title:

(A) pressure relief valves;

(B) open-ended valves or lines in an emergency shutdown system that [~~which~~] are designed to open automatically in the event of an emissions event;

(C) open-ended valves or lines containing materials that [~~which~~] would autocatalytically polymerize or would present an explosion, serious overpressure, or other safety hazard if capped or equipped with a double block and bleed system; and

(D) valves rated greater than 10,000 psig.

(10) Connectors in instrumentation systems, as defined in 40 CFR §63.161 (January 17, 1997), that meet 40 CFR §63.169 (June 20, 1996) are exempt from the requirements of this division except §115.356(3)(C) of this title.

(11) Components/systems that contact a process fluid containing VOC having a true vapor pressure equal to or less than 0.002 psia at 68 degrees Fahrenheit are exempt from the requirements of this division except §115.356(3)(C) of this title.

(12) [~~(11)~~] In the Houston/Galveston area, the requirements of Subchapter H of this chapter (relating to Highly-Reactive Volatile Organic Compounds) apply to components that [~~which~~] qualify for one or more of the exemptions in paragraphs (1) - (11) [~~(1) - (10)~~] of this section at any petroleum refinery; synthetic organic chemical, polymer, resin, or methyl tert-butyl ether manufacturing process; or natural gas/gasoline processing operation in which a highly-reactive volatile organic compound, as defined in §115.10 of this title (relating to Definitions), is a raw material, intermediate, final product, or in a waste stream.

§115.359. Counties and Compliance Schedules.

The owner or operator of each affected source in Brazoria, Chambers, Collin, El Paso, Dallas, Denton, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties must [~~shall~~]:

(1) continue to comply with this division (relating to Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes in Ozone Nonattainment Areas) as required by §115.930 of this title (relating to Compliance Dates);

(2) comply with §115.356(2)(C) [~~§115.356(2)(C) and (D)~~] of this title (relating to [~~Monitoring and~~] Recordkeeping Requirements) as soon as practicable, but no later than March 31, 2004; and

(3) develop and make available upon request to the executive director, United States Environmental Protection Agency [~~EPA~~], and any local air pollution control agency having jurisdiction the recordkeeping required by §115.356(1) and (3) [~~§115.356(1), (3), and (4)~~] of this title as soon as practicable, but no later than March 31, 2004.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404251
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 3. GENERAL PROVISIONS

SUBCHAPTER C. SERVICES AND PRODUCTS

31 TAC §3.31

The Texas General Land Office proposes an amendment to Title 31, Part 1, Chapter 3, Subchapter C of the Texas Administrative Code, §3.31(b)(16)(A) relating to fees for services and products. The amendment provides the Commissioner the discretion to waive the currently required in-kind contract maintenance fees. The Texas General Land Office will develop guidelines based on economies of scale to determine whether the fees shall be imposed.

The change will increase the flexibility of the Texas General Land Office to supply natural gas to its customers.

Marshall Enquist, Attorney with the Energy Section, has determined that for each of the first five years that the amendment as proposed will be in effect, there will be no significant negative fiscal impact to state or local government as a result of administering the section as amended.

Marshall Enquist, Attorney with the Energy Section, has determined that there will be a slight public benefit due to potential savings as a consequence of reduced service charges for sales of natural gas by the State. There will not be an effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Marshall Enquist, Attorney with the Energy Section, has determined that for each of the first five years that the amendment as proposed will be in effect, there will be no impact on local employment.

Comments may be submitted to Deborah Cantu, Legal Services, Texas General Land Office, 1700 N. Congress Avenue, Austin, Texas 78711 or by fax at (512) 463-6311, no later than 30 days after publication.

The amendment to this section is proposed under Texas Natural Resources Code §31.051, which authorizes the Texas General Land Office to make and enforce suitable rules consistent with the law.

The proposed amendment affects Sections 35.101 through 35.106 of the Utilities Code.

§3.31. Fees.

(a) (No change.)

(b) General Land Office fees. The commissioner is authorized and required to collect the following fees where applicable.

(1) - (15) (No change.)

(16) Miscellaneous services and fees:

(A) In-kind contract maintenance fee. Processing and accounting for in-kind oil, gas, and other related product contracts, from purchaser of state-owned products unless deemed unnecessary by the Commissioner: per barrel delivered: $.05; per MMBTU delivered: $.03.

(B) - (H) (No change.)

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404271
Trace Finley
Policy Director
General Land Office
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 305-8598

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER D. PUBLIC INFORMATION POLICIES

37 TAC §1.52

The Texas Department of Public Safety proposes an amendment to §1.52, concerning Release of Information in Criminal Investigations. Amendment to the section is necessary due to a name change/reorganization of a major division within the department and the reassignment of certain duties.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rule is in effect the anticipated public benefit resulting from adoption of the section will be current and updated rules. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Tela Mange, Chief of Media Relations, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0170, (512) 424-2080.

The amendment is proposed pursuant to Texas Government Code, §411.004(3) and §411.006(4), which provides the Public Safety Commission with the authority to adopt rules necessary for carrying out the department's work. The Director, subject to the approval of the Commission, shall have the authority to adopt rules considered necessary for the control of the department.

Texas Government Code, §411.004(3) and §411.006(4) are affected by this proposal.

§1.52. Release of Information in Criminal Investigations.

(a) Subject to the limitations outlined as follows, department employees may respond to news media inquiries about criminal investigations in which the department is involved.

(b) Release of information concerning criminal investigations may be made only by the officers directly responsible for the investigation, by the Public Information Office or designated public information officer on the scene [~~Safety Education Service~~] after consultation with the lead investigating officers[~~, or by other members of the department who have been provided information for release by the investigating officers~~]. Employees not involved as outlined in this subsection will refer all news media inquiries to the appropriate personnel.

(c) When an investigation is being conducted jointly with local officers, releases will be coordinated with them so as to maintain proper working relationships. Every effort should be made in such cases for releases to be handled by the sheriff or chief of police, if he so desires.

(d) Once an arrest has been made and primary responsibility for a case has shifted to the prosecutor, news media inquiries should normally be referred to the appropriate county or district attorney.

(e) The names of offenders under age 17 should not normally be released. Guidance should be sought from local juvenile authorities in cases involving juvenile offenders.

(f) The following information regarding criminal matters may not be released by members of this department:

(1) the prior criminal record, including arrests, indictments, or other charges of crime, or the character or reputation of the accused, except that the officer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present. Nothing herein should be construed as limiting the right of the news media to obtain and publish conviction data from court or public records;

(2) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement, except that the officer may announce without further comment that the accused denies the charges made against him;

(3) the details or results of any laboratory examinations of evidence in the case, or the results or failure of the accused to submit to any examination including polygraph. This prohibition does not apply to results of blood alcohol concentration tests (breath, blood or urine) or to the accused's failure to submit to such a test;

(4) the identity, testimony, or credibility of prospective witnesses, although the officer may announce the identity of the victim unless the offense involved sexual contact;

(5) the possibility of a plea of guilty to the offense charged or a lesser offense;

(6) any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;

(7) no member of this department shall deliberately pose a person in custody for photographing or televising by representatives of the news media. This does not limit the right of the news media to photograph the person in custody, in a public place, and on their own initiative.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404098
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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CHAPTER 35. PRIVATE SECURITY

The Texas Department of Public Safety (DPS) proposes the addition of new Chapter 35, §§35.1, 35.11-35.14, 35.31-35.40, 35.51, 35.61-35.75, 35.91-35.96, 35.111-35.117, 35.131, 35.141- 35.146, 35.161-35.163, 35.171, 35.172, 35.181-35.186, 35.201- 35.205, 35.221, 35.222, 35.231-35.232, 35.241, 35.251-35.268, 35.281, 35.291, and 35.301 to Texas Administrative Code, Title 37, Part 1, and the simultaneous repeal of Title 22, Part 20 of the Texas Administrative Code. The new sections promulgate the rules and regulations of the Texas Private Security Board under the Texas Administrative Code part that is dedicated to the Department of Public Safety. The new rules are proposed in order to implement the transfer of administration of the Texas Private Security Board to the DPS as provided by Tex. H.B. 28, 78th Leg., 3rd C.S. (2003). The new rules also assess additional fees.

House Bill 28 provides that DPS shall administer the private security law through the Texas Private Security Board. In order to assume administration responsibilities, DPS is transferring the administrative regulations for private security from the current location in Title 22 of the Texas Administrative Code to the rules section of DPS contained in Title 37 of the Texas Administrative Code. The new rules as proposed are substantially the same as the rules provided in Title 22. However, the new rules substitute statutorily repealed terms such as "Private Security Commission" with the new references to the "Private Security Board." Other terms have also been changed to conform the rules to the new law. Also, the new rules do not include redundant or obsolete provisions that were contained in Title 22 but are also contained in other parts of DPS regulations contained in Title 37. Examples of provisions that will not be readopted are provisions for rulemaking and petitioning for rulemaking. Finally, the new rules propose the adoption of certain fees in order to implement Texas Online requirements as provided by other law as further explained below.

In the new chapter: Section 35.1, Definitions, provides definitions for the new rules. Section 35.11, Fraudulent Application Prohibited, explains that fraudulent applications are government documents and that a fraudulent application is a criminal offense. Section 35.12, Permitting or Allowing Violations, prohibits any person who has applied for or been issued a license, registration, security officer commission, instructor approval, school approval, or letter of authority, from knowingly permitting or allowing any person to violate a provision of the Act, rule, or any criminal statute. Section 35.13, Return of Equipment, provides for licensees to immediately surrender equipment owned by the employer. Section 35.14, Good Standing, provides that no license registration, security officer commission or school approval shall be issued or renewed unless the licensee, registrant or commissioned security officer is in good standing with the board, and explains what constitutes "good standing." Section 35.31, Complaint Limitation, provides for the limitation of complaints. The board shall not accept a complaint against a licensee or an employee if the complaint is filed more than two years after the alleged violation date, except in matters that relate to conviction for a Class B offense or greater or a material misstatement in an application. Section 35.32, Date of Licensing, Certification or Acknowledgement, provides that if an application or written notification is required, the date of licensing, certification, or acknowledgment by the board will be either the receipt date or the date the complete application or written notification is accepted for processing, whichever is later. Section 35.33, Certificate of Installation, provides an interpretation of "exterior structure opening" and provides that any alarm system company may issue a certificate of installation pursuant to 1702.065 Occupations Code. Section 35.34, Standards of Conduct, provides the required standards of conduct for licensees under the rules and regulations. Includes a new requirement that licensees shall not use the DPS seal to advertise or publicize a commercial undertaking. Section 35.35, Standards of Service, explains the standards of required service for a licensee. Section 35.36, Consumer Information, explains the requirements for consumer information. Section 35.37, Information Shown in Advertisements, identifies the information that must be included in licensee advertisements. Section 35.38, Standards of Reports, explains that a client is entitled to receive a written report of services furnished and explains the requirements for that report. Section 35.39, Uniform Requirements, explains the requirements for uniforms and related information. Section 35.40, Confidential Information, explains that certain information held by a licensee, registrant or commissioned security officer is confidential and explains the circumstances of release and applicability. Section 35.51, Stay of Summary Suspension, explains the procedure to obtain a stay of a summary suspension. Section 35.61, Written Examination, provides that manager and supervisor applicants must pass a written examination administered by the board as well as requirements for the examination. Section 35.62, Reexamination Fee, provides for a reexamination fee. Section 35.63, Photographs, explains the requirements for photographs required by the Act. Section 35.64, Fingerprint Cards, explains requirements for fingerprint cards. Section 35.65, Assumed Name Requirements, explains the requirements for doing business under an assumed name. Section 35.66, Verification of Corporations, explains the requirements for applicant corporations. Section 35.67, Assignment under Class, explains that when a Class A license or a Class B license is assigned to a Class C license, a fee in the amount of the difference in the cost of the licenses shall be paid to upgrade the license; that there shall be no refund when a Class C license is assigned to a Class A or Class B license; and this fee is in addition to the regular assignment of a license fee. Section 35.68, Procedure for Termination of License or Branch Officer License, explains termination procedures for certain licenses. Section 35.69, Assignment to Spouse or Heirs, explains the procedure for a license to be transferred to a spouse or heir. Section 35.70, Fees, explains certain requirements regarding submission of fees to the board. Section 35.71, Operation without Manager, explains that when a qualified manager or supervisor of a license has terminated his position, and the board has been timely notified of the termination in writing within 14 days of the termination, the business shall be operated by an owner, officer, partner or shareholder. The section also explains that no license shall be operated without a manager

for a period exceeding 60 days after the date of the previous manager's termination. Section 35.72, Fingerprint Submission, explains the requirements for applicants to submit fingerprint information. Section 35.73, Change of Expiration Date of License, explains the procedure for changing the expiration date of a license. Section 35.74, Reapplication after Revocation, provides that an applicant who has had a license or registration revoked by the board is not eligible to re-apply for any license or registration issued under this Act unless the fifth anniversary of any such revocation has occurred. Section 35.75, Private Security Consultant, explains the requirements for registration as a Private Security Consultant. Section 35.91, Administrative Hearing Procedures, explains that hearings and appeal procedures related to all administrative hearings conducted by the board are governed by Government Code, Chapter 2001. Section 35.92, Service of Notice in Non-Rulemaking Proceedings, explains the service procedure for non-rulemaking proceedings. Section 35.93, Penalty Range, explains that the board shall develop, utilize, and publish guidelines for administrative penalties and ranges of violations of the Act and these rules. Section 35.94, Default Judgments, provides that in cases brought before SOAH in the event that the respondent is adjudged to be in violation of the Private Security Act or these rules, the board has the authority to assess, in addition to the penalty imposed, costs of the administrative hearing. Section 35.95, Trial on the Merits, provides that in cases brought before SOAH, in the event that the respondent is adjudicated to be in violation of the Private Security Act or these rules after a trial on the merits, the board has authority to assess in addition to the penalty imposed, the actual costs of the administrative hearing and explains what constitutes "costs". Section 35.96, Appeal, provides that the costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent. Section 35.111, Escort License Required, explains certain requirements for uniformed escort duty. The new rule also clarifies that certain funeral escort services are not covered by this subchapter. Section 35.112, Approved Uniforms, provides that the uniform, badge and shoulder patch worn by an escort service shall be approved by the board during the application process and that no uniform, badge, or shoulder-patch other that those approved by the board shall be worn. Section 35.113, Insurance, explains insurance policy requirements. Section 35.114, Driver License Required, explains the requirement for uniformed employees to hold a driver license. Section 35.115, Restrictions on Lights, explains restrictions on use of emergency lights. Section 35.116, Arrest for Conviction of Driving While Intoxicated, provides that any applicant or registrant may not be assigned to or be employed by a motorcycle escort service if that individual has been convicted of Driving While Intoxicated (DWI) during the five years preceding licensure or application to become licensed and also provides that any registrant or licensee who is arrested for DWI shall be subject to immediate summary suspension. Section 35.117, Police Officers May Furnish Escorts, provides that the rules do not prohibit regularly employed officers of the state or any political subdivision of the state from furnishing uniformed motorcycle escort services. Section 35.131, Welfare Requirements, explains regulatory requirements for guard dog companies. Section 35.141, Requirements for Issuance of a Security Officer Commission by the Board, explains minimum training and color photograph requirements for issuance of a security officer commission. Section 35.142, Application for a Security Officer Commission, explains the application requirements for a security officer commission. Section 35.143, Drug Testing Required for Commissioned Security Officers, provides details regarding the drug testing requirement for commissioned security officers. Section 35.144, Violations by Commissioned Security Officers, identifies specific prohibitions for commissioned security officers. Section 35.145, Carrying of a Security Officer Commission, explains the requirements for carrying a commission. Section 35.146, Renewal of Security Officer Commission, provides that the renewal period for security officer commissions shall be the calendar month prior to the expiration of the security officer commission. Section 35.161, Requirements for Issuance of a Personal Protection Authorization, explains application and requirements for issuance and transfer of a personal protection authorization. Section 35.162, Requirements for Personal Protection Officer Employer, identifies requirements for personal protection officer employers. Section 35.163, Violations of the Act by Personal Protection Officers, identifies specific prohibited conduct. Section 35.171, Requirements for Issuance of a Private Business of Authority, explains the procedure for the security department of a private business to obtain and hold a letter of authority. Section 35.172, Requirements for Issuance of a Governmental Letter of Authority, explains the procedure for a government entity to obtain and hold a letter of authority. Section 35.181, Employment Requirements, explains additional requirements for a licensee and the licensee's employer. Section 35.182, Fingerprints, provides additional detail regarding the submission of fingerprints by an applicant. Section 35.183, Exhibit Pocket Card, explains the requirement to carry and present a registration pocket card. Section 35.184, Licensed Company Responsible for the Registration of Employees, explains that it shall be the responsibility of the licensed company to register all employees required to register under the Act, with the board. Section 35.185, Registration Deadline, provides that any person required to be registered with the board must have their application on file with the board within 14 days after commencing employment. Failure to comply may, at the discretion of the manager, result in denial of the application. Section 35.186, Registration Applications, explains registration application requirements. Section 35.201, Employee Records, provides that licensed companies shall keep records of all registered or commissioned employees. Section 35.202, Location of Records, explains where records shall be maintained. Section 35.203, Records to be Available for Inspection, provides that all records required to be kept under the provisions of the Act and these rules shall be made available for inspection by bureau staff during normal business hours. Section 35.204, Pre- Employment Check, provides that an employer of a commissioned officer shall exercise due diligence in ensuring that an applicant's qualifications meet the provisions of §1702.113 of the Act, prior to duty assignment. Section 35.205, Records Required on Commissioned Security Officers, explains that the employer of a commissioned security officer shall maintain current records on all persons issued a security officer commission for board inspection and explains what those records shall contain. Section 35.221, General Reciprocity, explains procedures and requirements for general reciprocal licensing. Section 35.222, Limited Reciprocity, provides for a limited reciprocal agreement with another state in certain circumstances. Section 35.231, Subscription Fees, provides for the payment of certain fees. Section 35.232, Subscription Fees for Original Applications, provides for the payment of certain fees. Section 35.241, Business Evaluation Service, provides that Chapter 1703 does not apply to certain services. Section 235.251, Application for a Training School Approval, identifies requirements for application for a training school approval. Section 35.252, Attendance, Progress, and Completion Records Required, identifies standards for training

schools. Section 35.253, Board Refusal of Certificate of Completion, identifies circumstances where the board may refuse to issue a certificate of completion. Section 35.254, Withdrawal of Training School Approval, provides that the board may withdraw approval of a training school upon evidence the school has operated in violation of the Act or the rules. Section 35.255, Notification of Denial or Withdrawal of a Letter of Approval, provides for issuance of notification of a denial of approval for a training school. Section 35.256, Application for a Training Instructor Letter of Approval, provides details regarding the application for a training instructor letter of approval. Section 35.257, Training Courses, provides details regarding required training. Section 35.258, Firearm Courses, provides details regarding required firearm training qualification. Section 35.259, Shotgun Training, provides details regarding satisfactory completion of shotgun training requirements. Section 35.260, Shotgun Training Requirements, provides the standards for the course of fire for shotgun training. Section 35.261, Training School and Instructor Approval, provides that approval as a security officer training school and/or instructor shall be considered a license with respect to suspension, revocation or denial. Section 35.262, Security Officer Training Manual and Examination, provides details regarding training and testing. Section 35.263, Alarm Installer and Alarm Systems Salesperson Training and Testing/Application for Alarm Training Program Approval, explains the application process for alarm installation and related approvals. Section 35.264, Attendance, Progress and Completion Records Required, provides detail regarding the requirements for a board approved alarm training program. Section 35.265, Alarm Systems Installer or Alarm Systems Salesperson, provides details regarding issuance of a certificate of completion to an alarm system salesperson. Section 35.266, Records Required on Manager, provides details regarding requirements for each board approved alarm training program. Section 35.267, Statutory or Rules Violations, provides that a certificate of completion for an alarm training program may be denied, withdrawn, suspended, or revoked. Section 35.268, Certificate of Completion, identifies requirements for a certificate of completion. Section 35.281, Training, provides details regarding the courses of instruction for and the instructor approvals. Section 35.291, Continuing Education Courses, provides details regarding continuing education. Section 35.301, Manager, provides explanation regarding the board's determinations regarding delegated authority for the manager.

The new sections are necessary as a result of the passage of Tex. H.B. 28, 78th Leg., 3rd C.S. (2003), which provides that the Department of Public Safety shall administer the Act through the Private Security Board, and Tex. H.B.1, 78th Leg., R.S. (2003), art. IX, §11.20 which authorizes assessment of additional Texas Online Authority fees.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect, there will not be an additional estimated cost to the state as a result of enforcing or administering the rules. There is no additional estimated cost to local government as a result of enforcing or administering the rules. There are no estimated reductions in cost to the state and to local governments as a result of enforcing or administering the rules.

Mr. Haas also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the administration of the Private Security Board rules and regulations. Further, the benefit to the state will also include the new assessment for the Texas Online authority.

There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses for the rules that have been repealed from Title 22 and proposed as new rules to Title 37 of the Texas Administrative Code and readopted. The costs of compliance for small businesses, micro-businesses and large businesses are the same.

However, there is an economic cost of compliance for new §35.231 and §35.232. The economic cost of compliance for the new sections is the actual cost of the online assessment as stated in the rule. The costs of compliance for small businesses, micro-businesses and large businesses are the same.

The proposed rules will not affect private real property. The proposed rules do not fall within the definition of a major environmental rule.

Comments on the proposal may be submitted to Cliff Grumbles, Texas Department of Public Safety, Regulatory Licensing Service, P.O. Box 4087, Austin, Texas 78773-0240 (512) 424-7711. Written comments will be accepted regarding these proposed rules for 30 days after the date of publication.

SUBCHAPTER A. DEFINITIONS

37 TAC §35.1

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art. VIII, Section 4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.1. Definitions.

The following words or terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

(1) Client--Any person, individual, firm, association, company, partnership, corporation, nonprofit organization, institution, or similar entity, having a contract which authorizes services to be provided in return for financial or other considerations.

(2) Conflict of interest--A conflict or the appearance thereof, between the private interests and public obligations of an individual, organization, or other legal entity authorized to conduct business pursuant to the Act.

(3) Board--Means the members appointed by the Governor of Texas to serve as the governing body of the Texas Private Security Board or the staff serving the administration/enforcement needs of that entity.

(4) Contract--An agreement between a person or company licensed under this Act and a client. Such contracts may be oral or written, or in any combination thereof.

(5) Conviction--Any final adjudication of guilt, whether pursuant to a plea of guilty or nolo contendre, or otherwise, and any deferred or suspended sentence or judgment, community supervision, or pre-trial diversion.

(6) Curriculum--The collective, written documentation of the material content of a training course, or any particular phase of training prescribed by the Act, minimally consisting of course objectives, student objectives, lesson plans, training aids, and examinations.

(7) Licensee--Any person defined in the Act that has been granted a license, registration or security officer commission or has filed an application for a license, registration or security officer commissioned by or with the Texas Private Security Board.

(8) Act--Title 10, Chapter 1702, Texas Occupations Code as amended by the Texas Legislature.

(9) Manager--Means the manager of the Texas Private Security Bureau.

(10) Shareholder--Means any individual holding stock in a licensee who is actively involved in the normal course of operation and business of the licensee and shall not include those individuals who hold stock in the licensee solely for the purposes of investment.

(11) Advertising--Means the direct solicitation for business which requires a license under the provisions of this Act and involving more than a mere listing of a licensee's name, address and telephone number.

(12) Undercover Agent--A person as defined under §1702.240 of the Act, requiring protected identity, during the course and scope of a specific, ongoing, investigation.

(13) State--means the State of Texas or any political subdivision thereof.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404099
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER B. PROHIBITIONS

37 TAC §§35.11 - 35.14

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.11. Fraudulent Application Prohibited.

Applications submitted to the board are government documents and/or records. A fraudulent application for a license, registration or security officer commission pursuant to the Act is a criminal offense. Applicants that willfully make false statements in making applications for licenses, registrations, or security officer commissions pursuant to the Act, or otherwise commit a violation in connection with such application, will be subject to prosecution.

§35.12. Permitting or Allowing Violations.

Any person who has applied for or been issued a license, registration, security officer commission, instructor approval, school approval, or letter of authority, shall not knowingly permit or allow any person to violate a provision of the Act, rule, or any criminal statute.

§35.13. Return of Equipment.

Licensees, registrants or commissioned security officers shall surrender immediately on demand or not later than the seventh day after termination of employment, any uniform, badge or other item of equipment owned by the employer or provided by the employer issued to the licensee, registrant or commissioned security officer by an employer.

§35.14. Good Standing.

No license, registration, security officer commission or school approval shall be issued or renewed unless the licensee, registrant or commissioned security officer is in good standing with the board. Good standing includes, but is not limited to, compliance with Chapter 1702, Texas Occupations Code and these rules, no default on a student loan with the Texas Guaranteed Student Loan Corporation, a good standing of account status with the Comptroller of Public Accounts, and the payment in full of all administrative penalties assessed against the licensee, registrant, school or commissioned security officer. The manager has the discretion to waive the payment in full of all administrative penalties requirement for license renewal.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404100
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER C. STANDARDS

37 TAC §§35.31 - 35.40

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules

and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.31. Complaint Limitation.

The board shall not accept a complaint against a licensee or an employee if the complaint is filed more than two years after the alleged violation date, except in matters that relate to conviction for a Class B offense or greater or a material misstatement in an application.

§35.32. Date of Licensing, Certification or Acknowledgement.

If an application or written notification is required, the date of licensing, certification, or acknowledgment by the board will be either the receipt date or the date the complete application or written notification is accepted for processing, whichever is later.

§35.33. Certificate of Installation.

(a) For purposes of interpreting the term "exterior structure opening" in §6 (a) (2) (A), Texas Insurance Code, that term shall mean all exterior doors, windows, or other openings into a structure greater than 96 square inches with the smallest dimension exceeding six inches; provided however, that no opening is an "exterior structure opening" if it was designed and installed to be unmovable or inoperable and has not been reconstructed to be movable or operable. A garage door is not an exterior structure opening if all other exterior structure openings from the garage into the structure are contacted.

(b) Any alarm system company may issue a certificate of installation pursuant to §1702.065 of the Texas Occupations Code.

§35.34. Standards of Conduct.

(a) Licensees shall carry out fully any contract for services entered into with a client except for reasons deemed to be unlawful.

(b) Licensed companies may use the phrase "Licensed by the Texas Private Security Board" on stationary, business cards, and in advertisements, but no licensee shall have a badge, shield or insignia as part of any uniform, identification card or markings on a motor vehicle containing the State Seal of Texas, except those identification and license items that are prepared or issued by the board. No licensee shall use the State Seal of Texas or the seal of the Department of Public Safety to advertise or publicize a commercial undertaking.

(c) No licensee shall have a badge, shield or insignia as part of any uniform, identification card or markings on a motor vehicle containing the Flag of the State of Texas, except those identification and license items that are prepared or issued by the board. No licensee shall use the Flag of the State of Texas to advertise or publicize a commercial undertaking.

(d) Licensees will make copies of contracts with clients available to board investigators when served with a subpoena signed by the investigator for copies of said contracts if a written contract was utilized.

(e) Commissioned security officers or personal protection officers shall carry only a firearm of the category with which they have been formally trained and of which training documentation is on file with the board. Firearm categories will be shown on the individual's registration card and will be:

(1) SA: any handgun, whether semi-automatic or not,

(2) NSA: handguns that are not semi-automatic,

(3) STG: any shotgun.

(f) No commissioned security officer or personal protection officer shall carry an inoperative, unsafe, replica or simulated firearm while in the course and scope of their employment.

(g) No commissioned security officer or personal protection officer shall brandish, point, exhibit, or otherwise display a firearm at anytime, except as authorized by law.

(h) The discharge of a firearm while in the performance of their duty by any person registered, or commissioned by a licensee shall be reported to the Austin office of the board. Notification of the discharge of a firearm shall be in writing within 24 hours of the incident, and shall be faxed by the licensee, or manager. The fax shall be addressed to the manager of the bureau at (512) 424-7728. The fax shall include:

(1) name of the person discharging the firearm;

(2) name of the employer;

(3) location of the incident;

(4) a brief narrative of what happened;

(5) whether death, personal injury or property damaged resulted; and

(6) whether the incident is being or was investigated by a law enforcement agency.

(i) No licensee shall engage in any business activity in violation of §38.11 or §38.12 of the Texas Penal Code (Barratry and Solicitation of Professional Employment.)

(j) Licensees shall not perform any service regulated by the board if a Letter of Summary Suspension or Letter of Summary Denial has been forwarded in accordance with the Act and these rules. After Summary Suspension or Summary Denial, a Letter of Reinstatement must be received by the licensee prior to performing any services regulated by the board.

(k) All licensees, if arrested, charged, or indicted for a criminal offense above the level of Class C misdemeanor shall within 72 hours notify their employer, who shall then notify the board by fax at 512-424-7729 or in writing at the Austin office of the board within 72 hours of notification by licensee, including the name of the arresting agency, the offense, court, and cause number of the charge or indictment, if any.

(l) All licensees shall report any name changed by marriage, divorce or other reason to the board within 30 days of the effective date of change. The notice of the change shall be in writing, and shall include a certified copy of the legal document ordering the name change.

(m) No licensee shall engage in conduct while in the course, scope or performance of their duties that constitutes a Class C misdemeanor or greater offense as provided in the Texas Penal Code, Alcoholic Beverage Code, or Health and Safety Code.

(n) When an employee of a licensee is terminated for any conduct as described in §1702.361 of the Act, the licensee shall notify the board of such conduct within 14 days of termination. The notification shall be mailed to the board, to the attention of the Criminal Investigation division. The notification shall include but not be limited to:

(1) a completed board complaint form (form#022); and

(2) any and all documents or evidence concerning the alleged offense.

§35.35. Standards of Service.

(a) In accordance with subsection (c) of this section, a licensee shall inform each client he is entitled to receive a written contract that contains the fee arrangement with necessary information covering services to be rendered.

(b) A written contract for services required to be licensed under the Act shall be furnished to a client within seven days after a request is made for such written contract. The written contract shall contain the fee arrangement, with the necessary information covering services to be rendered.

(c) A written contract for services requiring a license under the Act shall be dated and signed by the owner, manager, or a person authorized by one or either of them to sign written contracts for the licensed company.

(d) Each licensee that has a contract to provide services licensed by the board within seven days after entering into a contract for services regulated by the board with another licensee shall:

(1) notify the recipient of those services of the name, address, and telephone number, and individual to contact at the company which purchased the contract;

(2) notify the recipient of services at the time the contract is negotiated that another licensed company may provide any, all or part of the services requested by sub-contracting or outsourcing those services; and

(3) if any of the services are sub-contracted or outsourced to a licensed third party, the recipient of services must be notified of the name, address, phone number and license number of the company providing those services.

§35.36. Consumer Information.

(a) A licensee shall notify consumers or recipients of services of the name, mailing address, and telephone number of the bureau on each written contract for services.

(b) A licensed company must display prominently in the principal place of business and any branch office, a sign containing the name, mailing address, and telephone number of the bureau, and a statement informing consumers or recipients of services that complaints against licensees can be directed to the bureau.

(c) Signs required to be displayed in the place of business of a licensed company shall be obtained from the bureau.

§35.37. Information Shown in Advertisements.

Any advertisement by a licensee shall include:

(1) the company name and address as it appears in the records of the board; and

(2) the license number of the licensee as issued by the board.

§35.38. Standards of Reports.

(a) At the time a contract for services requiring a license under the Act is negotiated, each client shall be informed that he or she is entitled to receive a written report concerning services rendered for which a fee has been tendered by a licensed company.

(b) A written report shall be furnished by the licensed company to the client within seven days after a written request is received from the client.

§35.39. Uniform Requirements.

(a) Each commissioned security officer shall, at a minimum, display on the outermost garment the name of the company under whom the commissioned security officer is employed, the word "Security" and identification which contains the last name of the security officer.

(b) The name of the company and the word "Security" shall be of a size, style, shape, design, and type which is clearly visible by a reasonable person under normal conditions.

(c) Each noncommissioned security officer shall display in the outermost garment in style, shape design and type which is visible by a reasonable person under normal conditions identification which contains:

(1) either the name or board-approved logo of the company under whom the security officer is employed, or the name or the board-approved logo of the business entity with whom the employing company had contracted;

(2) the last name of the security officer; and

(3) the word "Security."

(d) No licensee shall display a badge, shoulder patch, logo or any other identification which contains the words "Law Enforcement" and/or similar word(s) including, but not limited to: agent, enforcement agent, detective, task force, fugitive recovery agent or any other combination of names which gives the impression that the bearer is in any way connected with the federal government, state government or any political subdivision of a state government.

(e) A reserve law enforcement officer who has made application for or who has been issued a registration as a non-commissioned security officer or has been issued a security officer commission by the Texas Private Security Board under a licensed security services contractor or a letter of authority may wear the official uniform of that agency while working private security only when:

(1) the chief administrator of the appointing law enforcement agency has the authority to appoint reserve peace officers and a reserve peace officer license has been issued by the Texas Commission on Law Enforcement Officer Standards and Education;

(2) the reserve law enforcement officer has written permission to wear the official uniform of the appointing law enforcement agency;

(3) the written authorization must be signed and dated by the chief administrator of the appointing law enforcement agency and shall be maintained for inspection by the Texas Private Security Board at the principal place of business or branch office of the licensed security service contractor or letter of authority;

(4) the reserve is wearing the official uniform of the appointing agency that clearly identifies that agency and is not wearing a generic peace officer uniform;

(5) the reserve peace officer meets the definition of the Internal Revenue Service as an employee of the licensed security service contractor or letter of authority;

(6) the licensed security services contractor or letter of authority has not accepted any monies or remuneration to allow the reserve peace officer to work under the license of the security services contractor or letter of authority;

(7) the reserve peace officer has not terminated employment with the appointing agency; and

(8) the reserve peace officer has not been summary suspended or summary denied or revoked by the Texas Private Security Board.

(f) A reserve law enforcement officer, while working as a noncommissioned security officer or commissioned security officer for a licensed security services contractor (guard company), private business letter of authority, or governmental letter of authority, shall at all times carry on their person the noncommissioned security officer registration pocket card or security commissioned pocket card issued by the Texas Private Security Board and their official appointing agency's identification; and shall present the same upon request to any individual or law enforcement officer requesting them to identify themselves.

(g) A regular peace officer who maintains full-time employment, and meets the requirements of §1702.322 of the Act, may wear the uniform of the licensed security services contractor (guard company), private business letter of authority, or governmental letter of authority or the official police officer uniform of their appointing law enforcement agency while working private security in Texas.

§35.40. Confidential Information.

(a) Information that is contained in reports or records held by a licensee, registrant or commissioned security officer that concerns the location of an alarm system, the name of the occupant of an alarm system location, or the type of alarm system or any information pursuant to business activities regulated under Chapter 1702, Texas Occupations Code, is confidential and shall only be disclosed to the board, a law enforcement agency or as otherwise required by state law or court order.

(b) This section does not apply to and does not require or authorize the licensee, registrant or commissioned security officer to give a client notice of:

(1) a demand or inquiry from a municipal, state or federal government agency authorized by law to conduct an examination of certain records;

(2) a record request from a municipal, state, or federal government agency instrumentally under statutory or administrative authority that provides for, or is accompanied by, a specific mechanism for discovery and protection of a client record;

(3) a record request from or report to a governmental agency arising out of the investigation or prosecution of a criminal offense;

(4) a record request by a duly appointed receiver of the client;

(5) an investigative demand or inquiry from a state legislative investigative committee; or

(6) an investigative demand or inquiry from the attorney general of this state as authorized by law other than the procedural law governing discovery in civil cases.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404101
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER D. SUMMARY SUSPENSION

37 TAC §35.51

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.51. Stay of Summary Suspension.

(a) Within three (3) working days after receipt of notice of a summary suspension for a Class B misdemeanor or equivalent offense only, an individual may request a stay of summary suspension by submitting a written request to the manager by mail or by fax at 512-424-7728.

(b) The written request for a stay of summary suspension must include all of the following:

(1) the full name, mailing address, telephone number, fax number, social security number, license number, position with the company, and date of birth of the individual making the written request;

(2) the arrest date, time, and location, and the offense title, arresting officer's name and department relating to the offense for which the stay request is made;

(3) a statement as to whether the individual making the request for a stay of summary suspension was in the performance of an activity or duties involved in the operation of the individual's company or activities for which a license, board or registration would be required;

(4) a detailed account of the circumstances leading up to, and resulting in the requesting individual's arrest;

(5) an explanation as to why the summary suspension of the individual making the request for a stay would place an undue hardship on the company's continued operation;

(6) a statement providing that the information in the written request for a stay of summary suspension is true and correct; and

(7) any additional information requested by the manager.

(c) Upon receiving a written request for a stay of summary suspension, the manager may, at his discretion, consider the request under the following conditions:

(1) the Class B misdemeanor offense does not involve violence, theft or fraud, as outlined in Board Policy 2001-01;

(2) circumstances of the individual's arrest; and

(3) any other information as may be required by the manager.

(d) If, in the discretion of the director, a stay of the summary suspension is granted, the requesting individual will be notified in writing by the manager within two working days after the request is received by the manager.

(e) No stay of summary suspension shall be effective until and unless the requesting party has received written confirmation of the stay from the manager.

(f) No stay of summary suspension shall remain in effect beyond the date of the next called meeting of the board following the request for a stay at which time the board members will consider the disposition of the matter. No continuance shall be granted.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404102
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER E. GENERAL ADMINISTRATION AND EXAMINATIONS

37 TAC §§35.61 - 35.75

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.61. Written Examination.

(a) All manager or supervisor applicants shall pass a written examination administered by the board.

(b) The passing grade of a written examination shall be 75% of the total points possible.

(c) The written examination shall cover all sections of the Act and these rules.

(d) Before being administered the written examination, the manager or supervisor applicant must:

(1) present a valid identification card which contains a photograph upon request;

(2) report 30 minutes prior to the examination time; and

(3) comply with all the written and verbal instructions of the proctor.

(e) During an examination session, a manager or supervisor applicant shall not:

(1) bring any books, or other written material related to the content of the examination into the examination room;

(2) refer to, use, or possess any such written material in the examination room;

(3) give or receive answers or communicate in any manner with another examinee during the examination;

(4) communicate any of the content of an examination to another at any time;

(5) steal, copy, or in any way reproduce any part of the examination;

(6) engage in any deceptive or fraudulent act either during an examination or to gain admission to it;

(7) solicit, encourage, direct, assist, or aid another person to violate any provision of this section; or

(8) disrupt the examination session.

(f) The time limit for examination will be determined at the discretion of the manager.

§35.62. Reexamination Fee.
Any examination, other than the one examination authorized by payment of the original license fee, shall be considered a reexamination and the reexamination fee shall be $100.00.

§35.63. Photographs.
Photographs required by the Act shall be in color and shall show a facial likeness of applicants. Photographs placed on pocket cards shall have been taken within six months prior to the issuance of the card and be 1" x 1 1/4" in size.

§35.64. Fingerprint Cards.

(a) All fingerprint cards required by the Act shall be fingerprint cards approved by and obtained from the board. Except as provided for in §35.20 of this chapter (relating to Fingerprints), two fingerprint cards shall be submitted for each applicant. All blank spaces shall be completed and the cards shall be signed by the applicant and the person taking the prints.

(b) Applicants who have had fingerprints rejected on three separate attempts may appeal to the manager in writing for a waiver, which the manager may grant under conditions deemed appropriate.

§35.65. Assumed Name Requirements.

(a) All applicants doing business under an assumed name shall submit a certificate from the county clerk of the county of the applicant's residence showing compliance with the assumed name statute.

(b) Corporations using an assumed name shall submit a certificate from the Texas Secretary of State and the county clerk of the county of the applicant's residence showing compliance with the assumed name statute.

§35.66. Verification of Corporations.
Applicants that are corporations shall submit a current certificate of existence or a certificate of authority from the Texas Secretary of State.

§35.67. Assignment Under Class.
When a Class A license or a Class B license is assigned to a Class C license, a fee in the amount of the difference in the cost of the licenses shall be paid to upgrade the license. There shall be no refund when a Class C license is assigned to a Class A or Class B license. This fee is in addition to the regular assignment of a license fee.

§35.68. Procedure for Termination of License or Branch Office License.

(a) An owner or qualified manager shall:

(1) submit a written request to the board to terminate the license; and

(2) not be required to pay a fee to terminate a license.

(b) Once terminated, a license shall not be reinstated.

§35.69. Assignment to Spouse or Heirs.

The board may approve the assignment of a license to the spouse or heir(s) of a deceased provided:

(1) a certified copy of the owner's death certificate is filed with the board;

(2) a certified copy of the Will, Order Admitting Will to Probate, Letters of Testament, or Order of Heirship is filed with the board; and

(3) in the case of the death of a qualified manager, that a replacement manager is qualified within 90 days.

§35.70. Fees.

(a) The fees submitted to the board shall be the same as provided in §1702.062 of the Texas Occupations Code unless otherwise specified in Article V of the General Appropriations Act in accordance with §316.043 of the Texas Government Code, whether for an original application, renewal, reciprocal or provisional license, registration or security officer commission.

(b) Fees collected by the board are not refundable or transferable.

(c) Payment of fees shall be made by licensed company check, cashier's check, or money order or by an attorney on behalf of his client paid on the attorney's trust fund account.

(d) Original fees shall not be prorated. The full license fee shall accompany all applications for original license.

§35.71. Operation without Manager.

When a qualified manager or supervisor of a license has terminated his position, and the board has been timely notified of the termination in writing within 14 days of the termination, the business shall be operated by an owner, officer, partner or shareholder. No license shall be operated without a manager for a period exceeding 60 days after the date of the previous manager's termination.

§35.72. Fingerprint Submission.

All applicants for any license, registration, security officer commission, permit or approval issued by the board shall submit two sets of classifiable fingerprints on fingerprint cards obtained from the board along with any required fees to the board for the purpose of a criminal history check.

(1) One set of classifiable fingerprints shall be submitted to the Texas Department of Public Safety Crime Records Service.

(2) One set of classifiable fingerprints shall be submitted to the Federal Bureau of Investigation.

§35.73. Change of Expiration Date of License.

A licensee desiring to change the expiration date of his license may make such a request to the board during the renewal period as defined in §1702.302 of the Act.

(1) The expiration date desired shall be the last day of any of the 12 months in a calendar year.

(2) The renewal fee shall be prorated on a monthly basis.

§35.74. Reapplication after Revocation.

An applicant who has had a license or registration revoked by the board is not eligible to re-apply for any license or registration issued under this Act unless the fifth anniversary of any such revocation has occurred.

§35.75. Private Security Consultant.

(a) Effective September 1, 2001, any applicant for private security consultant or any person renewing their registration as a private security consultant shall meet all requirements under subsection (b) of this rule.

(b) In addition to compliance with all other applicable board rules, a private security consultant shall:

(1) meet all requirements under §§1702.110, 1702.113, 1702.117, and 1702.124 of the Act as appropriate;

(2) not have engaged in conduct that is grounds for disciplinary action under §1702.361(b) of the Act; and

(3) provide to the manager or his designee, proof that prior to the date of application, the applicant had two years of lawful experience in the security services field. The experience shall be determined by the manager, or his designee, to be adequate to qualify the applicant to engage in the business of a private security consultant.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404103
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §§35.91 - 35.96

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.91. Administrative Hearing Procedures.

Hearings and appeal procedures related to all administrative hearings conducted by the board are governed by Government Code, Chapter 2001.

§35.92. Service of Notice in Non-Rulemaking Proceedings.

(a) Chapter 2001 of the Texas Government Code, Chapter 1702 of the Texas Occupations Code, and these rules govern notice of any summary suspension, summary denial, imposition of penalty, preliminary hearing, pre-hearing conference, hearing before the board, notice of a contested case hearing before the State Office of Administrative Hearings (SOAH) or orders of the board.

(b) All licensees, letters of authority, schools, permit holders, letters of approval, letters of authorization, branch office licenses, or similar entity including any applicants for any of the above shall at all times maintain on file with the board their current mailing and principal place of business address. Notification to the board shall be made in writing and received in the Austin office of the board within 14 days of the date of the change of address.

(c) All registrants, commissioned security officers, alarm response runners, alarm salespersons, security officers, or any applicants for any of the above shall at all times maintain on file with the board their current residence address. Notification to the board shall be made in writing and received in the Austin office of the board within 14 days of the date of the change of address.

(d) The board may serve the notice of any summary suspension, summary denial, preliminary hearing, pre-hearing conference, hearing before the board, notice of a contested case hearing before SOAH or orders of the board, by mailing the notice by certified or registered mail to the last known address on file with the board at the time of the notice of those persons shown in subsection (b), by mailing the notice by certified or registered mail to the last known residence address on file with the board of those persons listed in subsection (c), or otherwise delivering the notice to such person. Additionally, the board will mail a copy of the notice of hearing by regular mail to any person that was mailed a notice by certified or registered mail. Service by mail is complete upon deposit of the document enclosed in a postage paid, properly addressed envelope in a U.S. Post Office or official depository under the care and control of the U.S. Postal Service.

§35.93. Penalty Range.

The board shall develop, utilize, and publish guidelines for administrative penalties and ranges of violations of the Act and these rules.

§35.94. Default Judgments.

In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Private Security Act or these rules, the board has the authority to assess, in addition to the penalty imposed, costs of the administrative hearing.

§35.95. Trial on the Merits.

In cases brought before SOAH, in the event that the respondent is adjudicated to be in violation of the Private Security Act or these rules after a trial on the merits, the board has authority to assess, in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that are necessary for the preparation of the board's case including the costs of any transcriptions of testimony.

§35.96. Appeal.

The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404104
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER G. UNIFORMED MOTORCYCLE ESCORT SERVICE

37 TAC §§35.111 - 35.117

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.111. Escort License Required.

All guard companies, as defined by Title 10, Chapter 1702 Subchapter G, §1702.161, Texas Occupations Code, shall register any employee who wears a uniform commonly associated with private security or law enforcement prior to assigning employee to any uniformed escort duty. Pursuant to Attorney General Opinion No. GA-008(2003), this subchapter does not apply to a uniformed motorcycle escort service that performs only traffic control functions and traffic safety functions in connection with escorting a funeral procession or other motorcade.

§35.112. Approved Uniforms.

The uniform, badge and shoulder patch worn by an escort service shall be approved by the board during the application process. No uniform, badge, or shoulder-patch other that those approved by the board shall be worn.

§35.113. Insurance.

An insurance policy in the amount specified by Chapter 1702 of the Act shall remain in effect for the term of any license. A copy of proof on the approved board form shall be on file with the board prior to the issuance of a license.

§35.114. Driver License Required.

All uniformed employees shall have a valid Class M Driver License as described in Subchapter D §521.084 of the Texas Transportation Code.

§35.115. Restrictions on Lights.

All uniformed motorcycle escorts shall comply with §547.305(c), Texas Transportation Code, and may not operate a motor vehicle equipped with a red, white or blue beacon, flashing, or alternating light unless the operator is a peace officer commissioned by the Texas Commission on Law Enforcement Officers Standards and Education (TCLEOSE).

§35.116. Arrest for Conviction of Driving While Intoxicated.
Any applicant or registrant may not be assigned to or be employed by a motorcycle escort service if that individual has been convicted of Driving While Intoxicated (DWI) during the five years preceding licensure or application to become licensed. Any registrant or licensee who is arrested for DWI shall be subject to immediate summary suspension.

§35.117. Police Officers May Furnish Escorts.
Nothing in this rule shall be construed to prohibit regularly employed officers of the state or any political subdivision of the state from furnishing uniformed motorcycle escort services when assigned by their respective departments or when providing a service in compliance with §1702.322 of the Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404105
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER H. GUARD DOGS

37 TAC §35.131

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.131. Welfare Requirements.
Each guard dog company and investigations company using dogs to conduct investigations licensed by the board shall comply with the following rules:

(1) All pens, spaces, rooms, runs, cages, compartments or hutches where guard dogs are housed, exercised, trained or placed shall be kept clean and maintained in a sanitary condition. Excreta shall be removed as often as necessary to prevent contamination of the inhabitants and reduce disease hazards and odors. Adequate shelter shall be provided to protect animals from any form of overheating or cold or inclement weather.

(2) All animals shall be fed at least once a day except as otherwise might be directed by a licensed veterinarian. The food shall be free from contamination, wholesome, palatable, and of sufficient quality and nutritive value to meet the normal daily requirements for the condition and size of the animal. Food receptacles shall be accessible to all animals and shall be located so as to minimize contamination by excreta. Feeding pans shall be durable and kept clean and sanitary. Disposable food receptacles may be used but must be discarded after each feeding. Self-feeders may be used for the feeding of food, and shall be kept clean and sanitary to prevent molding, deterioration, or caking of feed.

(3) All animals shall be furnished ample water. If potable water is not accessible to the animals at all times, it shall be offered to them at least twice daily for periods of not less than one hour, except as directed by a licensed veterinarian. Watering receptacles shall be kept clean and sanitary.

(4) All animals shall be vaccinated by a licensed veterinarian against rabies by the time they are four months of age and within each subsequent 12-month interval thereafter. Official rabies vaccination certificates issued by the vaccinating veterinarian shall contain certain standard information as designated by the Texas Department of Health. Information required is as follows:

(A) owner's name, address and telephone number;

(B) animal identification, including species, sex, age (three mo. to 12 mo., 12 mo. or older), size (lbs.), predominant breed, and colors;

(C) vaccine used, producer, expiration date and serial number;

(D) date vaccinated;

(E) rabies tag number; and

(F) veterinarian's signature and license number.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404106
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER I. COMMISSIONED SECURITY OFFICERS

37 TAC §§35.141 - 35.146

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B.

1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.141. Requirements for Issuance of a Security Officer Commission by the Board.

(a) An applicant shall have successfully completed a board approved 30-hour training program and be awarded a certificate of completion from a board approved security officer training school.

(b) The licensed company shall submit and maintain on file with the board color photographs of the company uniform(s) shown in full length and as worn by its security officer employees, size 8 inches by 10 inches desired, 3 inches by 5 inches minimum acceptable. The photographs shall show the entire uniform, including a close-up of the badge, shoulder patch, and nameplate.

§35.142. Application for a Security Officer Commission.

(a) A completed security officer commission application shall be submitted on the most current version of the form provided by the bureau. The application shall include:

(1) the required fee;

(2) at least two sets of fingerprints on fingerprint cards obtained from the board and the $25.00 FBI Fingerprint Check Fee;

(3) a copy of the applicant's Level I and Level II certificate of completion; and

(4) a copy of the certificate of completion provided to the applicant from a board approved Level III training school;

(5) Texas Driver License and or Texas Identification Certificate issued by the Texas Department of Public Safety.

(6) Applicants who are not United States citizens shall submit a copy of their current alien registration card.

(b) Incomplete applications cannot be processed and will be returned for clarification or missing information.

(c) The employer shall affix one recent color photograph to the pocket card when received from the board. The photograph shall be 1" x 1 1/4".

§35.143. Drug Testing Required for Commissioned Security Officers.

(a) At least 15% of a licensee's commissioned security officers at the main office and branch offices must submit to a commercially available means of drug screening, or be examined by a licensed physician each quarter and be declared in writing to show no trace of drug dependency or illegal drug use.

(b) Any drug test performed under subsection (a) of this section shall include tests for at least methamphetamine, THC and other cannibinoids, cocaine, opiates and amphetamines.

(c) No licensee shall place on duty any commissioned security officer who tests positive for any drug(s) or substance(s) until a successive test indicates no trace of the drug(s) or substance(s) for which the tests are performed.

§35.144. Violations by Commissioned Security Officers.

In additional to other rules, a commissioned security officer shall not:

(1) perform commissioned security officer duties for any person(s) other than the employer as indicated in the board records;

(2) carry a pocket card to which the security officer has failed to affix his signature and photograph to the card issued by the board;

(3) fail to timely surrender his card upon written notice served by the board;

(4) possess or use any security officer commission which has been altered; or

(5) deface or allow improper use of his security officer commission.

§35.145. Carrying of a Security Officer Commission.

A private security officer who has been issued a security officer commission by the board shall carry it while on duty and going to and from the place of assignment and shall present it upon request by a peace officer or to an investigator employed by the board.

§35.146. Renewal of Security Officer Commission.

The renewal period for security officer commissions shall be the calendar month prior to the expiration of the security officer commission.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404107
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER J. PERSONAL PROTECTION OFFICERS

37 TAC §§35.161 - 35.163

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.161. Requirements for Issuance of a Personal Protection Authorization.

(a) An applicant for personal protection authorization shall:

(1) submit a written application for a personal protection authorization on a form prescribed by the board;

(2) be at least 21 years of age;

(3) have a valid security officer commission issued prior to applying for a personal protection authorization;

(4) submit proof that the applicant has successfully completed the Personal Protection Officer Course taught by a board approved personal protection officer instructor; and

(5) submit proof of completion of the Minnesota Multiphasic Personality Inventory test or equivalent (proof of completion of the Minnesota Multiphasic Personality Inventory test shall be on the form of the board approved Declaration of Psychological and Emotional Health and shall be signed by a licensed psychologist).

(b) A personal protection officer may transfer his registration as a personal protection officer to another employer if the personal protection officer:

(1) has transferred his security officer commission to the new employer; and

(2) submits the appropriate form and transfer fee to the board's Austin office within 14 days of the transfer of employment to the new employer.

§35.162. Requirements for Personal Protection Officer Employer.

Personal protection officer employers shall:

(1) issue the personal protection officer authorization pocket card issued by the board to the Personal Protection Officer when received from the board and affix a color photograph to the pocket card;

(2) maintain on file for board inspection, contracts for Personal Protection Officer Services;

(3) maintain current records on all persons issued a personal protection authorization on file for board inspection including the current residence of the personal protection officer and the personal protection officer's name, address and telephone number; and

(4) upon receipt of a subpoena, provide the name of the client being protected and contract information; and the hours and dates of duty assignment.

§35.163. Violations of the Act by Personal Protection Officers.

In addition to other rules, a personal protection officer shall not:

(1) perform personal protection officer duties for any person(s) other than the employer indicated in the board records;

(2) fail to affix his or her signature and color photograph to the personal protection officer pocket card issued by the board;

(3) fail to timely surrender the personal protection officer pocket card upon written notice served by the board or his employer;

(4) while in the course and scope of his or her employment as a personal protection officer, provide or engage in any other service regulated by the Act or these rules other than providing personal protection from bodily harm to one or more individuals;

(5) fail to conceal his firearm on his person;

(6) fail to carry on his or her person, the issued security officer commission and personal protection authorization while performing the officer's duties as a personal protection officer; or

(7) fail to present his or her security officer commission and personal protection authorization card upon request made by a peace officer or investigator employed by the board.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404108

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER K. LETTERS OF AUTHORITY

37 TAC §35.171, §35.172

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.171. Requirements for Issuance of a Private Business Letter of Authority.

(a) The security department of a private business that protects only the property of that private business may apply for and upon approval, receive a letter of authority for purposes of complying with §1702.223 of the Act.

(b) A security department of a private business shall not provide guard company services to a third party for contracted compensation.

(c) A private business letter of authority shall:

(1) be obtained by a private business entity that employs commissioned or noncommissioned security officers to protect only its own property;

(2) register any unarmed security officers who come into contact with the public while protecting only the property of the private business in compliance with the provisions of the Act and these rules;

(3) be issued a number with each private business letter of authority approved by the board and this number shall be used on all applications submitted to the board;

(4) be valid for one year and shall be renewed upon receipt of a board approved renewal application and the renewal fee;

(5) be renewed during the calendar month preceding the month of expiration;

(6) qualify a manager who meets the requirements set forth in §1702.113 and §1702.117 of the Act as they pertain to a security services contractor; and

(7) maintain on file with the board a certificate of proof of insurance as prescribed in §1702.124 of the Act.

(d) Holders of a letter of authority shall be subject to all rules established under the Act unless specifically exempted by the director.

§35.172. Requirements for Issuance of a Governmental Letter of Authority.

(a) A governmental letter of authority shall be:

(1) obtained by a governmental entity that employs commissioned security officers;

(2) issued a number with each governmental letter of authority approved by the board and this number shall be used on all applications submitted to the board;

(3) valid for one year and may be renewed upon receipt of an acceptable renewal application; and

(4) renewed during the calendar month preceding the month of expiration.

(b) Holders of a letter of authority shall be subject to all rules of the Act and board, unless specifically exempted by the manager, and subject to review by the board at the next regular meetings.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404109
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER L. GENERAL REGISTRATION REQUIREMENTS

37 TAC §§35.181 - 35.186

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.181. Employment Requirements.

(a) A registrant or commissioned security officer of a licensed company must meet the specifications defined by the Internal Revenue Service as an "employee" or "contract laborer."

(b) A licensee shall not make application for any person knowing that the conditions of that person's employment do not conform to Subsection (a) of this section.

(c) In the public interest and to ensure the good conduct of applicants for a registration or a security officer commission, they shall meet the requirements of §1702.113 of the Act.

(d) No licensee shall place on duty any employee who tests positive for any drug(s) or substance(s) until a successive test indicates no trace of the drug(s) or substance(s) for which the tests are performed, unless such medication is being taken under the direction of a licensed physician.

§35.182. Fingerprints.

(a) An applicant for a registration, security officer commission or license under the provisions of this Act whose registration or board license has been expired for a period of time less than six months is not required to submit new fingerprint cards when making application.

(b) Notwithstanding §35.61 of this chapter (relating to Registration Deadline) a licensee shall obtain the fingerprints of an applicant for a registration or security officer commission prior to assigning the applicant to duty.

§35.183. Exhibit Pocket Card.

Any person who has been issued a registration pocket card shall carry the pocket card on or about his person while on duty and shall present same upon request from a peace officer or to an investigator employed by the board.

§35.184. Licensed Company Responsible for the Registration of Employees.

It shall be the responsibility of the licensed company to register all employees required to register under the Act, with the board.

§35.185. Registration Deadline.

Any person required to be registered with the board must have their application on file with the board within 14 days after commencing employment. Failure to comply may, at the discretion of the manager, result in denial of the application.

§35.186. Registration Applications.

A completed registration application shall be submitted on the most current version of the form provided by the board. The application shall include:

(1) the required fee;

(2) at least two sets of fingerprints on cards obtained from the board and the $25.00 FBI fingerprint fee;

(3) a copy of the applicant's Level I and Level II certificate of completion;

(4) a copy of the applicant's Texas Driver License or their identification certificate issued by the Department of Public Safety; and

(5) applicants who are not United States citizens shall include a copy of their alien registration card.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404110
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER M. COMPANY RECORDS

37 TAC §§35.201 - 35.205

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.201. Employee Records.
Licensed companies shall keep records of all registered or commissioned employees. Records shall be maintained for a period of two years from the last date of employment. The following records shall be maintained:

(1) full name of employee, date of employment, position and address;

(2) Social Security Number;

(3) last date of employment;

(4) date and place of birth;

(5) one color photograph; and

(6) the results of any drug screens for commissioned security officers.

§35.202. Location of Records.
(a) Records of registered employees shall be maintained at the following locations:

(1) if a company has no branch offices, the records shall be maintained at the principal place of business; or

(2) if a company has one or more branch offices, the records shall be maintained at the branch office where the registrant or commissioned security officer is employed.

(b) A company shall notify the board of any centralization of records when a branch is closed or if records from area branch offices are centralized.

§35.203. Records to be Available for Inspection.
All records required to be kept under the provisions of the Act and these rules shall be made available for inspection by bureau staff during normal business hours.

§35.204. Pre-Employment Check.
The employer of a commissioned security officer or registrant shall exercise due diligence in ensuring that an applicant's qualifications meet the provisions of §1702.113 of the Act, prior to duty assignment.

§35.205. Records Required on Commissioned Security Officers.
The employer of a commissioned security officer shall maintain current records on all persons issued a security officer commission for board inspection. The records shall contain:

(1) current residence of the security officer;

(2) current duty assignment and location of assignment;

(3) results of any drug screens administered; and

(4) documented information on training required and provided.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404111
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER N. RECIPROCITY

37 TAC §35.221, §35.222

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.221. General Reciprocity.

(a) The board shall identify those criteria for licensing from a state with whom a reciprocal agreement has been made that meet the requirements of the Act and these rules.

(b) The board shall establish an agreement of reciprocity for use in implementing reciprocal agreements with other states. The terms of the reciprocal agreement shall be binding upon the parties thereto and shall be enforceable through the dissolution of the agreement in the event of violation of its terms.

(c) The board shall design an application form to be used by applicants for reciprocal license. The application shall contain:

(1) the applicant's name, business address and telephone number;

(2) the type of license(s) or other authorization(s) currently held by the applicant and the identifying number(s) of such license(s) or other authorization(s);

(3) the dates of licensure or other authorization(s) and expiration date of the applicant's current license(s) or other authorization(s);

(4) in the case of individual applicants, any company affiliation(s);

(5) a statement that the applicant has read, and agrees to comply with all provisions of the rules, regulations and statutes governing investigations and security contractor providers in the State of Texas;

(6) a statement that the applicant agrees to cooperate with any investigation initiated by the Texas Private Security Board;

(7) the payment of all applicable fees;

(8) any and all items or documents required under the provisions of the Act or these rules needed to complete the application as shall be specified in the reciprocal agreement with the applicant's state of license origin;

(9) an irrevocable consent that service of process, in connection with any complaint or disciplinary action filed against the applicant arising out of the applicant's investigation or security contractor activities in the reciprocating state may be made by the delivery of such process on the administrator of the originating state regulatory agency; and

(10) a statement that the applicant's investigations company or security contractor license or other authorization has not been suspended and/or revoked within a period of ten years immediately preceding that application of previously-satisfied qualifications or reciprocal licensure.

(d) An agreement to enter a reciprocal agreement with another state shall be approved by the Governor of Texas.

§35.222. Limited Reciprocity.

(a) The manager may enter into a limited reciprocal agreement with another state in compliance with Title 10, Chapter 1702.1183 of the Act permitting private investigators to enter Texas for limited periods of time.

(b) All limited reciprocal agreements will be for completion of contracts executed in the state where the investigator is licensed and in good standing.

(c) The governing board of each state/party to the agreement shall, through the signature of the department director, approve any agreement made under this provision.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404112
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER O. FEES

37 TAC §35.231, §35.232

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, § 4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.231. Subscription Fees for Renewals.
Each licensee, registrant or commissioned security officer shall pay the following fee for occupational license renewal: $3.00 for renewals from $20 to $25; $5.00 for renewals from $50 to $100; $8.00 fee for a $250.00 renewal; a $10.00 fee for a $300.00 renewal; a $10.00 fee for a $440.00 renewal; a $5.00 fee for a $100.00 renewal; and a $5.00 fee for a $55.00 renewal. This fee is in addition to the renewal fee.

§35.232. Subscription Fees for Original Applications.
Each license applicant, registrant or application for a security officer commission shall pay the following fee upon application. For an application of $250.00 an $8.00 fee; for an application of $300.00 a $10.00 fee; for an application of $440.00 a $10.00 fee; for a $55.00 application a $5.00 fee; for a $25.00 application a $3.00 fee; for a $20.00 application a $3.00 fee; for a $50.00 application a $5.00 fee; for a $100.00 application a $10.00 fee. This fee is in addition to the application fee.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404113
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER P. BUSINESS EVALUATION SERVICE

37 TAC §35.241

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.241. Business Evaluation Service.

(a) The board has determined that Chapter 1702 of the Act does not apply to a person who poses or acts anonymously as a customer or client of a business or governmental entity or is in the business of providing the services of another for the purpose of evaluating the following operations or services of the business or governmental entity:

(1) a service or product provided to a customer or client;

(2) compliance with policies and operational procedures;

(3) the appearance, cleanliness, efficiency, and other operations of the office, facility, or physical plant;

(4) the friendliness, courtesy, or appearance of an employee;

(5) the necessity or effectiveness of a training program or employee reward or other incentive program;

(6) the quality, availability, or price of goods or services; and

(7) other operations or customer services of the business or governmental entity the evaluation of which is not otherwise prohibited by this chapter.

(b) A person described by subsection (a) of this section is entitled to the exemption under the subsection only if the person:

(1) uses an evaluation tool prescribed or approved by the business or governmental entity seeking the evaluation;

(2) does not engage in the investigation or observation of an employee or agent to determine whether the employee or agent has committed a crime; and

(3) the information obtained is not intended to be used by the business or governmental entity as the sole basis for the discipline or discharge of an employee or agent.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404114
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER Q. TRAINING

37 TAC §§35.251 - 35.268

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.251. Application for a Training School Approval.

(a) An application for training school approval shall be on a form prescribed by the board to show proof that the applicant has:

(1) developed an adequate training course or is using the board's most current version training manual as its curriculum;

(2) adequate space, qualified instructors, and proper instructional material; and

(3) appointed a qualified manager who will be responsible for training.

(b) The letter of approval shall be valid for one year and may be renewed by submitting an application for renewal 30 days prior to the expiration date.

(c) An entity having a private business letter of authority or a governmental letter of authority may seek approval for a training school approval by meeting requirements of §§35.81, 35.55, or 35.56 of this chapter where applicable. A training school approval granted under this section shall be limited to training employees of the letter of authority only.

§35.252. Attendance, Progress, and Completion Records Required.

(a) A board approved training school shall have a qualified manager who shall comply with the requirements of the Act and these rules. The manager shall:

(1) issue an original certificate of completion to each qualifying student, within seven days after the student qualifies;

(2) maintain adequate records to show attendance, progress, and grades of students and maintain on file a copy of each certificate issued to students at the board approved training school; and

(3) make all required records available to investigators employed by the board for inspection during reasonable business hours.

(b) Upon renewal, any board approved training school that has not submitted applications to register its owners, officers, partners, shareholders and qualified a manager shall be required to do so before the renewal can be completed along with any applications, fees, or fingerprints that may be required for licensing.

§35.253. Board Refusal of Certificate of Completion.

The board may refuse to accept a certificate of completion from a training school upon receipt of evidence of violation of the Act or these rules involving an owner, officer, partner, shareholder, qualified manager or instructor.

§35.254. Withdrawal of Training School Approval.

The board may withdraw approval of a training school upon evidence the school has operated in violation of the Act or these rules.

§35.255. Notification of Denial or Withdrawal of a Letter of Approval.

The board, upon review and consideration of an application for training school approval, shall set forth in writing the reasons for denial or withdrawal of approval.

§35.256. Application for a Training Instructor Letter of Approval.

An application for approval as an instructor shall contain evidence of qualification as required by the board. Instructors may be approved for classroom and/or firearm training. An individual may apply for approval for one or both of these categories. To qualify for a classroom or firearm instructor approval the applicant for approval must submit acceptable certificates of training for each category. The classroom instructor and firearm certificates shall each have consisted of a minimum of 40 hours of board approved instruction.

(1) Proof of qualification as a classroom instructor shall include, but not be limited to:

(A) an instructor's certificate issued by Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE);

(B) an instructor's certificate issued by federal, state or political subdivision law enforcement academy;

(C) an instructor's certificate issued by the Texas Education Agency; and

(D) an instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university.

(2) Proof of qualification as a firearm training instructor shall include, but not be limited to:

(A) an instructor's certificate issued by the Law Enforcement Activities Division of the National Rifle Association (NRA);

(B) an instructor's certificate issued by TCLEOSE; and

(C) a firearm instructor's certificate issued by a federal, state or political subdivision law enforcement agency approved by the manager.

(3) A letter of approval from the board shall be issued to each approved instructor and shall be valid for a period of one year. The instructor's approval may be renewed during the month preceding the month in which the approval expires for a period of one year after expiration, upon application to the board and payment of the renewal fee.

(4) The board may revoke or suspend an instructor's approval or deny the application or renewal thereof upon evidence that:

(A) The instructor or applicant has violated any provisions of the Act or these rules;

(B) The qualifying instructor's certificate has been revoked or suspended by the issuing agency;

(C) A material false statement was made in the application; or

(D) The instructor does not meet the qualifications set forth in the provisions of the Act and these rules as amended.

§35.257. Training Courses.

(a) Guard Training Courses.

(1) In accordance with the Act, the following training shall be required of registrants and commissioned security officers:

(A) Level I - All registrants, and commissioned security officers including noncommissioned security officers, private investigators, branch office managers, licensed managers, alarm systems monitors, dog trainers and security consultants and excluding alarm installers, alarm salespersons, owner, officers, partners, and shareholders. A certificate indicating completion of Level I training shall be submitted to the board along with the application to register the individual within 14 days after they commence employment.

(B) Level II - All noncommissioned security officers and commissioned security officers. A certificate indicating completion of Level II training shall be submitted to the board within 14 days after they commence employment.

(C) Level III Training - shall be completed by applicants for a security officer commission and a personal protection officer authorization. A certificate indicating completion of Level III Training shall be submitted to the board along with the application to register the individual.

(2) Level I and Level II may be taught by the manager, the manager's designee or a board approved school and board approved instructor using the most current version of the respective Board Level I and Level II Training Course manuals.

(3) Level III and IV shall be taught by a board approved school and board approved instructor using the most current version of the respective Board Level III and IV manuals.

(4) Training manuals for Levels I, II, III, and IV will be prepared by bureau staff and other qualified individuals selected by the manager.

(5) The passing grade for all examinations shall be a minimum of 75% correct answers.

(b) Alarm Training Courses.

(1) In accordance with the Act, the following training shall be required of an alarm systems installer and a security salesperson:

(A) Alarm Level I - All individuals employed as an alarm systems installer or a security salesperson must hold a certification by a board approved training program to renew an initial registration. An original certificate indicating successful completion of an Alarm Level I training program shall be submitted to the board along with the proper application to renew an initial registration.

(B) The passing grade for all Alarm Level I examinations shall be a minimum of 70% correct answers.

(C) An Alarm Level I program shall be taught by a board approved alarm instructor.

(2) A board approved alarm instructor may teach board approved continuing education courses.

§35.258. Firearm Courses.

(a) In addition to the firearm qualification requirements as set forth in the Act, a firearm instructor may qualify a student by using:

(1) the Texas Department of Public Safety Practical Combat Pistol Course;

(2) the Federal Law Enforcement Training Center Practical Pistol Course;

(3) the Texas Department of Public Safety Approved Concealed Handgun Weapons Range Qualifications course; or

(4) other training as may be approved by the manager.

(b) All individuals qualifying with a firearm to satisfy the requirements of the Act or Board rules shall qualify with an actual demonstration by the individual of their ability to safely and proficiently use the category of firearm for which the individual seeks qualification.

(c) The categories of handguns are:

(1) SA: any handgun, whether semi-automatic or not; and

(2) NSA: handguns that are not semi-automatic.

(d) The category for any shotgun is STG.

§35.259. Shotgun Training.

Competency with a shotgun shall be determined by the firearms training instructor after instructing the student in the operation of a shotgun, and the satisfactory completion of the Shotgun Training requirements of §35.260 of this chapter (relating to Shotgun Training Requirements).

§35.260. Shotgun Training Requirements.

(a) Any commissioned security officer licensed by the board who, in the performance of his/her duties, has a shotgun available to assist in the protection of life or property must demonstrate competency by successfully completing the course of fire for shotgun training. The course of fire shall consist of nine rounds of nine (9) pellet "00" buckshot fired as follows:

(1) from a standing position at a distance of fifteen (15) yards, three (3) rounds of "00" buckshot in twelve (12) seconds;

(2) from a standing position at a distance of ten (10) yards, three (3) rounds of "00" buckshot in ten (10) seconds;

(3) from a standing position at a distance of five (5) yards, three (3) rounds of "00" buckshot in ten (10) seconds; or

(4) an alternate course of fire may be approved by the director upon receipt of written application.

(b) A biennial familiarization of six (6) rounds of "00" buckshot shall be required for renewal of a security officer commission.

(1) The course of fire shall be as outlined in subsection (a) of this section reducing the number of rounds from three (3) to two (2) with a commensurate halving of time in each category.

(2) The manager may approve an alternate course of fire upon receipt of written application.

§35.261. Training School and Instructor Approval.

Approval as a security officer training school and/or instructor shall be considered a license with respect to suspension, revocation or denial.

§35.262. Security Officer Training Manual and Examination.

(a) The board's most current version training manual shall be used by all board approved Level III training schools.

(b) All students of a Level III training school shall be tested with the most current version examination prepared by and obtained from the board.

(c) The passing grade of all examinations shall be a minimum of 75% correct answers.

§35.263. Alarm Installer and Alarm Systems Salesperson Training and Testing/Application for Alarm Training Program Approval.

(a) An application for alarm installer or alarm systems salesperson training program approval shall be on a form prescribed by the board.

(b) A letter of approval shall be granted by the manager to all qualified alarm training programs and shall be valid for one year and may be renewed by submitting an application for renewal no later than 30 days prior to the expiration date along with any required fees.

(c) In addition to meeting the requirement of §1702.113 of the Act, a qualified manager for an alarm training program and a qualified alarm training instructor must have successfully completed a board approved program in alarm installation. Approval by the board of alarm training program directors and qualified alarm training instructors shall be valid for one year.

§35.264. Attendance, Progress and Completion Records Required.

(a) A board approved alarm training program shall:

(1) issue an original certificate of completion to each qualifying student within 7 days after the student qualifies;

(2) maintain adequate records to show attendance, progress, and grades of students; and

(3) make all records required to be maintained available for inspection by bureau staff during business hours.

(b) Qualified alarm training program instructors shall maintain records on file for inspection by bureau staff during business hours as proof of attendance and progress of grades of students.

§35.265. Alarm Systems Installer or Alarm Systems Salesperson.

(a) The certificate of completion shall contain:

(1) name and approval number of the school;

(2) approval number(s) of qualified class room instructor(s);

(3) date of completion;

(4) name and signature of the manager of the school; and

(5) full name and social security number of the student.

(b) The certificate of completion shall indicate that the student has passed the required test and shall contain the words "has successfully completed the alarm installers or alarm systems salespersons alarm training program approved by the Texas Private Security Board."

§35.266. Records Required on Manager.

(a) Each board approved alarm training program shall:

(1) have a qualified manager, and they shall comply with the requirements of §1702.113 of the Act.

(2) register any owners, officers, partners, shareholders, and qualify a manager, and they shall meet the requirements under §1702.113 of the Act.

(b) Each owner, officer, partner or shareholder and qualified manager of a board approved alarm training program shall, within 14 days after commencement of employment, submit an application to the board, the appropriate fees, and two sets of board approved fingerprint cards.

(c) A board approved alarm training program shall register its owners, officers, partners, shareholders and qualified manager prior to renewal of the training program.

§35.267. Statutory or Rules Violations.

(a) The board may refuse to accept a certificate of completion from an alarm training program upon receipt of proof of violation of the Act or these rules involving an owner, officer, partner, shareholder, manager, or alarm training program instructor.

(b) The board may withdraw, suspend or revoke an approval of an alarm training program or approval of an alarm training instructor upon receipt of evidence that the program or instructor has violated the Act or these rules.

§35.268. Certificate of Completion.

(a) The certificate of completion shall reflect the particular course or courses completed by a student during the training period.

(b) All certificates of completion shall contain:

(1) name and approval number of the school;

(2) date of completion;

(3) name, signature and approval number of training instructor;

(4) name and signature of the qualified manager;

(5) full name and social security number of student;

(6) the date of final completion of the entire course; and

(7) the specific date of firearm qualification along with the name and approval number of the firearms instructor on those certificates designating completion of Level III.

(c) The certificate of completion for firearms qualification shall:

(1) note the category of firearm as defined in §35.260 (2)(A) and (B) and §35.258 (c) and (d) of this title (relating to Shotgun Training Requirements and Firearm Courses);

(2) note the caliber of firearm; and

(3) be on a certificate form designed or approved by the board.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404115
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER R. PERSONAL PROTECTION OFFICERS TRAINING

37 TAC §35.281

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.281. Training - Personal Protection Officers.

(a) The personal protection officer course may only be offered by board approved commissioned personal protection officer training schools and taught by board approved personal protection officer instructors who are employed by the approved school. Personal protection officer training instructors must be approved to instruct Level Four training. To receive board approval, a school or instructor must submit an application to the board on a form provided by the board. Any person applying for approval as an instructor shall submit proof of qualification as required by the board. Proof of qualification as an instructor shall include, but not be limited to, the following:

(1) An instructor's certificate issued by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) affidavit from employer;

(B) a copy of curriculum taught;

(2) An instructor's certificate issued by federal, state or political subdivision law enforcement academy along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) affidavit from employer;

(B) a copy of curriculum taught;

(3) An instructor's certificate issued by the Texas Education Agency (TEA) along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) affidavit from employer;

(B) a copy of curriculum taught;

(4) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for 3 or more years. Evidence may include:

(A) affidavit from employer;

(B) a copy of curriculum taught; or

(5) Evidence of attending and successfully completing a board approved training course for Personal Protection Officer Instructors.

(A) a letter of approval from the board shall be issued to each approved instructor and shall be valid for a period of one year. The instructor's approval may be renewed for a period of one year upon application to the board and payment of the renewal fee.

(B) a letter of approval for a personal protection officer instructor shall be considered a license with respect to suspension, revocation or denial.

(C) notice shall be given in writing to the board within 14 days after a change in address of the approved instructor.

(b) Level IV Training (Personal Protection Officer Training Course). The Personal Protection Officer Training Course shall consist of a minimum of 15 classroom hours and shall be offered by board approved personal protection officer training schools and taught by board approved personal protection training instructors. All training shall be conducted with board approved instructor present during all instruction. All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the board. Board official Personal Protection Officer Training Video Tapes shall be obtained from the board and used as the curriculum.

(c) Personal Protection Officer Training Manual, Examination.

(1) The board's current version of the Personal Protection Officer Training Manual shall be used by all board approved personal protection officer schools and instructors as their curriculum and shall be obtained from the board.

(2) All students of a Personal Protection Officer Training Course shall be tested with the current version of an examination prepared by and obtained from the board.

(3) The passing grade of the Personal Protection Officer Training Course shall be a minimum of 75% correct answers on academic studies and must meet the minimum standards as set forth by the approved instructor on practical simulations.

(d) Certificate of Completion - Personal Protection Officer Training.

(1) The certificate of completion shall contain the:

(A) name and approval number of the school;

(B) name and signature of the school director;

(C) name, signature and approval number of the personal protection training instructor;

(D) date of completion;

(E) full name and social security number of the student; and

(F) complete address of the location where the training was conducted.

(2) Certificates of completion shall be issued by a board approved training school.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404116
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.291

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.291. Continuing Education Courses.

(a) A license may not be renewed until the required minimum hours of board approved continuing education credits have been obtained in accordance with the Act and board rules. Proof of the required continuing education must be maintained by the employer and contained in the personnel file of the registrant's employing company.

(1) All registrants not specifically addressed in this section shall complete a total of eight (8) hours of continuing education, seven hours of which must be in subject matter that relates to the type of registration held, and one (1) hour of which must cover ethics.

(2) Non-participating owners, partners, shareholders, non-commissioned security officers and administrative support personnel are specifically exempted from the continuing education requirements.

(3) Private investigators and managers of Class A and Class C licenses shall complete a total of sixteen (16) hours of continuing education, fourteen (14) hours of which must be in subject matter that relates to the type of registration held, and two hours of which must be over ethics.

(4) Any person registered as a private investigator who fails to complete 16 hours of continuing education during the 24 months of an initial registration is not eligible to make new or renewal application until such time as the training requirement for the previous registration period has been satisfied.

(5) Commissioned security officers and personal protection officers shall complete six (6) hours of continuing education. Continuing education for commissioned security officers and personal protection officers must be taught by schools and instructors approved by the board to instruct commissioned security officers as defined in §1702.1685 of the Act. Commissioned security officers shall submit a firearms proficiency certificate along with their renewal application.

(6) All registrants shall indicate they have completed the required minimum hours of board-approved continuing education credits on their application for renewal. A renewal application shall also include name of school, school number, seminar number, seminar date, and credits earned.

(7) Continuing education schools shall report attendees of continuing education classes to board within thirty (30) days of class completion. This report shall include the school number, instructor number, date and location of school. In addition to the following information for each participant: name, SSN and continuing education credit earned.

(8) During the first 24 months of initial registration each person employed as an alarm system installer or alarm systems salesperson must complete twenty (20) hours of classroom instruction, as described in Chapter 1702, Texas Occupation Code. Any person employed as an alarm systems installer or alarm systems salesperson must obtain 8 hours of continuing education credits in alarm related field during each subsequent 24 month period preceding the expiration date of registration in order to renew the registration.

(9) Any person licensed as an alarm systems installer or alarm systems salesperson who fails to complete 20 hours of training during the 24 months of initial licensure or who fails to complete 8 hours of continuing education during any subsequent licensing period is not eligible to make new or renewal application until such time as all

training requirements for the previous license period have been satisfied.

(10) Alarm monitors shall complete four (4) hours of continuing education in subject matter that relates to the duties and responsibilities of an alarm monitor.

(11) The manager or his designee shall approve classes for continuing education that are determined to meet the qualifications of the Act and board rules.

(12) Any person licensed by the board as an alarm instructor shall be authorized to instruct all alarm continuing education courses approved by the board.

(13) Any person licensed by the board as a Level III or Level IV Instructor shall be authorized to instruct all continuing education courses approved by the board excluding alarm continuing education.

(b) Continuing education instructors shall provide a certificate of completion to each person successfully completing the continuing education course within 7 days after the date of course completion.

(1) The continuing education certificate of completion shall contain:

(A) the name and social security number of the person attending the course;

(B) the title and topic of the course;

(C) the number of hours of instruction provided;

(D) the signature of the instructor; and

(E) any information deemed necessary by the manager.

(2) The manager of a commissioned security officer training school conducting a continuing education course for commissioned security officers shall provide a certificate of completion to each person successfully completing the course within 7 days after the date the course was completed.

(3) The certificate of completion for commissioned security officers shall contain:

(A) the name and social security number of the person attending the course;

(B) the title and topic of the course;

(C) the number of hours of instruction provided;

(D) the signature of the instructor and school director; and

(E) any information deemed necessary by the manager.

(c) To receive board approval, a continuing education course shall contain instruction relating to one or more of the following:

(1) investigative procedures and practices;

(2) business practices;

(3) legal aspects of private investigation or private security;

(4) ethical aspects of private investigation or private security;

(5) handgun proficiency as defined under §1702.168 of the Act; and/or

(6) any other course of instruction approved by the manager.

(d) To receive board approval, a continuing education course shall contain at least one (1) clock hour of instruction.

(e) The manager shall approve courses for continuing education that are determined to meet the qualifications of these rules and the Act.

(1) Courses may be provided for and taught by any organization or person that, in the manager's discretion, has the education, knowledge and experience to provide such information.

(2) A person wishing to conduct a continuing education course must provide the manager a description of the contents of the curriculum and the qualifications of any instructor.

(3) The manager shall inform the person wishing to conduct the course of the approval or disapproval within 10 working days of receiving the request.

(4) The manager may delegate this responsibility to other employees of the board.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404117
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

SUBCHAPTER T. DELEGATION OF AUTHORITY

37 TAC §35.301

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.005, which provides that the department shall administer Chapter 1702 through the Texas Private Security Board; Texas Occupations Code, §1702.061, which provides for the adoption of rules and general policies; Texas Occupations Code, §1702.062, which provides that reasonable and necessary fees may be established by rule to produce sufficient revenue to administer the chapter; and Tex. H.B. 1, 78th Leg., R.S. (2003), art VIII, §4 and art. IX, §11.20.

Texas Government Code, §411.004(3), Texas Occupations Code, §§1702.005, 1702.061, and 1702.062, and Tex. H.B. 1, 78th Leg., R.S. (2003), art. IX, §11.20 are affected by this proposal.

§35.301. Manager.

(a) The board has determined that good cause exists to delegate to the manager:

(1) the authority to add new courses;

(2) the authority to change the curriculum of existing courses;

(3) the authority to add new examinations or to update existing examinations;

(4) the authority to waive any rule in this Chapter if authorized by statute;

(5) the authority to conduct special projects.

(b) The manager may delegate the authority to, under his general supervision, have this provision exercised by other bureau employees as appropriate.

(c) Any temporary waiver or change outlined above will be reported to the board in a timely fashion.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404118
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 424-2135

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 4. EMPLOYMENT PRACTICES
SUBCHAPTER E. SICK LEAVE POOL PROGRAM

43 TAC §4.51, §4.56

The Texas Department of Transportation (department) proposes amendments to §4.51 and §4.56, concerning definitions and withdrawals under the department's Sick Leave Pool Program.

EXPLANATION OF PROPOSED AMENDMENTS

Government Code, Chapter 661, directs the department's executive director to develop and implement a sick leave pool program. The proposed amendments make clerical changes, update existing language, and revise existing definitions. These changes improve the readability of the department's sick leave pool program rules, increase the responsiveness of the program, make program rules more compatible with existing department policies, and more specifically tailor the program to ensure that leave is available to those dealing with a catastrophic illness or injury.

Section 4.51(4) is amended to expand the definition of "discipline" to include the full range of disciplinary actions available under the department's Human Resources Manual. Section 4.51(8) is amended to update the name of the Texas Department of Family and Protective Services. Section 4.51(12) is amended to revise the definition of "severe physical condition" to change from 10 to 12 the number of continuous weeks an employee will likely be off work.

These definitional changes allow the department to clarify the department's compliance with Government Code, §661.001, coordinate sick leave pool policy with existing human resources policies, and more precisely target those illnesses or injuries for which employees may apply for sick leave pool hours.

Section 4.56(a)(1) is amended to provide that employees may only seek to withdraw time from the sick leave pool when they or their family members have a catastrophic illness or injury and that illness or injury is the reason why the employee must be away from work. Existing versions of this rule imply the requirement that the leave request be connected to the illness or injury and this revision clarifies the department's compliance with Government Code, §661.005.

Section 4.56(a)(2)(A) is amended to add the requirement that the medical certification describing a catastrophic illness or injury of an employee's family member must include the type of assistance the employee will need to provide the ill family member. This change allows the department to better administer the program by matching an employee's need for sick leave pool time with the circumstances of the family member's illness or injury. This change is consistent with the requirement in Government Code, §661.004, that sick leave pool time be granted to employees "because of" a catastrophic illness or injury.

Section 4.56(a)(15) is amended to remove language regarding the circumstances in which a recertification of a medical condition may be necessary. The amendment allows the pool administrator to request a recertification on a monthly basis, if necessary. This amendment is authorized by Government Code, §661.002.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the amendments as proposed.

Diana L. Isabel, Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Ms. Isabel has also determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved administration of the program. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Diana L. Isabel, Director, Human Resources Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 9, 2004.

STATUTORY AUTHORITY: The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §661.002(c) which provides that the governing body of a state agency shall adopt rules and prescribe procedures relating to the operation of the agency sick leave pool.

CROSS REFERENCE TO STATUTE: Government Code, Chapter 661, Subchapter A.

§4.51. Definitions.

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

(1) - (3) (No change.)

(4) Discipline--Written reprimand, probation, [~~suspension with pay,~~] suspension without pay, involuntary demotion, [~~or~~] involuntary transfer (lateral), or disciplinary reduction in pay.

(5) - (7) (No change.)

(8) Immediate family--Individuals related by kinship, adoption, or marriage who are living in the same household, foster children living in the same household and certified by the Texas Department of Family and Protective [~~and Regulatory~~] Services, or a spouse, child, or parent of the employee who does not live in the same household and who needs care and assistance as a direct result of a documented medical condition.

(9) - (11) (No change.)

(12) Severe physical condition--A physical illness or injury that will likely result in death or causes the employee to be off work for 12 [~~10~~] continuous weeks or more for the current episode.

(13) (No change.)

(14) Sick leave--Leave taken when sickness, injury, or pregnancy and confinement prevent the employee's performance of duty or when the employee is needed to care and assist a member of his or her immediate family who is actually ill.

(15) - (16) (No change.)

§4.56. Withdrawals.

(a) Restrictions.

(1) An employee or an employee's immediate family must have a catastrophic illness or injury to be eligible to withdraw from the pool. The patient's health care provider must certify in writing that the illness or injury of the employee or member of the employee's immediate family is catastrophic and that the catastrophic illness is the reason the employee needs to be out of work.

(2) A written certification from a health care provider must be submitted with all requests for withdrawals. Requests related to severe psychological conditions must be certified by a licensed psychiatrist. The certification:

(A) shall include:

(i) (No change.)

(ii) the date the employee or employee's immediate family member will be able to return to [~~normal~~] activities of daily living; [~~and~~]

(iii) the amount of time the employee will be needed to provide primary care if the certification is for the employee's immediate family member; and

(iv) if the certification is for the employee's immediate family member, the specific type of care the employee needs to provide;

(B) - (C) (No change.)

(3) - (7) (No change.)

(8) The time transferred will begin on the date and time the employee exhausted all sick leave or, in cases that [~~which~~] are eligible for workers' compensation payments, after the period covered by the last workers' compensation check distributed.

(9) - (12) (No change.)

(13) An employee who is injured on the job, who is entitled to receive workers' [~~worker~~] compensation payments, and who chooses to integrate his or her sick leave, and vacation leave, or compensatory time is also eligible to receive a withdrawal in accordance with this subchapter.

(14) (No change.)

(15) The pool administrator may require the patient's condition to be recertified by a health care provider on a monthly basis [~~when the necessary information to make a definite determination of the employee's need for pool hours is changed, uncertain, or not available~~]. If the employee is determined to be able to return to work sooner than indicated on a previous certification, the pool administrator may require the unused portion of a withdrawal to be returned to the pool. If the employee fails to cooperate with recertification requirements and reevaluation procedures, the pool administrator may deny the request or require the unused portion of a withdrawal be returned to the sick leave pool.

(16) - (17) (No change.)

(b) Procedures.

(1) - (3) (No change.)

(4) If the pool administrator questions the validity of the certification completed by the employee's health care provider, based on the average expected duration or severity of the condition, the administrator may request a health care provider, contracted by the department, to review the patient's medical records. The contracted health care provider may consult with the patient's health care provider if more information is needed. If the determination of the contracted health care provider differs from the patient's health care provider, the request may be denied. If necessary, the pool administrator may request that the patient's medical records be reviewed by a third health care provider who is not under contract with the department. The pool administrator and the employee must agree on the third health care provider. The determination of the third health care provider is binding. The department will pay for both reviews. If the employee fails to cooperate with the medical records review, the pool administrator may deny the request.

(5) - (9) (No change.)

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404228
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER A. LAND ACQUISITION PROCEDURES

43 TAC §21.16

The Texas Department of Transportation (department) proposes new §21.16, concerning the use of options to purchase for advance acquisition of real property.

EXPLANATION OF PROPOSED NEW SECTION

Transportation Code, Chapter 202, Subchapter F, and Chapter 227, Subchapter D, authorize the Texas Transportation Commission (commission) to purchase options to acquire property for possible use in or in connection with any transportation facility, including but not limited to the Trans-Texas Corridor. The option may be purchased before a final decision has been made as to whether the transportation facility will be located on that property. The statutes were adopted by the 78th Legislature and became effective on September 1, 2003. The commission is proposing the adoption of §21.16 to establish a procedure for the implementation and administration of the legislation.

Section 21.16 outlines the requirements for executing option contracts. Specifically, §21.16(a) provides for a two-step process. In the first step, the commission must authorize the expenditure of option fees and execution of option contracts for a specific transportation facility project or corridor. This satisfies the statutory requirement of commission approval. Rather than require review and approval of each individual contract, the commission can authorize broad use of options for identifiable projects. The second step requires the district engineer to analyze the particular property and terms of a proposed contract in relation to needs and conditions of the specific transportation facility. The district engineer must find that the property may possibly be used in connection with the previously authorized transportation facility. This satisfies a statutory requirement. In addition, the district engineer must determine that the size and location of the property is reasonably related to the facility's possible design and alignment, and that the terms of the contract may be economically beneficial to the department by fulfilling at least one of the four listed benefits. These additional requirements seek to provide justification for the terms of each option contract by the person in a district who has the most complete overview and control of the project.

Because option contracts will typically contain a clause restricting development, §21.16(b) limits the primary period for an option contract to a maximum of 7 years in order to satisfy the statutory limitation on the acquisition of development rights set out in Transportation Code, §203.051(a)(2)(B). To provide flexibility for longer term arrangements, however, this subsection permits negotiation of one or more extensions which will require additional payment to the property owner.

Section 21.16(c) grants to the department the flexibility to negotiate the payment of a one-time option fee to be paid to the property owner at the time the contract is executed, or the payment of periodic amounts during the term of the contract, or a combination of both. Depending on the length of the option period, it may be more cost efficient for the department to set up annual payments so the department only pays for the number of years it actually has a need to tie up the property.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the new section as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the new section as proposed.

John P. Campbell, P.E., Director, Right of Way Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Campbell has also determined that for each of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be to further the department's mission to provide an efficient, timely, cost effective and fair process of acquiring real property needed for development of transportation facilities. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new section may be submitted to John P. Campbell, P.E., Director, Right of Way Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 9, 2004.

STATUTORY AUTHORITY: The new section is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, §227.002, which provides the commission with the authority to adopt rules as necessary or convenient to implement and administer Chapter 227 governing the Trans-Texas Corridor.

CROSS REFERENCE TO STATUTE: Transportation Code, Chapter 227.

§21.16. Use of Options to Purchase for Advance Acquisition of Real Property.

(a) The department may execute an option contract for the acquisition of right of way and control of development rights if the Texas Transportation Commission has authorized the expenditure of option fees for a transportation facility project or corridor and the district engineer determines that:

(1) the property to be optioned is or may possibly be used in or in connection with the transportation facility;

(2) the size and location of the property to be optioned is reasonably related to the possible future design and alignment of the transportation facility; and

(3) the terms of the option contract may be economically beneficial to the department by:

(A) establishing the purchase price at current market value as of the date of the option contract;

(B) establishing a methodology for determining a purchase price at the time the option is exercised to avoid the necessity for condemnation;

(C) restricting development or improvements that would substantially increase the purchase price; or

(D) reducing the time required for the acquisition of the property.

(b) An option contract shall be for a primary period of not more than 7 years, but may be subject to one or more extensions beyond the primary term.

(c) An option fee to be paid to the property owner may be:

(1) a one-time fee paid at the time the option contract is executed;

(2) in the form of periodic payments; or

(3) a combination of paragraphs (1) and (2) of this subsection.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404229
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER G. SPECIFIC INFORMATION LOGO SIGN PROGRAM

The Texas Department of Transportation (department) proposes amendments to §§25.400 - 25.402 and §§25.404 - 25.406, the repeal of §25.403, and simultaneously proposes new §25.403, concerning the Specific Information Logo Sign Program.

EXPLANATION OF PROPOSED AMENDMENTS, REPEAL, AND NEW SECTION

House Bill 2905 and House Bill 3330, 78th Legislature, Regular Session, 2003, require certain contracting provisions relating to the required percentage of program fees returned to the department and best value contracting for the department's logo sign program. House Bill 3330 requires remittance to the department of at least 10% of the fees collected by the contractor. House Bill 2905 provides for the scoring of proposals based, in part, on the percentage of returned fees offered. House Bill 1831, authorizes dual logos to be added to the information sign program.

The amendments to §25.400 update the statutory cite to Transportation Code, §391.091, and replace the phrase "undesignated head" with "subchapter." The definition of specific information logo sign is updated to use the term "sign" instead of "sign panel."

The definition of "dual logo" is added to §25.401 pursuant to House Bill 1831. A dual logo is a panel on a specific information logo sign containing the names of either two food establishments in a shared space under common ownership, or a gas and food establishment in a shared space under common ownership.

The amendments to relettered §25.402(l) and (o) update the statutory citations to Transportation Code, Chapter 391, and Government Code, Chapter 2253.

The amendments to subsection (e) remove the existing requirement regarding sign erection in the first year of the program. Since the program has been in existence since 1992, this requirement is no longer needed. The new text in this subsection requires the logo contractor to contact existing participating businesses within the first three months of a contract with the department. This will ensure that the contractor is working with participating businesses, the businesses know who to contact in case any issues arise related to the program, and that any rental renewal issues are handled in a timely manner.

New subsection (h) is added to require the program contractor to provide an electronic inventory to the department of participating businesses and sign locations. This provision is added to ensure that the department has a full and accurate inventory regarding the sign program operating on the state highway system.

Existing subsections (h) - (r) are relettered to reflect the addition of new subsection (h). The subsections are also updated for improved readability and clarity.

Amendments to relettered subsection (n) remove the mandatory set percentage that the contractor must remit to the department for installation, annual rental, covering and replacement sign fees. Under House Bill 2905 and House Bill 3330, the department may accept a best value bid that is higher than the current 5.0% fee. The mandatory set amounts for business logo/major shopping area guide sign installation, annual rental, covering, and replacement fees have been removed so the state may accept the contract with the best value.

Amendments to relettered subsection (r) clarify that the contractor will only be paid for the depreciated value of the information logo signs if the department terminates the contract before the contract's termination date for reasons other than default of the contractor.

The evaluation provisions of repealed §25.403 are moved to §25.404. The remainder of repealed §25.403 is reenacted in new §25.403, Notice and Proposal Submission, provides that the department will publish a notice of intent to award an information logo sign program contract along with proposal requirements. The new section describes proposal submittal requirements including delivery, page limits, team qualifications, the contractor's capability, the contractor's internal policies and procedures related to work quality, cost control, resources, a demonstration of the contractor's understanding of the project, the contractor's approach, a description of internal methods for schedule control, the locations for the work, an audited financial statement, supporting documentation, and the best value for the state. Pursuant to House Bill 2905, the best value for the state consists of the proposed percentage returned to the department from fees collected from program participants for installation, annual rental, covering, and replacement. The best value also includes the proposed amount for the fees that will be charged to a participant in the program. A business that has a dual logo will pay a fee that is 175% of the standard fee for a single logo. This will help ensure that businesses that seek a dual logo receive a price reduction from the standard costs associated with the rental of two separate logos. The department also seeks to set the rental fee for a dual logo at a rate that is similar to that of a single logo so as not to unduly encourage the use of dual logos. Dual logos are not as visible to motorists as a traditional single logo panel.

In accordance with House Bill 3330, the minimum percentage that a contractor may propose for return to the department is 10%.

The amendments to §25.404 relate to the evaluation of the proposals. There is no longer a prequalification requirement. The department will not consider a proposal that fails to comply with the notice, specifies an installation fee that is less than 5.0% or greater than 25% of the business logo annual rental fee, specifies that the ramp business logo annual rental fee is less than 5.0% or greater than 15% of the business logo annual rental fee, specifies a major shopping area guide sign annual rental fee that is less than two times or greater than six times the business logo

annual rental fee, or specifies that the major shopping area ramp sign annual rental fee is less than one-half or greater than 150% of the business logo annual rental fee.

These minimum ranges are to ensure that the fee for a logo sign rental is set at a minimum price that will encourage long-term businesses to participate in the program and discourage constant turnover within the program. The upper end of the range is established to ensure that the program contractor recoups its initial investment to install the sign over a period of several years thus encouraging the contractor to maintain the signs at an appropriate level.

The amendment also states that the department will not consider a proposal that fails to guarantee a return to the department of at least 10% of the rental fees collected from program participants in accordance with House Bill 3330.

The department will determine the best value to the state by evaluating the contractor's proposed team and time commitment, capability for undertaking and performing the work, quality of services offered, financial resources, ability to perform the work, understanding of the project, approach, ability to meet the schedule, ability to fulfill any other criteria listed in the notice, proposed percentage returned to the department from fees collected from program participants, and proposed amount for the rental and installation fees that will be charged to participate in the program in accordance with House Bill 2905.

The proposals will be evaluated by a panel of department employees appointed by the director of the Traffic Operations Division. The Texas Transportation Commission (commission) may accept or reject the recommended award.

The amendments to §25.405 allow dual logos. A business requesting a dual logo will pay a fee that is 175% of the standard fee for a single logo. No more than two dual logos may be installed per logo sign, and if demand for space on a logo sign exceeds the available number of spaces, businesses requesting a dual logo must follow the same random drawing process that is used for panels that are not dual logos.

The amendments to §25.405 do not permit a variance to be requested for a waiver of restrictions regarding dual logos. It is important to adhere to the requirements for dual logos to avoid detracting from overall sign visibility.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the amendments, repeal, and new section, as proposed, are in effect, there will be positive fiscal implications for the state as a result of enforcing or administering the amendments, repeal, and new section, because the percentage of program fees returned to the department from the program contractor will increase. Although the total positive impact cannot be determined until the percentage of program fees that are returned to the department is set during the next program contract, the department estimates the increase will be approximately $164,000 in additional annual funding for the department. There will be no impact on local governments. There are no anticipated economic costs for persons required to comply with the proposal.

Carlos Lopez, P.E., Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments, repeal, and new section.

PUBLIC BENEFIT

Mr. Lopez has also determined that for each of the first five years the amendments, repeal, and new section are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, repeal, and new section will be a more efficient operation of the Specific Information Logo Sign Program. The percentage of program fees returned will increase for the state as certain business establishments may obtain dual logos and the state is provided greater flexibility in the contracting process. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments, repeal, and new section may be submitted to Carlos Lopez, P.E., Director, Traffic Operations Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 9, 2004.

43 TAC §§25.400 - 25.402, 25.404 - 25.406

STATUTORY AUTHORITY: The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Specific Information Logo Sign Program.

CROSS REFERENCE TO STATUTE: Transportation Code, §§391.091 et seq.

§25.400. Purpose.

Transportation Code, §391.091, requires [~~Texas Civil Statutes, Article 4477-9a, require~~] the commission to contract with a person, firm, group, or association in the State of Texas to erect and maintain information logo signs within eligible highways and urban highway rights of way. It further requires the commission to adopt rules necessary to administer and enforce this signing program, and to regulate the content, composition, placement, erection, and maintenance of information logo signs and supports within eligible highways and urban highway rights of way. The sections in [~~under~~] this subchapter [~~undesignated head~~] prescribe the policies and procedures for the implementation of an information logo sign program.

§25.401. Definitions.

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

(1) - (7) (No change.)

(8) Dual logo--A panel on a specific information logo sign containing the names of either:

(A) two food establishments in a shared space under common ownership; or

(B) a gas and food establishment in a shared space under common ownership.

(9) [~~(8)~~] Eligible highway--A highway that:

(A) is located outside an urbanized area with a population of 50,000 or more[~~;~~] and qualifies for a maximum speed limit of 65 miles per hour under 23 U.S.C. §154, or if that law is repealed, qualified for a maximum speed limit of 65 miles per hour on the day before the effective date of the repeal; or

(B) is a controlled-access highway located inside an urbanized area with a population of 50,000 or more.

(10) [~~(9)~~] Eligible urban highway--An interstate highway located inside an urbanized area with a population of 200,000 or more.

(11) [~~(10)~~] Gross building area--Square footage of usable area within a building, or series of buildings under one roof, that is considered usable by the retail businesses and the public; if a building is multi-level, this includes the square footage available on each level.

(12) [~~(11)~~] Information logo sign--A specific information logo sign or a major shopping area guide sign.

(13) [~~(12)~~] Interchange--The intersection of the centerlines of an eligible highway or eligible urban highway and a crossroad.

(14) [~~(13)~~] Interstate highway--Any highway which is part of the national system of interstate and defense highways designed to be a multi-lane and divided full control access roadway.

(15) [~~(14)~~] Major shopping area--An enclosed retail shopping mall offering goods and services for sale to the public located on a minimum 30 acres of land that contains 1 million [~~1,000,000~~] square feet or more of gross building area.

(16) [~~(15)~~] Major shopping area guide sign--A rectangular supplemental sign panel imprinted with the name of the retail shopping area as it is commonly known to the public and containing directional information.

(17) [~~(16)~~] Major shopping area ramp sign--A supplemental sign with the common name of the retail shopping mall, directional arrows, and/or distances placed near an eligible urban highway exit ramp or access road.

(18) [~~(17)~~] Multiple crossroad interchange--An interchange in which one exit in a direction of travel from an eligible highway provides the only point of access for two or more crossroads; the center of a multiple crossroad interchange is the mid-point of the intersection of the centerline of the eligible highway and centerlines of the affected crossroads.

(19) [~~(18)~~] Primary motorist service--Gas, food, lodging, or camping available to the traveling public.

(20) [~~(19)~~] Ramp business logo--A reduced size separate sign panel of specified dimensions attached to a ramp and containing the commercial establishment name, symbol, brand, trademark, or combination.

(21) [~~(20)~~] Ramp sign--A supplemental sign with ramp business logos or the name of the major shopping area, directional arrows, and distances placed near an eligible highway or eligible urban highway exit ramp.

(22) [~~(21)~~] Retail shopping mall--Retail businesses located within a building, or a series of buildings, connected by a common continuous roof and walls, and enclosing and covering all inner pedestrian walkways and common areas.

(23) [~~(22)~~] Specific information logo sign--A rectangular supplemental sign [~~panel~~] imprinted with the words "GAS," "FOOD," "LODGING," or "CAMPING," or with a combination of those words, and the names (or business logos) of commercial establishments offering those services.

(24) [~~(23)~~] State--The State of Texas.

(25) [~~(24)~~] Texas MUTCD--Texas Manual on Uniform Traffic Control Devices for Streets and Highways, latest edition, issued by the Texas Department of Transportation.

§25.402. Information Logo Sign Program.

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

(e) Contacting participating businesses. In the first three months of a contract between the department and the contractor, the contractor shall contact all participating businesses with logo panels to:

(1) notify the businesses of the new contract between the department and the contractor; and

(2) coordinate whether the participating businesses will renew if space is available.

[~~(e) Sign erection in first year. In the first year of the contract between the department and contractor, the contractor shall erect information logo signs and business logos at a minimum of 40% of the interchanges where participation agreements have been completed between the commercial establishments or the retail shopping mall and the contractor. Information logo signs and business logos shall be erected within two years of the execution date of an agreement between the commercial establishments or the retail shopping mall and the contractor pursuant to §25.407 of this title (relating to Program Operation).~~]

(f) - (g) (No change.)

(h) Program information.

(1) The contractor shall furnish an electronic inventory to the department in a format of the department's choice. This inventory shall include, but not be limited to:

(A) a list of all businesses participating in the program;

(B) information on all participating businesses including addresses, key contacts, and phone numbers;

(C) location information for each specific information logo sign including:

(i) roadway;

(ii) exit number;

(iii) direction; and

(D) date of expiration of the contract between each participating business and the program contractor.

(2) The inventory shall be updated and provided to the department on a monthly basis.

(i) [~~(h)~~] Meetings. The contractor is required to attend meetings with the department or department representatives at least once per calendar year at a date and location determined by the department to discuss program operation. The department may also require other meetings.

(j) [~~(i)~~] Installation by contractor. Installation of information logo signs may only be performed by the contractor, a subcontractor approved by the department, or, in emergency situations, by the department. In the event that the department undertakes installation or other duties of the contractor, the contractor shall immediately remit to the department the specified fee or cost of such work.

(k) [~~(j)~~] Department review. Prior to installation, the design and location of information logo signs must be submitted to the department for review. The department shall inspect installation and monitor maintenance.

(l) [~~(k)~~] Sign relocation or removal. If the department determines that additional regulatory, warning, or guide signing is needed at an interchange, existing or planned information logo signs shall be removed or relocated by the contractor as directed by the department and at the sole expense of the contractor. If the department determines that construction or maintenance activities within the eligible highway

or eligible urban highway rights of way will create conditions where existing information logo signs will not be in compliance with Transportation Code, Chapter 391 [~~Texas Civil Statutes, Article 4477-9a~~], or provisions of this title, the contractor shall:

(1) remove the business logos and ramp business logos of the affected commercial establishments;

(2) remove the information logo signs and ramp signs; and

(3) reimburse advance rental fees paid by commercial establishments or retail shopping malls prorated as per the date of removal of the business logos or major shopping area guide signs.

(m) [~~(l)~~] Sign maintenance. The information logo signs shall be maintained by the contractor in a manner and condition that is a distinct benefit to the safety of the public, benefit to the commercial establishments or retail shopping malls, and to the satisfaction of the department.

(n) [~~(m)~~] Fees.

[~~(1) Non-refundable fees.~~] The contractor shall assess installation, annual rental, covering, and replacement fees for the signs [~~the following non-refundable fees~~] and shall remit to the department the amounts specified in the contract [~~an amount equal to 5.0% of all such fees~~] no later than the seventh business day following the last day of the month such fees are received by the contractor.

[~~(A) Business logo installation fee. A one-time fee in the amount specified in the contractor's bid proposal under §25.404 of this title (relating to Contract Award Procedures) for the installation of the commercial establishment's business logo and, if necessary, ramp business logo.~~]

[~~(B) Business logo annual rental fee. An annual fee for each business logo and for each ramp business logo (for ramp signs) in the respective amounts specified in the contractor's bid proposal under §25.404 of this title (relating to Contract Award Procedures).~~]

[~~(C) Business logo covering fee. A total fee of $100 for covering a business logo and the ramp business logo and a total fee of $100 for uncovering a business logo and the ramp business logo pursuant to §25.407 of this title (relating to Program Operation).~~]

[~~(D) Business logo replacement fee. A $100 fee for each business logo and ramp business logo replaced at the request of the commercial establishment.~~]

[~~(E) Major shopping area guide sign annual rental fee. An annual fee for major shopping area sign and ramp sign in the respective amounts specified in the contractor's bid proposal under §25.404 of this title (relating to Contract Award Procedures).~~]

[~~(F) Major shopping area guide sign installation fee. A one-time fee of $1,000 for initial installation of each major shopping area guide sign pursuant to §25.407 of this title (relating to Program Operation).~~]

[~~(G) Major shopping area guide sign covering fee. A total fee of $500 for covering the major shopping area guide sign and the ramp sign and a total fee of $500 for uncovering the major shopping area guide signs and the ramp signs pursuant to §25.407 of this title (relating to Program Operation).~~]

(1) [~~(2)~~] Reduced fees. The contractor shall reduce the annual rental fee a prorated amount for each calendar day when:

(A) the business or ramp business logo(s), or the major shopping area guide sign has not been erected; or

(B) a previously erected business, ramp business logo, or major shopping area guide sign is obscured from view of the motorists for a period of time exceeding 10 consecutive calendar days.

(2) [~~(3)~~] Non-reducible fee. A contractor may not reduce the annual fee for the period a business logo, ramp business logo, or major shopping area guide sign is covered at the request of the commercial establishment or retail shopping mall.

(o) [~~(n)~~] Bonding. The contractor shall satisfy all requirements of Government Code, Chapter 2253 [~~Texas Civil Statutes, Article 5160~~], relating to bonds.

(p) [~~(o)~~] Permits, licenses, and taxes. The contractor shall:

(1) procure all permits and licenses;

(2) pay all charges, fees, and taxes; [~~and~~]

(3) give all notices necessary and incidental to the due and lawful prosecution of the work; and[~~. When requested, the contractor shall~~]

(4) furnish the department with evidence of compliance with the permit, license, and tax requirements upon request.

(q) [~~(p)~~] Records. The contractor shall: [~~,~~]

(1) consistent with generally accepted accounting principles, maintain all books, documents, papers [~~paper~~], advertising contracts, accounting records, and other evidence pertaining to the contract with the department; and [~~shall, upon request of the department, make available such documents, records, and information for examination by the department, its designee, or the State Auditor.~~]

(2) furnish the department, its designee, or the state auditor such documents, records, and information for examination upon request.

(r) [~~(q)~~] Termination. The department or the contractor may terminate the contract upon default of the other party.

(1) If the contractor terminates the contract or defaults prior to the conclusion date of any five-year term, ownership of the contract rights and any rights in the information logo signs constructed at the various interchanges and intersections shall immediately pass to and vest in the department on the effective date of termination, and the contractor shall not be entitled to any compensation.

(2) If the department terminates the contract, before the contract's termination date, for reasons other than default of the contractor, the contractor will be paid for [~~a percentage of~~] the depreciated [~~fair market~~] value, as established by the department, for each of the information logo signs erected. The percentages are as follows: elapsed time since sign installation: less than one [~~0 - 1~~] year--90%; one - two years--75%; two - three years--50%; three - four years--25%; four years or greater--0%.

(s) [~~(r)~~] Sale, transfer, and assignment of contract. The contractor shall not sell, transfer, assign, or otherwise dispose of the contract or any portion thereof, or of its right, title, or interest therein, without the prior written consent of the department.

§25.404. Evaluation [~~Contract Award Procedures~~].

(a) Ineligible proposal. [~~Notice. The department will publish a notice of intent to award an information logo sign program contract in industry related publications at least 45 calendar days prior to contractor selection. The notice shall include prequalification requirements for potential contractors.~~]

[~~(b) Bidding requirements.~~]

[(1) To be considered for award of a contract under this section, a contractor must file with the director of traffic operations a sealed bid proposal in a form prescribed by the department. Submission of the bid proposal must comply with the location, date, and time requirements of the notice. The bids shall be opened at a public hearing conducted by the director of traffic operations. All bidders may attend and all bids shall be opened in their presence.]

[(2) The bid amount will be the total of the specific information logo sign installation fee plus, five times the sum of the annual rental fees for one business logo sign space and one ramp business logo sign per direction of travel, added to one-tenth of the sum of the major shopping area guide sign and major shopping area ramp sign rental fees. Expressed as a formula in the following Figure 1.]
[Figure 1: 43 TAC §25.404(b)(2)]

[(3)] The department will not consider a proposal that [bid which]:

(1) [(A)] fails to comply with any requirement of the notice;

(2) [(B)] specifies an installation fee that is less than 5.0% or greater than 25% of the business logo annual rental fee;

(3) [(C)] specifies that the ramp business logo annual rental fee is less than 5.0% or greater than 15% of the business logo annual rental fee;

(4) [(D)] specifies a major shopping area guide sign annual rental fee that is less than two times or greater than six times the business logo annual rental fee; [or]

(5) [(E)] specifies that the major shopping area ramp sign annual rental fee is less than one-half or greater than 150% of the business logo annual rental fee; or [.]

(6) fails to guarantee a fee to be paid to the department of at least 10% of the rental fees collected from program participants.

(b) Evaluation. The department will determine the best value to the state by evaluating the contractor's:

(1) proposed team and the time commitment for each team member;

(2) capability for undertaking and performing the work;

(3) understanding of the project;

(4) quality of services offered;

(5) financial resources and ability to perform the work;

(6) approach or course of action to meeting the goals and objectives;

(7) ability to meet the schedule;

(8) ability to fulfill any other criteria listed in the notice;

(9) proposed percentage to be paid to the department from fees collected from program participants; and

(10) proposed amount for the rental and installation fees that will be charged to participants in the program.

(c) Award of contract.

(1) All [bid] proposals received by the director of traffic operations will [shall] be evaluated by a panel of department employees to determine which proposal will provide the best value to the state. A recommendation for award will be [tabulated and] forwarded to the commission to accept or reject. [The commission may accept or reject all bids, and if accepted, award the contract to the lowest bidder.]

(2) The department will notify the contractor by certified mail of the award of a information logo sign program contract within 10 [ten] calendar days of the date of the award. To accept the award, the contractor must execute a contract with the department within 30 calendar days of the date of the award.

(3) The contract shall be in a form prescribed by the department and shall, at a minimum, include all terms and conditions prescribed under this subchapter [by this undesignated head] and such other terms and conditions the department deems advantageous to the state.

§25.405. Specifications for Information Logo Signs.

(a) Specific information logo signs.

(1) (No change.)

(2) Content. A specific information logo sign shall contain:

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

(C) no more than six business logos on one sign panel; [and]

(D) no more than three types of services on a sign panel ([.] Signs with greater than two services shall be approved by the department prior to fabrication and installation;) and [.]

(E) no more than two dual logos.

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

(b) Business logos.

(1) (No change.)

(2) Content. A business logo may:

(A) (No change.)

(B) contain supplemental information, limited to the word "DIESEL" on a gas logo or "PROPANE" on a camping logo, or the words "24 HOURS" on a gas or a food logo, the words "DIESEL", "PROPANE", and "24 HOURS" not to exceed six inches in height;

(C) - (D) (No change.)

(c) (No change.)

(d) Dual logos.

(1) An establishment may have two names displayed on a single logo sign panel if the establishment consists of:

(A) two food outlets in a shared space under common ownership; or

(B) gas and food outlets in a shared space under common ownership.

(2) A business requesting a dual logo will pay a fee that is 175% of the standard fee for a single logo.

(3) No more than two dual logos may be installed per logo sign.

(4) Dual logos may not be installed on a specific information logo sign unless all available spaces for the "FOOD" or "GAS" specific service categories are full.

(5) If demand for space on a logo sign exceeds the available number of spaces, businesses requesting a dual logo must follow the same random drawing process as described in §25.407 of this subchapter.

(e) [(d)] Major shopping area guide signs.

(1) Design. A major shopping area sign shall:

(A) have a green background with a white reflective legend and border;

(B) meet the applicable provisions of the Texas MUTCD;

(C) have background, legend, and border material which conforms with department specifications for reflective sheeting;

(D) not be illuminated externally or internally; and

(E) be fabricated, erected, and maintained in conformance with department specifications and fabrication details.

(2) Content. A major shopping area guide sign shall:

(A) contain the name of the major shopping area as it is commonly known to the public; and

(B) contain the exit number or, if exit numbers are not applicable, other directional information.

(3) Placement. Subject to approval of the department, a major shopping area guide sign shall be installed or placed:

(A) independently mounted, or if approved by the department, attached to existing guide signs;

(B) to take advantage of natural terrain;

(C) to have the least impact on the scenic environment;

(D) to avoid visual conflict with other signs within the highway right-of-way;

(E) with a lateral offset equal to or greater than existing guide signs;

(F) for both directions of travel on the eligible urban highway;

(G) without blocking motorists' visibility of existing traffic control and guide signs; and

(H) in locations that are not overhead unless approved by the department.

(4) Existing signs. Existing regulatory, warning, destination, guide, recreation, and cultural interest signs will not be removed; provided, however, that subject to the written approval of the department, such existing signs may be relocated by special permission of the department at the sole expense and responsibility of the contractor and only to the extent necessary to accommodate major shopping area guide signs.

(f) [~~(e)~~] Major shopping area ramp signs.

(1) Design. A major shopping area ramp sign shall:

(A) have a green background with a white reflective legend and border;

(B) meet the applicable provisions of the Texas MUTCD;

(C) have background, legend, and border material which conforms with department specifications for reflective sheeting;

(D) be fabricated, erected, and maintained in conformance with department specifications and fabrication details; and

(E) not be illuminated internally or externally.

(2) Content. A ramp sign shall contain:

(A) the name of the major shopping area as it is commonly known to the public; and

(B) directional arrows and distances.

(3) Placement. Subject to approval of the department, the major shopping area ramp sign(s) may be placed along an exit ramp or access road, or at an intersection of an access road and crossroad if the retail shopping mall driveway access, buildings, or parking areas are not visible from that exit ramp, access road, or intersection.

§25.406. Commercial Establishment Eligibility.

(a) - (c) (No change.)

(d) Variances.

(1) (No change.)

(2) A variance may be requested for a waiver of:

(A) - (C) (No change.)

(D) type of highway, except the highway must be on the state highway system and at or near a grade-separated intersection; [~~.~~]

(3) Variances may not be requested for restrictions regarding dual logos.

(4) [~~(3)~~] A person may submit a request for a variance to the department's local district engineer indicating:

(A) which requirement of the program it does not meet; and

(B) the variance requested.

(5) [~~(4)~~] The department may require additional documentation following generally accepted engineering standards, which shall include, but not be limited to:

(A) traffic studies;

(B) maps indicating ramps, major arterials, ingress and egress points, existing signs and distances;

(C) traffic flow analysis including traffic counts to and from the commercial establishment or major shopping area;

(D) crash data and analysis; and

(E) detailed site plan of the commercial establishment or major shopping area, including but not limited to parking available, driveways, and location in reference to eligible highway or eligible urban highway.

(6) [~~(5)~~] The executive director, or the director's designee, may grant a variance if he or she determines it is feasible to place the sign at the requested location and the sign meets the requirements of the Texas MUTCD; and

(A) the variance will substantially promote traffic safety;

(B) the variance will substantially improve traffic flow;

(C) an overpass, highway sign or other highway structure unduly obstructs the visibility of an existing commercial sign; or

(D) the variance is necessary to substantially improve the efficiency and effectiveness of communicating information needed by people to safely and efficiently use the transportation system.

(7) [~~(6)~~] The executive director, or the director's designee, will indicate the reason for granting or denying a variance in writing.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404230
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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43 TAC §25.403

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

STATUTORY AUTHORITY: The repeal is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Specific Information Logo Sign Program.

CROSS REFERENCE TO STATUTE: Transportation Code, §§391.091 et seq.

§25.403. Prequalification.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404231
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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43 TAC §25.403

STATUTORY AUTHORITY: The new section is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Specific Information Logo Sign Program.

CROSS REFERENCE TO STATUTE: Transportation Code, §§391.091 et seq.

§25.403. Notice and Proposal Submission.

(a) Notice. The department will publish a notice of intent to award an information logo sign program contract in industry related publications and the *Texas Register* at least 45 calendar days prior to contractor selection. The notice shall include proposal requirements for potential contractors.

(b) Eligibility. A contractor must submit a sealed proposal to the director of the Traffic Operations Division, by mail or overnight delivery in compliance with the location, date, and time requirements of the notice.

(c) Contents. The proposal shall contain:

(1) the identity of key individuals, including subcontractors, who are proposed to be part of the contractor's project team together with their respective qualifications and experience on similar or related projects, the expected amount of involvement, and the time commitment for each individual and subcontractor;

(2) description of the contractor's:

(A) capability for undertaking and performing the work, including the types and locations of similar work performed in the last three years that best characterize the quality and cost control of the contractor as well as the names, addresses, and phone numbers of knowledgeable individuals who can be contacted; and

(B) internal policies and procedures related to work quality, cost control, and resources, including management and organization capabilities currently available for performing the work;

(3) a demonstration of the contractor's understanding of the project, based on information available from the department, site visits by the contractor, and knowledge of applicable regulations or requirements;

(4) a realistic, clear, and concise approach or course of action to meet the goals and objectives of the project that identifies potential impacts, impediments, or conflicts;

(5) a description of internal methods for schedule control, including current references that confirm the contractor's ability for the timely completion of project work;

(6) the location or locations where the work will be accomplished by the contractor and any subcontractor, the identities of those who will be involved at each work location for the major work elements on the project, the location of the business offices, and the location where the signs will be fabricated;

(7) an audited financial statement dated no later than the fiscal year immediately preceding the date of the proposal;

(8) supporting documentation such as graphs, charts, photos, resumes, and references; and

(9) the best value for the state which shall include:

(A) the proposed rate of return to the department from fees collected from program participants for the business logo/major shopping area guide sign installation fee, annual rental fee, area guide sign covering fee, and area guide sign replacement fee (The minimum rate of return that a contractor may propose for return to the department is 10%); and

(B) the proposed amount for the rental and installation fees that will be charged to a participant in the program (A business that has a dual logo will pay a fee that is 175% of the standard fee for a single logo).

(d) Page limits. The entire proposal should not exceed 25 pages. A page is defined as an 8.5 by 11 inch or 11 by 17 inch sheet containing text, pictures, graphs, charts, plan sheets, or any other graphics. Not more than five 11 by 17 inch sheets may be used in conjunction with pictures, graphs, charts, plans, and other graphics. If 11 by 17 inch sheets contain text only, they will be counted as two pages.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404232
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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SUBCHAPTER K. MAJOR AGRICULTURAL INTEREST SIGN PROGRAM

The Texas Department of Transportation (department) proposes amendments to §25.702, the repeal of §25.703 and §25.704, and simultaneously proposes new §25.703 and §25.704, concerning the Major Agricultural Interest Sign Program.

EXPLANATION OF PROPOSED AMENDMENTS, REPEALS, AND NEW SECTIONS

House Bill 2905 and House Bill 3330, 78th Legislature, Regular Session, 2003, require certain contracting provisions relating to required rate of return and best value contracting for the department's Major Agricultural Interest Sign Program. House Bill 3330 requires remittance to the department of 10% of the fees collected by the contractor. House Bill 2905 provides for the scoring of proposals based, in part, on the percentage of fees offered.

The amendments to §25.702 removes the requirement that a contract must be awarded to the lowest bidder and also requires the contractor to contact businesses that are or have in the past participated in the program.

The amendments to subsection (e) remove the existing requirement regarding sign erection in the first year of the program. Since the program has been in existence since 1998, this requirement is no longer needed. The new text in this subsection requires the logo contractor to contact existing participating businesses within the first three months of a contract with the department. This will ensure that the contractor is working with participating businesses, the businesses know who to contact in case any issues arise in the program, and that any rental renewal issues are handled in a timely manner.

Amendments to subsection (m) remove the mandatory set percentage of fees that the contractor must remit to the department for installation, annual rental, covering, and replacement sign fees. Under House Bill 2905 and House Bill 3330, the department may accept a best value bid that is higher than the current 5.0% fee. The mandatory set amounts for sign installation, annual rental, covering, and replacement sign fees have been removed in order that the state may accept the contract with the best value. Amendments to subsection (q) clarify that the contractor will only be paid for a portion of the fair market value of the signs if the department terminates the contract before the contract's termination date for reasons other than default of the contractor.

The evaluation provisions of repealed §25.703 are moved to new §25.704. New §25.703, Notice and Proposal Submission, provides that the department will publish a notice of intent to award a major agricultural sign program contract and the proposal requirements. The new section describes proposal submittal requirements including delivery, page limits, team qualifications, the contractor's capability, the contractor's internal policies and procedures work quality/cost control/resources, a demonstration of the contractor's understanding of the project, the contractor's approach, a description of internal methods for schedule control, the locations for the work, an audited financial statement, supporting documentation, and the best value for the state. Pursuant to House Bill 2905, the best value for the state consists of the proposed rate of return to the department from fees collected from program participants for installation, annual rental, covering, and replacement. The best value also includes the proposed amount for the fees that will be charged to a participant in the program.

New §25.704 relates to the evaluation of the proposals. The prequalification requirement in former §25.704 is repealed. The department will not consider a proposal that fails to comply with the notice, specifies an installation fee that is less than 5.0% or greater than 25% of the annual rental fee. The minimum range is to ensure that the fee for sign rental is set at a minimum price that will encourage long-term businesses to participate in the program and discourage constant turnover within the program. The upper end of the range is established to ensure that the program contractor recoups its initial investment to install the sign over a period of several years, thus encouraging the contractor to maintain the signs at an appropriate level.

New §25.704 also states that the department will not consider a proposal that fails to guarantee a return to the department of 10% of the rental fees collected from program participants as required under House Bill 3330.

The department will determine the best value to the state by evaluating the contractor's proposed team and time commitment, capability for undertaking and performing the work, understanding of the project, quality of services offered, financial resources, approach, ability to meet the schedule, ability to fulfill any other criteria listed in the notice, proposed rate of return to the department from fees collected from program participants, and proposed amount for the rental and installation fees that will be charged to participate in the program in accordance with House Bill 2905. The proposals will be evaluated by a panel of department employees. The Texas Transportation Commission (commission) may reject or accept the recommended award.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the amendments, repeals, and new sections as proposed are in effect there will be positive fiscal implications for the state as a result of enforcing or administering the amendments, repeals, and new sections. This positive impact will result from increasing the state's rate of return from the program contractor from 5.0% to 10%. The amount of increased revenue that will be provided to the state is estimated to be approximately $500 annually. There will be no fiscal impact to local governments. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Carlos Lopez, P.E., Director, Traffic Operations Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments, repeals, and new sections.

PUBLIC BENEFIT

Mr. Lopez has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, repeals, and new sections will be a more efficient operation of the Major Agricultural Interest Sign Program. The rate of return will increase for the state as it increases and as the state is provided greater flexibility in the contracting process. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments, repeals, and new sections may be submitted to Carlos Lopez, P.E., Director, Traffic Operations Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on August 9, 2004.

43 TAC §25.702

STATUTORY AUTHORITY: These amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Major Agricultural Interest Sign Program, and Transportation Code, §391.097 which requires the commission to regulate the content, composition, placement, erection, and maintenance of major agricultural interest signs and supports on an eligible rural highway right-of-way, and adopt rules necessary to enforce and implement that section.

CROSS REFERENCE TO STATUTE: Transportation Code, §391.091.

§25.702. Program.

(a) Award. The department may award a contract or contracts [~~by low bid~~] to a person, firm, group, or association in the State of Texas, for an initial period not to exceed five years, to develop, erect, operate, and maintain major agricultural interest signs at appropriate locations, subject to the following terms and conditions.

(b) Marketing. In marketing the sign program, the contractor shall:

(1) advertise the sign program in local papers and post notices at appropriate locations at the county seats; [~~and~~]

(2) send letters explaining the program to potential eligible major agricultural interests who request information; and

(3) contact prior businesses that are participating or have participated in the program.

(c) Site plans. Prior to construction of a sign at an approved location, the contractor must submit a site plan to the department. Upon approval of the site plan, the contractor may begin work at the location described.

(d) As-built plans. The contractor shall submit as-built plans to the department within 45 calendar days upon completion of the installation of a sign.

(e) Contacting participating businesses. In the first three months of a contract between the department and contractor, the contractor shall contact all participating businesses with logo signs to coordinate any renewal issues with the participating businesses. [~~Sign erection in first year. In the first year of the contract between the department and contractor, the contractor shall erect signs at a minimum of 40% of the sites where participation agreements have been completed between the major agricultural interest and the contractor. Signs shall be erected within two years of the execution date of an agreement between the major agricultural interest and the contractor pursuant to §25.707 of this title (relating to Program Operation).~~]

(f) Cooperation with other contractors. The contractor is required to cooperate with any contractor working on the state highway system as well as any other contractors operating major agricultural interest sign programs within the state. Upon request by a potential lessee, the department, or a member of the public, the contractor will furnish the name, address, and telephone number of other operating major agricultural interest sign contractors.

(g) Annual report. The contractor shall furnish an annual report to the department. The annual report will include the signs erected and number of participation agreements completed. Other reports may also be required throughout the year as determined by the department.

(h) Meetings. The contractor is required to attend meetings with the department or department representatives at least once per calendar year at a date and location determined by the department to discuss program operation. The department may also require other meetings as necessary to ensure compliance with this subchapter.

(i) Installation by contractor. Installation of signs may only be performed by the contractor, a subcontractor approved by the department, or, in emergency situations, by the department. In the event that the department undertakes installation or other duties of the contractor, the contractor shall immediately remit to the department the specified fee or cost of such work.

(j) Department review. Prior to installation, the design and location of signs must be submitted to the department for review. The department shall inspect installation and monitor maintenance.

(k) Sign relocation or removal. If the department determines that additional regulatory, warning, or signing is needed at any location along the eligible rural highway, existing or planned signs shall be removed or relocated by the contractor as directed by the department and at the sole expense of the contractor. If the department determines that construction or maintenance activities within highway rights of way will create conditions where existing signs will not be in compliance with Transportation Code, §§391.097-391.098, or provisions of this subchapter, the contractor shall:

(1) remove the affected signs; and

(2) reimburse advance rental fees paid by the agricultural interest prorated as per the date of removal of the sign.

(l) Sign maintenance. The signs shall be maintained by the contractor in a manner and condition that is:

(1) a distinct benefit to the safety of the public;

(2) a benefit to the major agricultural interest; and

(3) to the satisfaction of the department.

(m) Fees.

(1) The contractor shall assess installation, annual rental, covering, and replacement fees for the signs, and shall remit to the department the amounts specified in the contract [~~Non-refundable fees. The contractor shall assess the following non-refundable fees and shall remit to the department an amount equal to 5.0% of all such fees~~] no later than the seventh business day following the last day of the month such fees are received by the contractor.

[~~(A) Sign installation fee. The contractor shall assess a one-time fee of the amount specified in the contractor's bid proposal under §25.704 of this title (relating to Contract Award Procedures) for~~

~~initial installation of a sign pursuant to §25.707 of this title (relating to Program Operation).]~~

~~[(B) Annual rental fee. The contractor shall assess an annual fee to the major agricultural interest in the amount specified in the contractor's bid proposal under §25.704 of this title.]~~

~~[(C) Sign covering fee. The contractor shall assess a total fee of $250 for covering the sign and a total fee of $250 for uncovering the sign pursuant to §25.707 of this title.]~~

(2) Reduced fees. The contractor shall reduce the annual rental fee to a prorated amount for each calendar day when:

(A) the sign has not been erected; or

(B) a sign is obscured from view of the motorists for a period of time exceeding 10 consecutive calendar days.

(3) Non-reducible fee. A contractor may not reduce the annual fee for the period a sign is covered at the request of the major agricultural interest.

(n) Bonding. The contractor shall satisfy all requirements of Government Code, Chapter 2253, concerning bonds.

(o) Permits, licenses, and taxes. The contractor shall:

(1) procure all permits and licenses;

(2) pay all charges, fees, and taxes;

(3) give all notices necessary and incidental to the due and lawful prosecution of the work; and

(4) furnish the department with evidence of compliance with the permit, license, and tax requirements upon request.

(p) Records. The contractor shall:

(1) consistent with generally accepted accounting principles, maintain all books, documents, papers, advertising contracts, accounting records, and other evidence pertaining to the contract with the department; and

(2) furnish the department, its designee, or the state auditor [~~State Auditor~~] such documents, records, and information for examination upon request.

(q) Termination. The department or the contractor may terminate the contract upon default of the other party.

(1) If the contractor terminates the contract or defaults prior to the conclusion date of any five-year term, ownership of the contract rights and any rights in signs constructed along the eligible rural highways shall immediately pass to and vest in the department on the effective date of termination, and the contractor shall not be entitled to any compensation.

(2) If the department terminates the contract, before the contract's termination date, for reasons other than default of the contractor, the contractor will be paid for a percentage of the fair market value, as established by the department, for each of the signs erected. The percentages are as follows: elapsed time since sign installation: less than one [~~0-1~~] year--90%; one-two years--75%; two-three years--50%; three-four years--25%; four years or greater--0%.

(r) Sale, transfer, and assignment of contract. The contractor shall not sell, transfer, assign, or otherwise dispose of the contract or any portion thereof, or of its right, title, or interest therein, without the prior written consent 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.

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404233
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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43 TAC §25.703, §25.704

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

STATUTORY AUTHORITY: These repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Major Agricultural Interest Sign Program, and Transportation Code, §391.097 which requires the commission to regulate the content, composition, placement, erection, and maintenance of major agricultural interest signs and supports on an eligible rural highway right-of-way, and adopt rules necessary to enforce and implement that section.

CROSS REFERENCE TO STATUTE: Transportation Code, §391.091.

§25.703. Prequalification.

§25.704. Contract Award Procedures.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404234
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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43 TAC §25.703, §25.704

STATUTORY AUTHORITY: These new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department and more specifically, Transportation Code, §391.092, which provides the commission with the authority to establish rules regarding the Major Agricultural Interest Sign Program, and Transportation Code, §391.097 which requires the commission to regulate the content, composition, placement, erection, and maintenance of major agricultural interest signs and supports on an eligible rural highway right-of-way, and adopt rules necessary to enforce and implement that section.

CROSS REFERENCE TO STATUTE: Transportation Code, §391.091.

§25.703. Notice and Proposal Submission.

(a) Notice. The department will publish a notice of intent to award a major agricultural sign program contract in industry related publications and the *Texas Register* at least 45 calendar days prior to contractor selection. The notice shall include proposal requirements for potential contractors.

(b) Eligibility. A contractor must submit a sealed proposal to the director of the Traffic Operations Division by mail or overnight delivery in compliance with the location, date, and time requirements of the notice.

(c) Contents. The proposal shall contain:

(1) the identity of key individuals, including subcontractors, who are proposed to be part of the contractor's project team together with their respective qualifications and experience on similar or related projects, the expected amount of involvement, and the time commitment for each individual and subcontractor;

(2) a description of the contractor's:

(A) capability for undertaking and performing the work, including the types and locations of similar work performed in the last three years that best characterize the quality and cost control of the contractor as well as the names, addresses, and phone numbers of knowledgeable individuals who can be contacted; and

(B) internal policies and procedures related to work quality, cost control, and resources, including management and organization capabilities currently available for performing the work;

(3) a demonstration of the contractor's understanding of the project, based on information available from the department, site visits by the contractor, and knowledge of applicable regulations or requirements;

(4) a realistic, clear, and concise approach or course of action to meet the goals and objectives of the project that identifies potential impacts, impediments, or conflicts;

(5) a description of internal methods for schedule control, including current references that confirm the contractor's ability for the timely completion of project work;

(6) the location or locations where the work will be accomplished by the contractor and any subcontractor, the identities of those who will be involved at each work location for the major work elements on the project, the location of the business offices, and the location where the signs will be fabricated;

(7) an audited financial statement dated no later than the fiscal year immediately preceding the date of the proposal;

(8) supporting documentation such as graphs, charts, photos, resumes, and references; and

(9) the best value for the state which shall include:

(A) the proposed rate of return to the department from fees collected from program participants (the minimum rate of return that a contractor may propose for return to the department is 10%) for the installation fee, annual rental fee, covering fee, and sign replacement fee; and

(B) the proposed amount for the rental and installation fees that will be charged to a participant in the program.

(d) Page limits. The entire proposal should not exceed 25 pages. A page is defined as an 8.5 by 11 inch or 11 by 17 inch sheet containing text, pictures, graphs, charts, plan sheets, or any other graphics. Not more than five 11 by 17 inch sheets may be used in conjunction with pictures, graphs, charts, plans, and other graphics. If 11 by 17 inch sheets contain text only, they will be counted as two pages.

§25.704. Evaluation.

(a) Ineligible proposal. The department will not consider a proposal that:

(1) fails to comply with any requirement of the notice;

(2) specifies an installation fee that is less than 5.0% or greater than 25% of the business logo annual rental fee; or

(3) fails to guarantee a percentage to be paid to the department of 10% of the rental fees collected from program participants.

(b) Evaluation. The department will determine the best value to the state by evaluating the contractor's:

(1) proposed team and the time commitment for each team member;

(2) capability for undertaking and performing the work;

(3) understanding of the project;

(4) quality of the services offered;

(5) financial resources and ability to perform the work;

(6) approach or course of action to meeting the goals and objectives;

(7) ability to meet the schedule;

(8) ability to fulfill any other criteria listed in the notice;

(9) proposed percentage to be paid to the department from fees collected from program participants; and

(10) proposed amount for the rental and installation fees that will be charged to participant in the program.

(c) Award of contract.

(1) All proposals received by the director of the Traffic Operations Division will be evaluated by a panel of department employees to determine which proposal will be the best value for the state, and a recommendation for award will be forwarded to the commission to accept or reject.

(2) The department will notify the contractor by certified mail of the award of the sign program contract within 10 calendar days of the date of the award. To accept the award, the contractor must execute a contract with the department within 30 calendar days of the date of the award.

(3) The contract shall be in a form prescribed by the department and shall, at a minimum, include all terms and conditions prescribed by this subchapter and such other terms and conditions the department deems advantageous to the state.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404235

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: August 8, 2004
For further information, please call: (512) 463-8630

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §251.2

The Commission on State Emergency Communications (CSEC) adopts an amendment to §251.2, concerning guidelines for changing or extending 9-1-1 service arrangements, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4343).

This action is adopted as part of Rule Review of Chapter 251, pursuant to Government Code, Section 2001.039. The rule continues to be essential to the CSEC's operations and per statutory authority.

CSEC adopts the rule with amendments to this rule to streamline reporting requirements for the regional planning commissions (RPCs). The associated instructions for reporting are being proposed as a new proposed Program Policy Statement, a more formal version of the agency's former Program Policies and Procedures.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056; and Title 1 Texas Administrative Code, Part 12, Chapter 251, Regional Plan Standards, which provide the Commission on State Emergency Communications with the authority to plan, develop, fund, and provide provisions for the enhancement of effective and efficient 9-1-1 service.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404275
Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: July 18, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 305-6933

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1 TAC §251.5

The Commission on State Emergency Communications (CSEC) adopts an amendment to §251.5, concerning the use of 9-1-1 funds for equipment management and disposition, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4345).

This action is adopted as part of Rule Review of Chapter 251, pursuant to Government Code, Section 2001.039. The rule continues to be essential to the CSEC's operations and per statutory authority.

CSEC adopts the rule with amendments to ensure consistency with Texas Uniform Grant Management Standards (UGMS). Reporting forms attached to the previous version of this rule have been revised and are now included in a new proposed Program Policy Statement, a more formal version of the agency's former Program Policies and Procedures.

The following comments were received regarding adoption of the amendment.

Comments received from the Texas Association of Regional Councils' (TARC) 9-1-1 Coordinators' Committee to 251.5 related to the required annual certification of assets and notices of equipment disposal are being addressed in the proposed PPS-014, *Asset Inventory Reporting*, which will be presented for Commission action at the July 15th meeting.

The amendment is adopted under Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056, 771.071, 771.0711, 771.072, 771.075, 771.078, 771.079; and Title 1 Texas Administrative Code, Part 12, Chapter 251, Regional Plan Standards, which provide the Commission on State Emergency Communications with the authority to plan, develop, fund, and provide provisions for the enhancement of effective and efficient 9-1-1 service.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404276
Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: July 18, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 305-6933

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1 TAC §251.7

The Commission on State Emergency Communications (CSEC) adopts an amendment to §251.7, concerning the inclusion of

third-party software applications into the 9-1-1 integrated workstation environment, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4353).

This action is adopted as part of Rule Review of Chapter 251, pursuant to Government Code, Section 2001.039. The rule continues to be essential to the CSEC's operations and per statutory authority.

CSEC adopts the rule with substantive revision to the rule to add a requirement that mapping of telephone number (TN) data is tested for accuracy prior to "going live" with Mapped ALI at a PSAP.

The following comments were received regarding adoption of the amendment.

Comments received from the Texas Association of Regional Councils' (TARC) 9-1-1 Coordinators' Committee to 251.7, *Guidelines for Implementing Integrated Services* related to documentation of testing for integrated services, are being addressed in the proposed PPS-015, 9-1-1 System Survey, which will be presented for Commission action at the July 15th meeting.

The amendment is adopted under Health and Safety Code, Chapter 771, §§771.051, 771.055 and 771.056; and Title 1 Texas Administrative Code, Part 12, Chapter 251, Regional Plan Standards, which provide the Commission on State Emergency Communications with the authority to plan, develop, fund, and provide provisions for the enhancement of effective and efficient 9-1-1 service.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404277
Paul Mallett
Executive Director
Commission on State Emergency Communications
Effective date: July 18, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 305-6933

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1 TAC §251.8

The Commission on State Emergency Communications (CSEC) adopts an amendment §251.8, concerning proposed guidelines for the procurement of equipment services with 9-1-1 funds, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4355).

This action is adopted as part of Rule Review of Chapter 251, pursuant to Government Code, Section 2001.039. The rule continues to be essential to the CSEC's operations and per statutory authority.

CSEC adopts the rule with amendments made to ensure consistency with Texas Uniform Grant Management Standards (UGMS).

No comments were received regarding adoption of the amendment.

The amendment is adopted under Health and Safety Code, Chapter 771, §§771.051, 771.071, 771.0711, 771.072, 771.075; and Title 1 Texas Administrative Code, Part 12, Chapter 251, Regional Plan Standards, which provide the Commission on State Emergency Communications with the authority to plan, develop, fund, and provide provisions for the enhancement of effective and efficient 9-1-1 service.

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

Filed with the Office of the Secretary of State on June 28, 2004.

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.112

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.112, with changes to the proposed text published in the April 30, 2004, issue of the *Texas Register* (29 TexReg 4037).

The primary purpose of the amendment was to expand the definition of an attendant in the Residential Care (RC) and Community Based Alternatives Assisted Living/Residential Care (CBA AL/RC) programs to include drivers as attendants. This amended definition accurately reflects the fact that attendants also function as drivers in the majority of RC and CBA AL/RC facilities. While serving as drivers, attendants provide assistance with activities of daily living such as doctor and hospital visits, shopping, and outdoor activities. The amendment also corrected references to the CBA AL/RC Program so they are consistent throughout the rule.

HHSC received no comments regarding adoption of the amendment.

HHSC, however, has initiated a minor editorial change to the text of §355.112(b)(4) to clarify and improve the accuracy of the section.

The amendment is adopted under the Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Human Resources Code, Chapter 32.

The amendment affects the Government Code, §§531.033 and 531.021(b).

§355.112. Attendant Compensation Rate Enhancement.

(a) Eligible programs. Providers contracted in the Primary Home Care, including Family Care (PHC/FC); Day Activity and Health Services (DAHS); Residential Care (RC); Community Living Assistance and Support Services (CLASS)--Direct Service Agency; Community Based Alternatives (CBA)--Home and Community Support Services (HCSS); Deaf-Blind Multiple Disabilities Waiver (DBMD); and CBA--Assisted Living/Residential Care (AL/RC) programs, are eligible to participate in the attendant compensation rate enhancement.

(b) Definition of attendant. An attendant is the unlicensed caregiver providing direct assistance to the clients with Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL).

(1) In the case of DAHS, RC, and CBA AL/RC programs, the attendant may perform some nonattendant functions. In such cases, the attendant must perform attendant functions at least 80% of his or her total time worked. Staff in these settings not providing attendant services at least 80% of their total time worked are not considered attendants. Time studies must be performed in accordance with §355.105(b)(2)(B)(i) for staff in the DAHS, RC, and CBA AL/RC programs that are not full-time attendants but perform attendant functions to determine if a staff member meets this 80% requirement. Failure to perform the time studies for these staff will result in the staff not being considered to be attendants.

(2) Attendants do not include the director, administrator, assistant director, assistant administrator, clerical and secretarial staff, professional staff, other administrative staff, licensed staff, attendant supervisors, cooks and kitchen staff, maintenance and groundskeeping staff, activity director, and laundry and housekeeping staff. In the case of PHC/FC, CLASS, CBA HCSS, and DBMD staff other than attendants may deliver attendant services and be considered an attendant if they must perform attendant services that cannot be delivered by another attendant to prevent a break in service.

(3) An attendant also includes a driver in the DAHS, RC, and CBA AL/RC programs.

(4) An attendant also includes medication aides in the RC and CBA AL/RC programs.

(c) Attendant compensation cost center. This cost center will include employee compensation, contract labor costs, and personal vehicle mileage reimbursement for attendants as defined in subsection (b) of this section.

(1) Attendant compensation is the allowable compensation for attendants defined in §355.103(b)(1) of this title (relating to Specifications for Allowable and Unallowable Costs) and required to be reported as either salaries and/or wages, including payroll taxes and workers' compensation, or employee benefits. Benefits required by §355.103(b)(1)(A)(iii) of this title (relating to Specifications for Allowable and Unallowable Costs) to be reported as costs applicable to specific cost report line items, except as noted in paragraph (3) of this subsection, are not to be included in this cost center.

(2) Contract labor refers to personnel for whom the contracted provider is not responsible for the payment of payroll taxes, such as FICA, Medicare, and federal and state unemployment insurance, and who perform tasks routinely performed by employees where allowed by program rules. Allowable contract labor costs are defined in §355.103(b)(2)(C) of this title (relating to Specifications for Allowable and Unallowable Costs).

(3) Mileage reimbursement paid to the attendant for the use of his or her personal vehicle and which is not subject to payroll taxes is considered compensation for this cost center.

(d) Rate year. The rate year begins on the first day of September and ends on the last day of August of the following year.

(e) Open enrollment. Open enrollment begins on the first day of July and ends on the last day of that same July preceding the rate year for which payments are being determined, unless the Texas Health and Human Services Commission (HHSC) notified providers before the first day of July that open enrollment has been postponed or cancelled. Should conditions warrant, HHSC may conduct additional enrollment periods during a rate year.

(f) Enrollment contract amendment. An initial enrollment contract amendment is required from each provider choosing to participate in the attendant compensation rate enhancement. On the initial enrollment contract amendment, the provider must specify for each contract a desire to participate or not to participate. The participating provider must specify for each program the desire to have all participating contracts be considered as a group or as individuals for purposes related to the attendant compensation rate enhancement. For the PHC/FC program, the participating provider must also specify if he wishes to have either priority 1, nonpriority, or both priority 1 and nonpriority services participating in the attendant compensation rate enhancement. If the PHC/FC provider selects to have their contracts participating as a group, then the provider must select to have either priority 1, nonpriority, or both priority 1 and nonpriority services participate for the entire group of contracts. For providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs. After initial enrollment, participating and nonparticipating providers may request to modify their enrollment status during any open enrollment period. A nonparticipant can request to become a participant; a participant can request to become a nonparticipant; a participant can request to change its participation level; a provider whose participating contracts are being considered as a group can request to have them considered as individuals; and a provider whose participating contracts are being considered as individuals can request to have them considered as a group. Requests to modify a provider's enrollment status during an open enrollment period must be received by HHSC Rate Analysis by the last day of the open enrollment period as per subsection (e) of this section. If the last day of open enrollment is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. Providers from which HHSC Rate Analysis has not received an acceptable request to modify their enrollment by the last day of the open enrollment period will continue at the level of participation and group or individual status in effect during the open enrollment period within available funds. To be acceptable, an enrollment contract amendment must be completed according to instructions, signed by an authorized signatory as per the Texas Department of Human Services (DHS) Corporate Board of Directors Resolution applicable to the provider's contract or ownership type, and legible.

(g) New contracts. For the purposes of this section, for each rate year a new contract is defined as a contract delivering its first day of service to a DHS client on or after the first day of the open enrollment period, as defined in subsection (e) of this section, for that rate year. Contracts that underwent a contract assignment are not considered new contracts. For purposes of this subsection, an acceptable contract amendment is defined as a legible enrollment contract amendment that has been completed according to instructions, signed by an authorized signator as per the DHS Corporate Board of Directors Resolution applicable to the provider's contract or ownership type, and received

by HHSC Rate Analysis within 30 days of the date of notification to the provider that such an enrollment contract amendment must be submitted. If the 30th day is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. The granting of newly requested rate enhancement increments as outlined in subsection (p) of this section is limited to available funds. New contracts will receive the nonparticipant attendant compensation rate as specified in subsection (m) until:

(1) for new contractors specifying the desire not to participate on an acceptable enrollment contract amendment, the attendant compensation rate component is as specified in subsection (m) of this section.

(2) for new contractors specifying the desire to participate on an acceptable enrollment contract amendment, the attendant compensation rate component is adjusted as specified in subsections (l) and (n) of this section retroactive to the first day of their contract.

(3) for new contracts from which an acceptable enrollment contract amendment is not received, the attendant compensation rate component is as specified in subsection (m) of this section.

(h) Attendant Compensation Report submittal requirements. Attendant Compensation Reports must be submitted by participating contracted providers as follows.

(1) Contracted providers participating for the full rate year. Contracted providers participating for the full rate year must provide annual Attendant Compensation Reports as follows:

(A) Participating contracted providers will provide HHSC Rate Analysis, in a method specified by HHSC Rate Analysis, an annual Attendant Compensation Report reflecting the activities of the provider while delivering contracted services from the first day of the rate year through the last day of the rate year. This report must be submitted for each participating contract if the provider requested participation individually for each contract; or, if the provider requested participation as a group, the report must be submitted as a single aggregate report covering all contracts participating at the end of the rate year within one program of the provider. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with reporting requirements for the owner prior to the termination or contract assignment. This report will be used as the basis for determining compliance with the spending requirements and recoupment amounts as described in subsection (s) of this section. Contracted providers failing to submit an acceptable annual Attendant Compensation Report within 60 days of the end of the rate year will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(B) Contracts whose cost report year, as defined in §355.105(b)(5) of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures), coincides with the state of Texas fiscal year, are exempt from the requirement to submit a separate annual Attendant Compensation Report. For these contracts, their cost report will be considered their annual Attendant Compensation Report.

(2) Contracted providers participating for less than a full year. Contracted providers participating for less than a full year must provide Attendant Compensation Reports as follows:

(A) A participating provider whose contract is terminated either voluntarily or involuntarily before the end of the rate year must submit an Attendant Compensation Report covering the period from the beginning of the rate year to the date recognized by DHS as the contract termination date. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(B) In cases where a participating provider changes ownership through a contract assignment, the owner prior to the change of ownership must submit an Attendant Compensation Report, covering the period from the beginning of the rate year to the effective date of the contract assignment as determined by DHS. The owner, after the change of ownership, must submit an Attendant Compensation Report within 60 days of the end of the rate year, covering the period from the effective date of the contract assignment as determined by DHS to the end of the rate year. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(C) A participating provider who is excluded from participation as per subsection (u) of this section must submit an Attendant Compensation Report within 60 days from the date of notification of the exclusion, covering the period from the beginning of the rate year to the date of exclusion as determined by HHSC Rate Analysis. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(D) A participating provider who voluntarily withdraws from participation as per subsection (x) of this section must submit an Attendant Compensation Report within 60 days from the date of withdrawal as determined by HHSC, covering the period from the beginning of the rate year through the date of withdrawal as determined by HHSC. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(E) A participating provider who is a new contractor as per subsection (g) of this section must submit an Attendant Compensation Report within 60 days of the end of the rate year, covering the period from the first day of the contract as determined by DHS through the end of the rate year. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(3) Other reports. HHSC may require other reports from all contracts as needed.

(4) Vendor hold. HHSC will place on hold the vendor payments for any contractor who does not submit an Attendant Compensation Report completed in accordance with all applicable rules and instructions by the due dates described in this subsection. This vendor hold will remain in effect until HHSC Rate Analysis receives an acceptable Attendant Compensation Report.

(A) Contractors participating at the end of the rate year who do not submit an Attendant Compensation Report in accordance with paragraphs (1), (2)(B), and (2)(E) of this subsection, completed in accordance with all applicable rules and instructions, within 60 days of the vendor hold being placed will become a nonparticipant retroactive to the first day of the reporting period until the first day of the month after all of the following conditions are met:

(i) the provider submits an acceptable annual Attendant Compensation Report;

(ii) the provider submits a separate Attendant Compensation Report from the beginning of the current rate year to the date they were disenrolled as a participant;

(iii) the provider repays to DHS funds that are identified for recoupment from subsection (s) of this section; and

(iv) HHSC Rate Analysis receives, in writing by certified mail, a request from the provider to be restored to the participant status.

(B) Contractors not participating at the end of the rate year who do not submit an Attendant Compensation Report in accordance with paragraph (2)(A) - (D) of this subsection, completed in accordance with all applicable rules and instructions, within 60 days of the vendor hold being placed will become nonparticipants from the beginning of the rate year to the date of ownership change, exclusion, or withdrawal.

(i) Attendant Compensation Report contents. Each Attendant Compensation Report will include any information required by HHSC to implement this attendant compensation rate enhancement.

(j) Completion of compensation reports. All Attendant Compensation Reports must be completed in accordance with the provisions of §§355.102 - 355.105 of this title (relating to General Principles of Allowable and Unallowable Costs, Specifications for Allowable and Unallowable Costs, Revenues, and General Reporting and Documentation Requirements, Methods, and Procedures) and may be reviewed or audited in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports). Beginning with the rate year that starts September 1, 2002, all Attendant Compensation Reports must be completed by preparers who have attended the required cost report training for the applicable program under §355.102(d) of this title (relating to General Principles of Allowable and Unallowable Costs).

(k) Enrollment. Providers choosing to participate in the attendant compensation rate enhancement must submit to HHSC a signed enrollment contract amendment as described in subsection (f) of this section. Participation is determined separately for each program specified in subsection (a) of this section, except that for providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs. For PHC/FC, participation is also determined separately for priority 1 and nonpriority services. Participation will remain in effect, subject to availability of funds, until the provider notifies HHSC, in accordance with subsection (x) of this section, that it no longer wishes to participate or until HHSC excludes the contract from participation for reasons outlined in subsection (u) of this section. Contracts voluntarily withdrawing from participation will have their participation end effective with the date of withdrawal as determined by HHSC. Contracts excluded from participation will have their participation end effective on the date determined by HHSC.

(l) Determination of attendant compensation rate component for participating contracts. For each of the programs identified in subsection (a) of this section, an attendant compensation rate component will be determined for participating contracts from subsection (k) of this section. The attendant compensation rate enhancement component will be determined by taking into consideration quality of care, labor market conditions, economic factors, and budget constraints. The attendant compensation rate enhancement component will be determined on a per-unit-of-service basis applicable to each program or service.

(m) Determination of attendant compensation rate component for nonparticipating contracts. For each of the programs identified in subsection (a) of this section, HHSC will calculate an attendant compensation rate component for nonparticipating contracts as follows.

(1) Determine for each contract included in the cost report data base used in determination of rates in effect on September 1, 1999, the attendant compensation cost center from subsection (c) of this section.

(2) Adjust the cost center data from paragraph (1) of this subsection in order to account for inflation utilizing the inflation factors used in the determination of the September 1, 1999 rates.

(3) For each contract included in the cost report database used to determine rates in effect on September 1, 1999, divide the result from paragraph (2) of this subsection by the corresponding units of service. Provider projected costs per unit of service are rank-ordered from low to high, along with the provider's corresponding units of service. For DAHS, the median cost per unit of service is selected. For all other programs, the units of service are summed until the median unit of service is reached. The corresponding projected cost per unit of service is the weighted median cost component. The result is multiplied by 1.044 for all programs in subsection (a) of this section except for RC and CBA AL/RC, which is multiplied by 1.07. The result is the attendant compensation rate component for nonparticipating contracts.

(4) The attendant compensation rate component will remain constant over time, except for adjustments necessitated by increases in the minimum wage. In such cases, adjustments to the nonparticipating rates are limited to ensuring that these rates are adequate to cover mandated minimum wage levels.

(n) Determination of attendant compensation rate enhancements. HHSC will determine attendant compensation rate enhancement increments associated with each enhanced attendant compensation level. The attendant compensation rate enhancement increments will be determined by using data from sources such as cost reports, surveys, and/or other relevant sources. The attendant compensation rate enhancement increments will be determined by taking into consideration quality of care, labor market conditions, economic factors, and budget constraints. The attendant compensation rate enhancement increments will be determined on a per-unit-of-service basis applicable to each program or service.

(o) Enhanced attendant compensation. Participating contracts desiring to provide attendant compensation above the level included in subsection (l) of this section may request attendant compensation increments from an array of enhanced attendant compensation options and associated add-on payments determined in subsection (n) of this section during open enrollment. Participating providers who select to have all of their contracts participate in a program as a group must request a single attendant compensation increment for the entire group of contracts. PHC/FC providers participating as a group must select a single attendant compensation increment for their entire group of contracts for the priority 1 and/or nonpriority services they have selected for participation.

(p) Granting additional attendant compensation rate enhancement increments. HHSC divides all requests for attendant compensation rate enhancement increments into two groups: preexisting rate enhancement increments which providers requested to carry over from the prior year and newly requested rate enhancement increments. Newly requested rate enhancement increments may be requested by providers who were nonparticipants in the prior year, by providers who were participants during the prior year desiring to be granted additional rate enhancement increments or by new contracts as described in subsection (g) of this section. Using the process described herein, HHSC first determines the distribution of carry-over rate enhancement increments. If funds are available after the distribution of carry-over rate enhancement increments, HHSC determines the distribution of newly requested rate enhancement increments as follows:

(1) HHSC determines projected units of service for contracts requesting each enhancement increment and multiplies this number by the enhancement rate add-on amount associated with that enhancement increment as determined in subsection (n) of this section.

(2) HHSC compares the sum of the products from paragraph (1) of this subsection to available funds.

(A) If the product is less than or equal to available funds, all requested enhancements are granted.

(B) If the product is greater than available funds, enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until requested enhancements are granted within available funds. Based upon an examination of existing compensation levels and compensation needs, HHSC may grant certain enhancement options priority for distribution.

(q) Notification of granting of enhancements. Participating contracts are notified, in a manner determined by HHSC, as to the disposition of their request for additional attendant compensation rate enhancement increments.

(r) Total attendant compensation rate for participating contracts. Each participating contract will receive an attendant compensation rate equal to the attendant compensation rate component for participating contracts from subsection (l) of this section, plus any additional attendant compensation rate enhancement payments granted to the contract.

(s) Spending requirements for participating contracts. HHSC will determine from the Attendant Compensation Report, as specified in subsection (h) of this section and other appropriate data sources, the amount of attendant compensation spending per unit of service delivered. The provider's compliance with the spending requirement is determined based on the total attendant compensation spending as reported on the Attendant Compensation Report for each participating contract if the provider requested participation individually for each contract. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with the spending requirement for the owner prior to the termination or contract assignment. If the provider specified that he wished to have all participating contracts be considered as a group for purposes related to the attendant compensation rate enhancement, as specified in subsection (f) of this section, compliance with the spending requirement is based on the total attendant compensation as reported on the single aggregate Attendant Compensation Report described in subsection (h) of this section. Compliance with the spending requirement is determined separately for each program specified in subsection (a) of this section, except for providers delivering services to both RC and CBA AL/RC clients in the same facility whose compliance is determined by combining both programs. HHSC will calculate recoupment, if any, as follows.

(1) For the rate year beginning September 1, 2000, the attendant compensation spending per unit of service is multiplied by 1.09 to determine the adjusted attendant compensation per unit of service. For the rate years beginning September 1, 2001, and September 1, 2002, the attendant compensation spending per unit of service is multiplied by 1.07 to determine the adjusted attendant compensation per unit of service. For the rate year beginning September 1, 2003, and thereafter, the attendant compensation spending per unit of service is multiplied by 1.10 to determine the adjusted attendant compensation per unit of service.

(2) The adjusted attendant compensation per unit of service from paragraph (1) of this subsection will be subtracted from the accrued attendant compensation revenue to determine the amount to be recouped. If the adjusted attendant compensation per unit of service is greater than or equal to the accrued attendant compensation revenue per unit of service, there is no recoupment.

(3) The amount paid for attendant compensation per unit of service after adjustments for recoupment must not be less than the amount determined in subsection (m) of this section.

(t) Notification of recoupment. Providers will be notified in a manner specified by HHSC of the amount to be repaid to DHS. If a subsequent review or audit results in audit adjustments to the annual Attendant Compensation Report that changes the amount to be repaid, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid to DHS. DHS will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter.

(u) Exclusion from participation. Effective with the rate year that begins September 1, 2002, if the Attendant Compensation Report described in subsection (h) of this section indicates that the participating provider did not meet their spending requirement as determined from subsection (s) of this section, HHSC will notify the provider of the noncompliance. If the subsequent compensation report from subsection (h) of this section indicates that the provider has not met their spending requirement, the contract will be excluded from participation in the attendant rate enhancement effective immediately upon notice of failure to meet the spending requirement. The contract will be excluded from participation in the attendant compensation rate enhancement and will remain a nonparticipant for the remainder of the rate year in which the determination was made plus an additional rate year. Providers whose contracts are participating as a group must meet the requirements of this subsection as a group or all the contracts of the group will be excluded.

(v) Contract terminations. For terminating participants, HHSC will place a vendor hold on the payments of the contracted provider until HHSC receives an acceptable Attendant Compensation Report, as specified in subsection (h)(2)(A) of this section, and funds identified for recoupment from subsection (s) of this section are repaid to DHS. DHS will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid by the terminating provider's last vendor payment, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to DHS. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in placement of a vendor hold on all DHS contracts controlled by the responsible entity and will bar the responsible entity from enacting new contracts with DHS until repayment is made in full.

(w) Contract assignments. The following applies to contract assignments.

(1) Contracts participating under the prior legal entity will continue participation under the legal entity accepting the contract assignment. When the provider or legal entity accepting the contract assignment has their contracts participating as individuals, participation in the attendant compensation rate enhancement confers to the provider or legal entity accepting the contract assignment. When the provider or legal entity accepting the contract assignment has their contracts participating as a group, the contract will participate with the group of the legal entity accepting the contract assignment for purposes related to the attendant compensation rate enhancement. When the provider or legal entity accepting the contract assignment has no contracts participating, the individual or group status of participating contracts under the old owner will transfer to the new owner. When the provider or legal entity accepting the contract assignment has its contracts participating as individuals or has no contracts participating, the provider or legal entity may submit an enrollment contract amendment to modify the enrollment of the assigned contract. To be acceptable, an enrollment contract amendment must be completed according to instructions,

signed by an authorized signatory as per the DHS Corporate Board of Directors Resolution applicable to the provider's contract or ownership type, and be legible.

(2) When the contract assignment is an ownership change from one legal entity to a different legal entity, HHSC will place a vendor hold on the payments of the existing contracted provider until HHSC receives an acceptable Attendant Compensation Report specified in subsection (h)(2)(B) of this section and until funds identified for recoupment from subsection (s) of this section are repaid to DHS. DHS will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid by the existing contracted provider's vendor payments that are being held, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to DHS. Failure to repay the amount due within 60 days of notification will result in placement of a vendor hold on all DHS contracts controlled by the responsible entity and will bar the responsible entity from enacting new contracts with DHS until repayment is made in full.

(x) Voluntary withdrawal. Participating contracts wishing to withdraw from the attendant compensation rate enhancement must notify HHSC Rate Analysis in writing by certified mail. The requests will be effective the first of the month following the receipt of the request. Contracts voluntarily withdrawing must remain nonparticipants for the remainder of the rate year. Providers whose contracts are participating as a group must request withdrawal of all the contracts in the group.

(y) Adjusting attendant compensation requirements. Providers that determine that they will not be able to meet their attendant compensation requirements may request to reduce their attendant compensation requirements and associated enhancement payment to a lower participation level by submitting a written request to HHSC Rate Analysis by certified mail. These requests will be effective the first of the month following the receipt of the request. Providers whose contracts are participating as a group must request the same reduction for all of the contracts in the group.

(z) All other rate components. All other rate components will continue to be calculated as specified in the program-specific reimbursement methodology and will be uniform for all providers.

(aa) Failure to document spending. Undocumented attendant compensation expenses will be disallowed and will not be used in the determination of the attendant compensation spending per unit of service in subsection (s) of this section.

(bb) Appeals. Subject matter of informal reviews and formal appeals is limited as per §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(cc) Responsible entities. The contracted provider, owner, or legal entity which received the attendant compensation rate enhancement is responsible for the repayment of the recoupment amount.

(dd) Reinvestment. HHSC will reinvest recouped funds in the attendant compensation rate enhancement to the extent there are qualifying contracts.

(1) Identify qualifying contracts. Contracts that meet the following criteria during the most recently completed reporting period are qualifying contracts for reinvestment purposes.

(A) The contract was a participant in the attendant compensation rate enhancement.

(B) The contract's attendant compensation spending per unit of service was greater than the total attendant compensation rate per unit of service granted to the contract.

(C) HHSC Rate Analysis has received an acceptable Attendant Compensation Report completed in accordance with all applicable rules and instructions.

(2) Distribution of available reinvestment funds. Available funds are distributed as follows:

(A) HHSC determines units of service provided during the most recently completed reporting period by each qualifying contract and multiplies this number by the attendant compensation spending per unit of service minus the attendant compensation rate per unit of service for the reporting period.

(B) HHSC compares the sum of the products from subparagraph (A) of this paragraph to funds available for reinvestment.

(i) If the product is less than or equal to available funds, all enhancements for qualifying contracts are retroactively awarded for the reporting period.

(ii) If the product is greater than available funds, retroactive enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until enhancements are granted within available funds.

(3) Non-qualification as pre-existing enhancements. Retroactively awarded enhancements do not qualify as pre-existing enhancements for enrollment purposes.

(4) Notification of reinvested enhancements. Qualifying facilities are notified of the award of reinvested enhancements in a manner determined by HHSC.

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

Filed with the Office of the Secretary of State on June 24, 2004.

TRD-200404224
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: July 14, 2004
Proposal publication date: April 30, 2004
For further information, please call: (512) 438-3734

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SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8069

The Health and Human Services Commission (HHSC) adopts the amendment to §355.8069, concerning the reimbursement methodology for supplemental payments to certain rural public hospitals. The amendment is adopted without change to the proposed text published in the January 30, 2004, issue of the *Texas Register* (29 TexReg 740).

The amendment to §355.8069 eliminates the aggregate limit on supplemental inpatient payments to non-state government-owned or operated rural public hospitals. The amendment will result in additional reimbursement to certain rural public hospitals, which will help maintain access to medically necessary services in rural counties.

During the public comment period, which included a public hearing on February 19, 2004, HHSC received comments from the Texas Organization of Rural and Community Hospitals and several health care providers.

The following comments were received during the comment period.

Comment: Concerning the rule in general, the comments received expressed support for the proposed amendment.

Response: HHSC acknowledges the comments and agrees with the commenters. No changes were made to the rule in response to these comments.

The amendment is adopted under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404169
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Effective date: July 12, 2004
Proposal publication date: January 30, 2004
For further information, please call: (512) 424-6576

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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER E. DIRECTION OF AFFAIRS

7 TAC §91.502

The Credit Union Commission adopts an amendment to §91.502 relating to the payment of director fees and expenses without changes to the text published in the March 12, 2004 issue of the *Texas Register* (29 TexReg 2495).

The amendment clarifies that the payment of fees and expenses that are excessive or that could lead to material financial loss is considered an unsafe and unsound practice. The amendment specifically indicates that fees and expenses shall be considered excessive when amounts paid are disproportionate to the services performed, or unreasonable considering the financial condition of the credit union and similar practices at credit union's of comparable asset size, geographic location, and/or operational complexity.

No comments were received on the proposal.

The amendment is adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 122.062, which authorizes the Commission to establish by rule the fees that may be paid and expenditures that may be reimbursed to persons serving as directors and committee members of a credit union.

The specific section affected by the amendment is Texas Finance Code Section 122.062.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404073
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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7 TAC §91.510

The Credit Union Commission adopts amendments to §91.510 relating to fidelity bond and insurance requirements with nonsubstantive grammatical changes to the text published in the March 12, 2004 issue of the *Texas Register* (29 TexReg 2496).

The amendments clarify that the prescribed minimum coverage thresholds, which is computed based upon a credit union's total asset size, apply to any single loss. The amendments also require that any aggregate limit of liability provided for in a fidelity bond policy must be at least twice the single loss limit of liability. Finally, a new subsection was added to make clear that a credit union must also comply with all bond requirements imposed by an insuring organization as a condition to maintain insurance on share and deposit accounts, including the minimum fidelity bond specifications contained within Part 741.201 of the NCUA Rules and Regulations.

No comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 122.063, which authorizes the Commission to establish by rule the requirements for fidelity bond coverage.

The specific section affected by the amendments is Texas Finance Code Section 122.063.

§91.510. Bond and Insurance Requirements.

(a) Fidelity bond. Each credit union shall purchase and maintain a blanket fidelity bond covering the officers, directors, employees, committee members, and its agents, against loss caused by dishonesty, burglary, robbery, larceny, theft, holdup, forgery or alteration of instruments, misplacement or mysterious disappearance. All carriers writing credit union blanket bonds must be authorized by the Insurance Commissioner for the state of Texas as an acceptable fidelity on bonds in this state.

(1) The amount of coverage to be required for each credit union shall be determined by the credit union's board of directors, based on its assessment of the level that would be safe and sound in view of the credit union's potential exposure to risk. In making its determination the board shall be guided by the following minimum required amount of fidelity bond coverage for any single loss computed according to asset categories:
Figure: 7 TAC §91.510(a)(1)

(2) Any aggregate limit of liability provided for in a fidelity bond policy must be at least twice the single limit of liability. This requirement does not apply to optional insurance coverage.

(3) The following maximum amounts of blanket bond deductibles are authorized according to asset categories:
Figure: 7 TAC §91.510(a)(3)

(4) A deductible may be applied separately to one or more insuring clauses in a blanket bond. No deductible will exceed ten percent of a credit union's unencumbered reserves and undivided earnings unless the credit union creates a segregated Contingency Reserve for the amount of the excess. Valuation allowance accounts, e.g., allowance for loan losses, may not be considered part of the unencumbered reserves and undivided earnings when determining the maximum deductible.

(5) The commissioner may require additional coverage of any credit union when, in his opinion, the fidelity bond in force is insufficient to provide adequate fidelity coverage. It shall be the duty of the board of directors to obtain the additional coverage within 30 days after the date of written notice of the findings by the commissioner.

(6) After the effective date of this section, any bond coverage purchased or renewed by any credit union shall conform to this section.

(b) Cancellation. A fidelity bond must include a provision requiring written notification by the fidelity to the commissioner prior to cancellation of any or all coverages set out in the bond which includes a brief statement of cause for termination.

(c) Other insurance. Each credit union shall, subject to approval by the board, purchase appropriate insurance coverages to insure the credit union and its assets against loss or damage by fire, liability, casualty or any other insurance risks.

(d) Board review. The board of directors of each credit union shall formally approve the credit union's bond and insurance coverages. In deciding whether to approve the coverages, the board shall review the adequacy of the standard coverage and the need for supplemental coverage. Documentation of the board's approval shall be included as part of the minutes of the meeting at which the board approves coverages. Additionally, the board of directors shall review the credit union's bond and insurance coverages at least annually to assess the continuing adequacy of coverage.

(e) Review by fidelity company. Credit unions which are analyzed by a fidelity company shall notify the commissioner of the analysis within 30 days of the review commencement. The report of the review is to be provided to the commissioner upon request. The confidentiality of the report shall be preserved in the same manner afforded a report of examination conducted by the department.

(f) Insuring organization's bond requirements. As applicable, a credit union shall also comply with all bond requirements imposed by an insuring organization as a condition to maintain insurance on share and deposit accounts, including, the minimum fidelity bond specifications contained within Part 741.201 of the NCUA Rules and Regulations.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404074
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

SUBCHAPTER F. ACCOUNTS AND SERVICES

7 TAC §91.602

The Credit Union Commission adopts an amendment to §91.602 relating to the solicitation and acceptance of brokered deposits with changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2497).

The amendment adds a new subsection to clarify that credit unions utilizing brokered deposits must have proper risk management practices in place, including appropriate written asset/liability management policies, business strategies, concentration limits, monitoring procedures, and contingency funding plans. In addition, a credit union must implement adequate due diligence procedures prior to establishing a business relationship with a deposit broker.

No comments were received on the proposal.

The amendment is adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance.

The specific sections affected by the amendment are Texas Finance Code Sections 123.202, 123.203, and 123.204.

§91.602. Solicitation and Acceptance of Brokered Deposits.

(a) Definitions.

(1) Brokered deposit means any deposit that is obtained, directly or indirectly, from or through the mediation or assistance of a deposit broker.

(2) Deposit broker means a person engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with financial institutions; or the business of placing funds with financial institutions for the purpose of selling interests in the deposit to third parties.

(b) Limitation. A credit union that has a net worth ratio of less than six percent as defined in §91.901 of this title (relating to Reserve Requirements) or is not deemed adequately capitalized by its insuring organization may not accept, renew or roll over any brokered deposit unless it has been granted a waiver by the commissioner.

(c) Risk management and due diligence. Credit unions utilizing brokered deposits shall ensure that proper risk management practices are in place, including appropriate written asset/liability management policies, business strategies, concentration limits, monitoring procedures, and contingency funding plans. In addition, credit unions must implement adequate due diligence procedures before entering into a business relationship with a deposit broker.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404078
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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7 TAC §91.608

The Credit Union Commission adopts amendments to §91.608 relating to the confidentiality of member records with changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2497).

The amendments require that a credit union's written privacy policy be consistent with the disclosure and reporting requirements applicable to federally insured credit unions as provided in Part 716 of NCUA Rules and Regulations. In addition, a new subsection was added to clarify that the provisions of this rule may not be construed to alter or affect any applicable federal statute, regulation, or interpretation that affords a member greater protection than provide in this rule.

No comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 125.402, which authorizes the Commission to establish rules relating to the confidentiality of the accounts of credit union members and the duties of a credit union to maintain that confidentiality.

The specific section affected by the amendments is Texas Finance Code Section 125.402.

§91.608. Confidentiality of Member Records.

(a) Confidentiality of members' accounts. No credit union officer, director, committee member or employee may disclose to any person, other than the member, or to any company or governmental body the individual savings, shares, or loan records of any credit union member, contained in any document or system, by any means unless specifically authorized to do so in writing by such members, except as follows:

(1) reporting credit experience to a bona fide credit reporting agency, another credit union, or any other bona fide credit-granting business and/or merchants information exchange, provided that applicable state and federal laws and regulations pertaining to credit collection and reporting are followed;

(2) furnishing information in response to a valid request from a duly constituted government agency or taxing authority, or any subdivision thereof, including law enforcement agencies;

(3) furnishing information, orally or in written form, in response to the order of a court of competent jurisdiction or pursuant to other processes of discovery duly issuing from a court of competent jurisdiction;

(4) furnishing reports of loan balances to co-borrowers, co-makers, and guarantors of loans of a member and of share or deposit account balances, signature card information, and related transactions to joint account holders;

(5) furnishing information to and receiving information from check and draft reporting, clearing, cashing and authorization services relative to past history of a member's draft and checking accounts at the credit union; or

(6) as otherwise authorized by law, including access by examiners of the Department.

(b) Non-disclosure statement. Nothing in this rule shall prohibit the credit union from releasing the name and address of members to assist the credit union in its marketing efforts or sale of third party products, provided, however, that the credit union obtains a written non-disclosure statement providing assurances that the information will be used exclusively for the benefit of the credit union and no other.

(c) Privacy policy. Each credit union shall develop, implement and maintain a written policy on the protection of nonpublic personal information of individual members in its possession. This policy shall be consistent with the disclosure and reporting requirements applicable to federally insured credit unions as addressed in Part 716 of NCUA Rules and Regulations.

(d) Relation to federal laws. This section shall not be construed as altering or affecting any applicable federal statute, regulation, or interpretation that affords a member greater protection than provided under this section.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404079
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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SUBCHAPTER H. INVESTMENTS

7 TAC §91.801

The Credit Union Commission adopts amendments to §91.801 relating to investments in credit union service organizations with changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2499).

The amendments make the existing restrictions on receiving compensation from a credit union service organization applicable to credit union directors. In addition, the amendments impose a new requirement on a credit union to provide written notice to the Commissioner of its intent to perform new activities in an existing credit union service organization. The amendments also provides specific guidelines as to the content of the required notice that must be given to the Commissioner prior to commencing certain credit union service organization activities.

No comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 124.352, which allows the Commission to authorize by rule certain investments.

The specific sections affected by the amendments are Texas Finance Code Sections 124.351 and 124.352.

§91.801. Investments in Credit Union Service Organizations.

(a) Definition. When used in this section, a credit union service organization (CUSO) is an organization whose primary purpose is to strengthen or advance the credit union movement, serve or otherwise assist credit unions or their operations, or provide services authorized by subsection (f) of this section to members of credit unions.

(b) A credit union by itself, or with other parties, may only organize, invest in or make loans to a CUSO which is structured and operated in a manner that demonstrates to the public that it maintains a legal existence separate from the credit union. A credit union and a CUSO must operate so that:

(1) their respective business transactions, accounts, and records are not intermingled;

(2) each observes the formalities of their separate corporate or other organizational procedures;

(3) each is adequately financed as a separate unit in light of normal obligations reasonably foreseeable in a business of its size and character;

(4) each is held out to the public as a separate enterprise; and

(5) unless the credit union has guaranteed a loan to the CUSO, all borrowings by the CUSO indicate that the credit union is not liable.

(c) Notice. A credit union shall provide written notice to the commissioner of its intent to make an initial investment in, make an initial loan to a CUSO, or perform new activities in an existing CUSO at least 15 days prior to commencing efforts to effect such activity. The written notice must include a complete description of the credit union's investment in or loan to the CUSO, the activity to be conducted, and a representation and undertaking that the activity will be conducted in accordance with applicable law. The credit union shall provide any additional information reasonably requested by the commissioner.

(d) Limitations. The board of directors of a credit union that organizes, invests in, or lends to any CUSO shall establish, in writing, the maximum amount relative to the credit union's net worth, that will be invested in or loaned to any one CUSO. Investments and loans described in this section shall not, in the aggregate, exceed 10% of the total assets of the credit union, unless the credit union receives the prior written approval of the commissioner. The amount of loans to CUSOs, cosigned, endorsed, or otherwise guaranteed by the credit union, shall be included in the aggregate for the purpose of determining compliance with the limitations set forth in this section.

(e) Prohibitions. No credit union may invest in or make loans to a CUSO:

(1) if any officer, director, committee member, or employee of such credit union or any member of the immediate family of such persons owns or makes an investment in or has made or makes a loan to the CUSO;

(2) unless the organization is structured as a corporation, limited liability company, registered limited liability partnership, or limited partnership and the credit union has obtained a written legal opinion that the CUSO is established in a manner that will limit the credit union's potential exposure to not more than the loss of funds invested in or loaned to such CUSO;

(3) if the CUSO engages in any revenue producing activity other than the performance of services for credit unions or members of credit unions, and such activity equals or exceeds one half (1/2) of the CUSO's total revenue;

(4) unless prior to investing in or making a loan to a CUSO the credit union obtains a written agreement which requires the CUSO to follow GAAP, render financial statements to the credit union at least quarterly, and provide the department, or its representatives, complete access to the CUSO's books and records at reasonable times without undue interference with the business affairs of the CUSO; or

(5) if any director is an employee of the CUSO, or anticipates becoming an employee of the CUSO upon its formation.

(f) Permissive activities and services. A CUSO shall be engaged in providing products and services that include, but are not limited to:

(1) operational services including credit and debit card services, cash services, wire transfers, audits, ATM and other EFT services, share draft and check processing and related services, shared service center operations, electronic data processing, development, sale, lease, or servicing of computer hardware and software, alternative methods of financing and related services, other lending related services, and any other services or activity, including consulting, related to the operations of credit unions;

(2) financial services including financial planning and counseling, securities brokerage and dealer activities, estate planning, tax services, insurance services, administering retirement, deferred compensation and other employee or business benefit plans, or any other service deemed economically beneficial or attractive to the members of the participating credit union or credit unions;

(3) internet based or related services including sale and delivery of products to credit unions or members of credit unions; or

(4) any other service or activity approved, in writing, by the commissioner.

(g) Compensation. A credit union director, senior management employee, or committee member or immediate family member of any such person may not receive any salary, commission, or other income or compensation, either directly or indirectly, from a CUSO affiliated with their credit union, unless received in accordance with a written agreement between the CUSO and the credit union. The agreement shall describe the services to be performed, the rate of compensation (or a description of the method of determining the amount of compensation) and any other provisions deemed desirable by the CUSO and the credit union. The agreement, and any amendments, must be approved by the board of directors of the credit union and the board of directors (or equivalent governing body) of the CUSO prior to any performance of service or payment and annually thereafter. For purposes of this section, senior management employee shall include the chief executive officer, any assistant chief executive officers (e.g. vice presidents and above), and the chief financial officer; and immediate family shall include a person's spouse or any other person living in the same household.

(h) Examination fee. If a CUSO is requested by the commissioner to make its books and records available for inspection and examination, the CUSO shall pay a supplemental examination fee as prescribed in §97.113(d) of this title (relating to Supplemental Examinations). The commissioner may waive the supplemental examination fee or reduce the fee as he deems appropriate.

(i) Exclusion. A credit union which has a net worth ratio greater than six percent (6%) and is deemed adequately capitalized by its insuring organization may invest in or make loans to a CUSO that is not limited by the restriction set forth in subsection (e)(3); provided the activities of the CUSO are exclusively limited to activities which could be conducted directly by a credit union or are incidental to the conduct of the business of a credit union. Notwithstanding this exclusion, all other provisions of the act and this chapter applicable to a CUSO apply. In the event a credit union's net worth or capital declines below the required thresholds, the credit union may not renew, extend the maturity of, or restructure an existing loan, advance additional funds or increase the investment in the CUSO without the prior written approval of the commissioner.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404080
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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7 TAC §91.803

The Credit Union Commission adopts amendments to §91.803 relating to investment limits and prohibitions without changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2503).

The amendments establish the criteria the Commissioner will consider in rendering a decision on a request to participate in an investment pilot program. The amendments also provide authority for the Commissioner to rescind an approval to participate in an investment pilot program upon the finding that certain conditions exist. Finally, the amendments remove the exception to the prescribed limitation for loan participations purchased from other credit unions, in order to comply with a recently adopted amendment to §91.711.

One comment in support of the amendments was received from an individual.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 124.351, which authorizes the Commission to adopt rules authorizing other investments permissible for credit unions that are responsive to changes in economic conditions or competitive practices and to the need for safety and soundness of credit union investments.

The specific section affected by the amendments is Texas Finance Code Section 124.351.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404081
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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7 TAC §91.804

The Credit Union Commission adopts amendments to §91.804 relating to custody and safekeeping without changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2504).

The amendments authorize a credit union to invest in certain federally insured certificates of deposit as long as the investment is held for a credit union by a board-approved safekeeper that is supervised by the Securities and Exchange Commission, or a Federal or State depository institution regulatory agency. The amendments would allow a credit union to participate in a third-party certificate arrangement where the certificate is not issued directly to the credit union and the credit union's name as the owner of the certificate is not directly on the books and records of the issuing financial institution; however, the program must meet all applicable federal deposit insurance requirements to ensure the availability of pass-through insurances coverage to each credit union investor.

One comment in support of the amendments was received from Porter, Wright, Morris & Arthur, LLP. One comment was received from an individual agreeing with the amendments but also suggesting an additional provision be added to require that credit unions annually analyze all safekeepers and perform monthly reconciliation. The Commission declined to add this additional provision, concerned that it might be overly burdensome regulation, but agreed to further study the need for such a provision for possible inclusion in a future amendment.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 124.351, which authorizes the Commission to adopt rules authorizing other investments permissible for credit unions that are responsive to changes in economic conditions or competitive practices and to the need for safety and soundness of credit union investments. The amendments are also proposed under Section 123.003, Texas Finance Code. The Commission interprets this section as authorizing it, in conjunction with the exercise of its specific rulemaking authority, to adopt rules reflecting the statutory right of state chartered credit unions to engage in any activity, exercise any power, or make any loan or investment, that they could engage in, exercise, or make if they were chartered as federal credit unions.

The specific section affected by the amendments is Texas Finance Code Section 124.351.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404082
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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SUBCHAPTER I. RESERVES AND DIVIDENDS

7 TAC §91.901

The Credit Union Commission adopts amendments to §91.901 relating to reserve requirements without changes to the text published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2505).

The amendments clarify that credit unions must fully comply with Part 702 of NCUA Rules and Regulations and to also remove existing subsection (c) which conflicts with Part 702.206. The amendments also transfer the authority for the Commissioner to impose certain administrative sanctions contained in the existing subsection (c) to the provisions dealing with unsafe practices. Specifically, if a credit union is deemed to be engaging in an unsafe practice, the department may: (1) encumber as special reserves all reserves and earnings; (2) require the written approval of the Commissioner to pay dividends or give interest refunds; and (3) require the written approval of the Commissioner to make changes to the credit union's board or senior management staff. Finally, for clarity purposes, the provision currently existing in subsection (e) which reserves the right of the department to take appropriate enforcement action against a credit union whenever circumstance dictate, is incorporated into a separate new subsection.

No comments were received on the proposal.

The amendments are adopted under the provision of the Texas Finance Code, Section 15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code and under Texas Finance Code Section 122.0104, which authorizes the Commission to adopt rules requiring credit unions to maintain reserves necessary to protect the interest of its members.

The specific sections affected by the amendments are Texas Finance Code Sections 122.103 and 122.104.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404083
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 11, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 837-9236

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.80

The Commission adopts amendments to §3.80, relating to Commission Forms, Applications, and Filing Requirements, with one change to the proposal published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4375). The amendments add to Table 1, entitled Railroad Commission Oil and Gas Division Forms, the Security Administrator Designation (SAD) Form, the Form CF-1 (Commercial Facility Bond Form), and the revised version of the United States Environmental Protection Agency Form 8700-12 (RCRA Subtitle C Site Identification Form), as well as to correct the title of Form CF-2 (Commercial Facility Irrevocable Letter of Credit). The change that is adopted from the proposed version is in the Table, where an error in the title of Form W-1A is corrected.

Section §3.80 was previously amended effective on April 12, 2004, to revise language relating to electronic filing in anticipation of changes and/or new electronic filing opportunities that are developing in association with the expansion of the Electronic Compliance and Approval Process (ECAP) and the Commission's Oil and Gas Migration (OGM) Project. The OGM Project is a major initiative to move the Commission's outdated computer mainframe technologies to an open systems environment. In addition to improving the Oil and Gas Division's internal business processes and providing the public with access to accurate up-to-date information, the OGM Project is providing the Commission with opportunities to reassess its data reporting requirements and enhance electronic filing capabilities. The initial step for ECAP, an electronic commerce system that eliminates paper by capturing, storing, and transmitting oil or gas well permitting information electronically, converted the filing, review, and approval of a drilling permit application (Form W-1) to a completely electronic process. Now that the initial step is completed and the infrastructure is in place to support the filing, processing, and storage of drilling permits, ECAP has been incorporated into the Commission's OGM Project, which eventually will include all compliance permits and performance reports.

To provide for electronic filing in association with ECAP, several years ago the Commission developed a required authorization procedure through the filing and approval of a hard copy Master Electronic Filing Agreement (MEFA) and a Security Administrator Designation (SAD) Form. Before an operator could file electronically, both the Commission and operator representatives were required to sign the MEFA, which established the terms of agreement for electronic filing. Signing the SAD Form was also a condition of participation in ECAP. Upon Commission approval of the MEFA, the security administrator is notified of his or her assigned User ID. The security administrator could

then distribute security by assigning additional User IDs to employees within the company and designating the forms they are authorized to file electronically through ECAP.

In the amendments to §3.80 that became effective on April 12, 2004, the Commission replaced language concerning requirements for electronic filing under ECAP and language relating to requirements for electronic filing under the Electronic Data Interchange (EDI) program with broader language to accommodate changes in the requirements for electronic filing associated with the Commission's new automated systems, and made the MEFA unnecessary for electronic filing of oil and gas forms. (The MEFA is still a requirement for other electronic filings at the Commission.)

In these adopted amendments, the Commission revises the SAD Form to conform the language to §3.80 and to include the revised form in Table 1 of §3.80(a), entitled Railroad Commission Oil and Gas Division Forms, which lists all Oil and Gas Division forms and the date that each was adopted or last revised. The Commission also revises the instructions for obtaining permission to file electronically with the Commission. The changes to the SAD Form reflect the Commission's decision to expand its use to any electronic filing with the Commission, not just ECAP filing, and to allow third-party filers.

An operator wishing to file electronically with the Commission's Oil and Gas Division must complete and submit to the Commission a SAD Form. An operator may designate multiple security administrators. After receiving an operator's SAD Form, the Commission will issue to each designated security administrator a User ID that will allow the security administrator to access and update the Commission's electronic filing security system. The security administrator will then be responsible for assigning additional User IDs to individuals within the company and for maintaining that security. The distributed security design ensures that the control will rest within the operator's organization through each operator's designated security administrator(s). No MEFA will be required.

There will be no immediate changes for any operator that already has met the ECAP filing requirements. The SAD Form the operator previously filed will remain in effect after the revised SAD Form is adopted; however, there are 12 petroleum consultants/independent contractors or other non-operators who previously filed a SAD Form with the Commission who would be required to complete and submit a revised SAD Form once it is adopted if they wish to continue electronic filing on behalf of operators. In addition, operators who are currently filing with the Oil and Gas Division electronically and who have never submitted a SAD Form would be required to do so; however, all electronic filers would be required to have their software re- certified for any future new technical requirements that result from movement of programs from the Commission's mainframe to its new open systems environment. The Commission will provide advance notice of any future changes in electronic filing requirements.

The Commission also adds to Table 1 Form CF-1, Commercial Facility Bond, and corrects the title of Form CF-2 to "Commercial Facility Irrevocable Letter of Credit."

Finally, the Commission adds to Table 1 the revised version of the Form EPA 8700-12 (RCRA Subtitle C Site Identification Form), which the Environmental Protection Agency revised effective January 2004, and which is required by §3.98 of this title, relating to Standards for Management of Hazardous Oil and Gas Waste.

The Commission received one comment from an individual. Commission staff contacted the individual, who agreed that his concerns were not with the actual proposed amendments to §3.80, but with an operator's ability to submit to the Commission required reports and other information in a timely manner. The individual agreed to submit additional information detailing specific areas of concern so that the Commission may better focus on possible solutions, which will be handled in a future rulemaking, if necessary.

The Commission adopts the amendments to §3.80 pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells and persons owning or operating pipelines in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; and §91.142, which requires the Commission to obtain specified information from a person, firm, partnership, joint stock association, corporation, or other domestic or foreign organization operating wholly or partially in this state and acting as principal or agent for another for the purpose of performing operations which are within the jurisdiction of the Commission.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, and 91.142.

Cross-reference to statute: Texas Natural Resources Code, §§81.051, 81.052, and 91.142.

Issued in Austin, Texas, on June 22, 2004.

§3.80. Commission Oil and Gas Forms, Applications, and Filing Requirements.

(a) Forms. Forms required to be filed at the Commission shall be those prescribed by the Commission as listed in Table 1 of this subsection. A complete set of all Commission forms listed on Table 1 required to be filed at the Commission shall be kept by the Commission secretary and posted on the Commission's web site. Notice of any new or amended forms shall be issued by the Commission. For any required or discretionary filing, an organization may either file the prescribed form on paper or use any electronic filing process in accordance with subsections (e) or (f) of this section, as applicable. The Commission may at its discretion accept an earlier version of a prescribed form, provided that it contains all required information and meets the requirements of subsection (e)(3) of this section.
Figure: 16 TAC §3.80(a)

(b) 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) Electronic filing process--An electronic transmission to the Commission in a prescribed form and/or format authorized by the Commission and completed in accordance with Commission instructions.

(3) Form--A printed or typed paper document or electronic submission, including any necessary instructions, with blank spaces for insertion of required or requested specific information.

(4) Organization--Any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the Commission.

(5) Position of ownership or control--A person holds a position of ownership or control in an organization if the person is:

(A) an officer or director of the organization;

(B) a general partner of the organization;

(C) the owner of an organization which is a sole proprietorship;

(D) the owner of more than a 25 percent ownership interest in the organization; or

(E) the designated trustee of the organization.

(6) Violation--Non-compliance with a statute, Commission rule, order, license, permit, or certificate relating to safety or the prevention or control of pollution.

(c) Organization eligibility. The Commission may not accept an organization report or an application for a permit, or approve a certificate of compliance if:

(1) the organization that submitted the report, application, or certificate violated a statute or Commission rule, order, license, certificate, or permit that relates to safety or the prevention or control of pollution; or

(2) any person who holds a position of ownership or control in the organization has, within the seven years preceding the date on which the report, application, or certificate is filed, held a position of ownership or control in another organization, and during that period of ownership or control the other organization violated a statute or Commission rule, order, license, permit, or certificate that relates to safety or the prevention or control of pollution.

(d) Violations. An organization has committed a violation if there is either a Commission order against an organization finding that the organization has committed a violation and all appeals have been exhausted or an agreed order entered into by the Commission and an organization relating to an alleged violation, and:

(1) the conditions that constituted the violation or alleged violation have not been corrected;

(2) all administrative, civil and criminal penalties, if any, relating to the violation or agreed settlement relating to an alleged violation have not been paid; or

(3) all reimbursements of costs and expenses, if any, assessed by the Commission relating to the violation or to the alleged violation have not been collected.

(e) Authorization and standards for electronic filing.

(1) An organization may file electronically any form listed on Table 1 for which the Commission has provided an electronic version, provided that the organization pays all required filing fees and complies with all requirements, including but not limited to security procedures, for electronic filing.

(2) The Commission deems an organization that files electronically or on whose behalf is filed electronically any form, as of the time of filing, to have knowledge of and to be responsible for the information filed on the form, pursuant to the statutory requirements, restrictions, and standards found in and pertaining to:

(A) Texas Natural Resources Code, Title 3 (oil and gas well drilling, production, and plugging);

(B) Texas Natural Resources Code, Title 5 (geothermal resources);

(C) Texas Natural Resources Code, Title 11 (hazardous liquids storage);

(D) Texas Utilities Code, Chapter 121, Subchapter I (sour gas pipeline facilities);

(E) Texas Water Code, §26.131 (discharge permits);

(F) Texas Water Code, Chapter 27 (class II injection and disposal wells and class III brine mining wells);

(G) Texas Water Code, Chapter 29 (oil and gas waste haulers);

(H) Texas Health and Safety Code, §401.415 (oil and gas naturally occurring radioactive material (NORM) waste); and

(I) Texas Administrative Code, Title 16, Chapter 3 (Oil and Gas Division) and Chapter 4 (Environmental Protection).

(3) All forms that an organization submits or that are submitted on behalf of an organization shall be transmitted in the manner prescribed by the Commission that is compatible with its software, equipment, and facilities.

(4) The Commission may provide notice electronically to an organization of, and may provide an organization the ability to confirm electronically, the Commission's receipt of a form submitted electronically by or on behalf of that organization.

(5) The Commission deems that the signature of an organization's authorized representative appears on each form submitted electronically by or on behalf of the organization, as if this signature actually appears, as of the time the form is submitted electronically to the Commission.

(6) The Commission holds each organization responsible, under the penalties prescribed in Texas Natural Resources Code, §91.143, for all forms, information, or data that an organization files or that are filed on its behalf. The Commission charges each organization with the obligation to review and correct, if necessary, all forms or data that an organization files or that are filed on its behalf.

(f) Other electronic transmissions. The Commission may at its discretion accept other documents or data electronically transmitted.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404144
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: July 12, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 475-1295

CHAPTER 7. GAS SERVICES DIVISION
SUBCHAPTER B. SPECIAL PROCEDURAL RULES

16 TAC §7.45

The Railroad Commission of Texas adopts amendments to §7.45, relating to Quality of Service, without changes to the proposal published in the May 7, 2004, issue of the *Texas*

Register (29 TexReg 4377). The adopted amendments add wording in paragraph (5)(C)(i) to authorize a designee of the Attorney General in the Crime Victims Services Division of the Office of the Attorney General (CVSD) to certify that a person is a victim of family violence. Currently, §7.45(5)(C)(i) requires a gas utility to waive any requirement that an applicant for gas utility service pay a deposit if the applicant has been determined to be a victim of family violence, as defined in the Texas Family Code, §71.004, by a family violence center, by treating medical personnel, or by law enforcement agency personnel. This determination must be evidenced by the applicant's submission of a certification letter developed by the Texas Council on Family Violence. The waiver for gas utility deposits helps victims of family violence to obtain gas utility service in new and safer surroundings with relative ease. The adopted amendment adds one more entity--the Attorney General's designee in the CVSD--as authorized to certify that a person is a victim of family violence, thus allowing a person being assisted by the CVSD to obtain the certification letter without having to return to a family violence center, treating medical personnel, or law enforcement agency personnel for the required signature.

The Commission previously amended §7.45(5)(C)(i), effective November 10, 2003, based on comments by the Texas Council on Family Violence in other rulemaking proceedings, to require a gas utility to waive any deposit requirement for residential service for an applicant who has been determined to be a victim of family violence as defined in Texas Family Code, §71.004, by a family violence center, by treating medical personnel, or by law enforcement agency personnel. This determination must be evidenced by the applicant's submission of a certification letter developed by the Texas Council on Family Violence and made available on its web site. This provision is similar to the rules and process for a waiver for electric utility and telephone utility deposits that are currently adopted by the Public Utility Commission (PUC) and currently in effect in 16 Tex. Admin. Code §25.478(a)(3)(D), relating to Credit Requirements and Deposits, for electric service providers, and 16 Tex. Admin. Code §26.24(a)(1)(B)(iv), also titled Credit Requirements and Deposits, for telecommunications service providers. The Commission's rule is similar to the two PUC rules except that the Commission's rule authorizes certification by law enforcement agency personnel in addition to certification by a family violence center or by treating medical personnel. This new adopted amendment extends certification authority to the CVSD.

The Commission received one comment suggesting that the word "adult" be added before the word "applicant" to ensure that the public is aware that most gas utilities will not allow service in a minor's name. The Commission disagrees with the addition of this word because applicants for gas utility service must comply with the utility's tariff with respect to all other qualifications for receiving such service; that means the utility may, and should, make its own determination with respect to whether an applicant is legally of age to enter into a binding contract. In addition, "adult" is not a defined term in Chapter 7; it is possible that an emancipated minor could be a legally responsible person and therefore could be subject to this rule even though the individual was not technically "an adult." The Commission has not made a change to the rule language based on this comment.

The Commission adopts the amendment under Texas Utilities Code, §102.001, which gives the Railroad Commission exclusive original jurisdiction over the rates and services of a gas utility distributing natural gas or synthetic natural gas in areas outside a municipality; Texas Utilities Code, §102.151, which requires gas utilities to file schedules showing all rates for a gas utility service, product, or commodity offered by the gas utility and each rule or regulation that relates to or affects a rate of the gas utility or a gas utility service, product, or commodity furnished by the gas utility; Texas Utilities Code, §104.001, which vests in the Railroad Commission all the authority and power of this state to ensure compliance with the obligations of gas utilities in Texas Utilities Code, Title 3, Subtitle A, and which authorizes the regulatory authority to adopt rules for determining the classification of customers and services; Texas Utilities Code, §104.005, which prohibits a gas utility from directly or indirectly charging, demanding, collecting, or receiving from a person a greater or lesser compensation for a service provided or to be provided by the utility than the compensation prescribed by the applicable schedule of rates filed under Texas Utilities Code, §102.151; and Texas Utilities Code, §104.251, which requires gas utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable.

Statutory authority: Texas Utilities Code, §§102.001, 102.151, 104.001, 104.005, and 104.251.

Cross-reference to statute: Texas Utilities Code, Chapters 102 and 104.

Issued in Austin, Texas, on June 22, 2004.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404143
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Effective date: July 12, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 475-1295

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CHAPTER 11. SURFACE MINING AND RECLAMATION DIVISION
SUBCHAPTER E. QUARRY AND PIT SAFETY

16 TAC §§11.1001 - 11.1005, 11.1021, 11.1031 - 11.1045, 11.1061 - 11.1065, 11.1081

The Texas Department of Transportation (department) adopts the repeal of Title 16, Part 1, Chapter 11, Subchapter E, §§11.1001 - 11.1005, 11.1021, 11.1031 - 11.1045, 11.1061 - 11.1065, and 11.1081, concerning Quarry and Pit Safety. The repeal of Title 16, Part 1, Chapter 11, Subchapter E, §§11.1001 - 11.1005, 11.1021, 11.1031 - 11.1045, 11.1061 - 11.1065, and 11.1081 is adopted without changes to the proposal as published in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3584) and will not be republished.

EXPLANATION OF ADOPTED REPEALS

House Bill 2847, 78th Legislature, Regular Session, 2003, transferred all powers, duties, functions, and activities performed by the Railroad Commission of Texas under the Texas Aggregate Quarry and Pit Safety Act, Chapter 133, Natural Resources Code, to the Texas Department of Transportation.

Due to fundamental differences in structure and operation between the Railroad Commission and the department, the rules in Title 16 cannot be implemented by the department in their current form. The department is simultaneously adopting new Title 43, Chapter 21, Subchapter M, §§21.701 - 21.723, concerning quarry and pit safety.

COMMENTS

No comments were received on the proposed repeal.

STATUTORY AUTHORITY: The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Texas Natural Resources Code, §133.011, which provides the commission with authority to adopt rules regarding the Texas Aggregate Quarry and Pit Safety Act.

CROSS REFERENCE TO STATUTE: Texas Natural Resources Code, §133.011.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404240
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 15, 2004
Proposal publication date: April 9, 2004
For further information, please call: (512) 463-8630

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 64. TEMPORARY COMMON WORKER EMPLOYERS

16 TAC §64.91

The Texas Department of Licensing and Regulation ("Department") adopts the repeal of 16 Texas Administrative Code §64.91, regarding the Temporary Common Worker Employers program as published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4637), without changes and will not be republished.

Section 64.91, relating to sanctions--denial, revocation, or suspension of a license because of a criminal conviction is no longer necessary because the Department has issued Criminal Conviction Guidelines pursuant to Texas Occupations Code, §53.025(a). These guidelines address factors the Department considers when determining if a criminal conviction causes an applicant to be an unsuitable candidate for a license, or whether a conviction justifies the revocation or suspension of a license previously granted.

The Department drafted and distributed the proposed repeal to persons internal and external to the agency. No comments were received.

The repeal is adopted under Texas Labor Code, Chapter 92 and Texas Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement the codes and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted repeal are those set forth in Texas Labor Code, Chapter 92, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adopted repeal.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404187
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: July 13, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 463-7348

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CHAPTER 73. ELECTRICIANS

16 TAC §§73.10, 73.51 - 73.53

The Texas Department of Licensing and Regulation ("Department") adopts amendments to 16 Texas Administrative Code §73.10 and new §§73.51 - 73.53, regarding the electricians program. Sections 73.10, 73.51, and 73.52 are adopted with changes to the proposed text as published in the April 30, 2004, issue of the *Texas Register* (29 TexReg 4049). Section 73.53 is adopted without changes and will not be republished.

The amendments and new sections are needed to clarify the nature of work individual licensees perform, to define the nature of the supervision required, and to clarify responsibilities of licensees.

The Department drafted and distributed the proposed amendments and new sections to persons internal and external to the agency. The rules adopted by the Department and justified herein have been developed through a lengthy process beginning with a series of focus group meetings conducted by the department during the latter part of 2003 and early 2004 to allow all interested persons an opportunity to discuss with the department their concerns with regulation of electricians pursuant to House Bill 1487 as passed by the 78th Texas Legislature in regular session. Although those discussions were not specifically focused upon rulemaking, the language contained in the rules published for comment addressed some of the concerns expressed in those meetings. Further, before the department published the rules for comment, a task group appointed by the Electrical Safety and Licensing Advisory Board ("Board") developed language for the advisory board to review, amend as it deemed needed and recommend to the department for publication in the *Texas Register*. Fifty-nine written comments were received including a request in one of the comments for a public hearing to allow oral comments concerning the proposed rules. A public hearing was conducted on June 15, 2004, and ten commenters made oral presentations. Further, the Board met on June 15, 2004, and reviewed the comments and recommended to the Texas Commission of

Licensing and Regulation ("Commission") proposed language changes in response to the comments. Those comments and the commission's response to them are discussed below.

The first proposed rule addressed in writing by one commenter, and orally by one commenter is §73.10(6), General Supervision. The writer proposed deleting the phrase "on behalf of an electrical contractor." The commenter also proposed deletion of the same phrase in paragraphs (8) - (11) and (13) - (16). That phrase is used in all the definitions of individual licenses to make it clear that all of them must perform electrical work or electrical sign work through an electrical contractor or an electrical sign contractor. The statute does not address the nature of the relationship between a contractor and the individual licensees who perform the work. The statute provides that a person may not perform electrical work unless the person holds an appropriate license issued or recognized under the statute. Licenses are required for individuals and for contractors. Thus, all electrical work must be performed by individuals holding a license, and by a licensed contractor. The phrase is used to make it clear that individual licensees performing electrical work must do so through a contractor and that a relationship must exist. The wording was chosen to impose no limitations on the nature of the relationship. The oral commenter proposed that the section provide that an engineer may provide general supervision. To provide that engineers could generally supervise electrical work would be to establish by rule a category, i.e., not licensed as a master, of persons who may serve as the required master for contractors. The statute specifically requires that all contractors either, be licensed as a master under the statute, or that they hire a master. No change is made.

Section 73.10(7), Direct Supervision. Thirty-three written comments and one oral comment addressed this section with comments ranging from noting that the rule is very good as proposed to a recommendation for deletion. Most of the comments addressed a concern that this section, especially when read in conjunction with paragraph (11) to be discussed below, requires the continuous presence of a licensee, other than an apprentice, at every site where electrical work or electrical sign work is performed. Most of those commenters said that continuous on-site supervision by a licensee should not be required of persons performing electrical work on residences. Many of them noted that such a requirement would have an adverse impact on the home building business in that it would increase costs and would lead to delays in construction due to the unavailability of an adequate number of licensees. One commenter stated, "Currently a wireman/journeyman may supervise multiple crews working in multiple locations that could be located miles from each other." The commenter included language from the National Guidelines For Apprenticeship Standards developed by the Independent Electrical Contractors and approved by the U.S. Department of Labor. Those standards specifically allow the supervising licensee to leave the job site while an apprentice remains on site. They also specifically state that the requirement that an apprentice be supervised at all times does not imply that an apprentice must always be in sight of the supervising licensee.

Another commenter discussing this section and paragraph (11) noted that the term, "direct supervision" is not consistent with the definition of apprentice which requires on-site supervision with no reference to direct supervision. This definition is changed from "Direct Supervision" to "On-Site Supervision."

The Commission intends to adopt rules as necessary to implement regulation of electricians pursuant to legislative intent expressed in the statute, making no unnecessary changes to current industry practice. The language as published was not intended to require continuous supervision of apprentices since it is the understanding of the Commission that no such standard has existed in the industry. The Commission recognizes that some contractors choose to provide continuous supervision of apprentices, especially in the context of commercial work. On the other hand, some contractors do not choose to continuously supervise individuals performing electrical work for them. To impose a requirement that contractors provide for continuous supervision of apprentices would be an unnecessary change to industry practice. With no statutory provision nor any safety issue brought to the Commission's attention that makes such a requirement necessary, the Commission will not adopt the requirement. The following is adopted.

(7) On-Site Supervision--Exercise of on-site supervision of electrical work, or electrical sign work by a licensed individual, other than an electrical apprentice. Continuous supervision of an electrical apprentice is not required, though the on-site supervising licensee is responsible for review and inspection of the electrical apprentice's work to ensure compliance with any applicable codes or standards.

Section 73.10(8), Electrical Contractor. Two comments were filed by the same organization concerning this section. One comment proposed to delete the phrase "licensed as an electrical contractor" and noted that it should be clarified that the term "person" includes corporations. Chapter 311, Government Code, which provides construction rules for civil codes, at §311.005(2) provides that the term "person" includes a corporation. No change is made.

Section 73.10(10), Journeyman Electrician. A comment proposed deleting the term "general" in this paragraph and in paragraphs (14) - (16). In each of these definitions describing licensees, other than apprentices and masters, the term "general supervision" is used to make it clear that on-site supervision is not required for them although their work, as is all electrical work, is subject to supervision by the contractor's master. No change is made.

Section 73.10(11) Electrical Apprentice. Thirty-three written comments were received concerning this rule. Most of them were made as part of the comments concerning the definition of direct supervision, now on-site supervision. Those concerns, continuous supervision, were addressed in changes to paragraph (7).

One commenter suggested that the rule require continuous supervision and a ratio of one journeyman per four apprentices. The statute does not directly address the nature of the business relationship between licensees, other than between the qualifying master and a contractor. Nor does the statute address the number of persons an individual should be allowed to supervise. Without guidance from the statute and without any explanations from the commenter concerning why a ratio was proposed, the Commission finds no basis to adopt rules requiring ratios.

The Electrical Sign Task Group, organized by the Electrical Safety and Licensing Advisory Board, proposed changes to this section to address the fact that the statute does not define electrical sign apprentices. The task group and one other commenter suggested adding language to recognize that an apprentice may work under the supervision of a master sign

electrician. The statutory language providing for licensure of apprentices indicates that an electrical apprentice must be supervised by a master electrician. The proposal, to by rule, allow an electrical apprentice to also be supervised by a master sign electrician, would overcome the absence of a statutory reference to electrical sign apprentices. The Commission however, may not by rule extend the reach of the statute, and since the language is unambiguous, there is no basis for clarification by rule. Another commenter noted that the reference to on-site supervision of apprentices is inconsistent with a definition of direct supervision. The comment is well taken and has been addressed by changes made to paragraph (7) of §73.10 in that direct supervision has been changed to on-site supervision. No other change is made.

Comments concerning Section 73.10(12) - (16) have been noted above.

Section 73.10(17), Electrical Maintenance Work was commented on in writing by two persons, and by six oral comments. The first noted that maintenance needed no definition to limit the scope of maintenance work since a master electrician will provide general supervision just as masters do for all electrical work. The department has defined "electrical maintenance work" in recognition of the legislature having included maintenance electrician without defining the term or their work. If a maintenance electrician were "the same as," a journeyman in terms of experience and ability there would be no need to recognize them. The department is charged with the responsibility to define the types of activities that may be performed by each class of license holder. All the other classes are defined to perform electrical work or electrical sign work, including residential wiremen although the statute limits the locations where they may work. The department does not recommend eliminating the definition based on the comment received.

The other writer proposed a change to the section being discussed and to the definition of "employee" apparently for the purpose of expanding the scope of §1305.003(7) which provides an exemption for manufacturers of electrical equipment. Electrical equipment is often complicated and specialized to the extent that persons not having special training--often times such persons are engineers--are not qualified to install, maintain, or repair the equipment. The commenter has proposed that the definition of electrical maintenance work be extended to exempt persons authorized by a manufacturer to inspect, test, or repair its electrical equipment. Further, four of the six oral comments on this section addressed the need for specially trained persons to install service and maintain electrical equipment and that such persons are not electricians and should not be required to obtain electrician licenses. One of the four also indicated that testing and calibrating electrical equipment is not electrical work and that maintenance work should not include those terms. That commenter also proposed that language be added to allow engineers to perform maintenance work.

One oral commenter proposed that the rule include in the definition repair and replacement of conduit and raceways. The other oral commenter urged that the definition of electrical maintenance work and maintenance electrician not be expanded to include additional work. The Electrical Safety and Licensing Advisory Board recommended that the terms, "calibration", "inspection", and "testing" be deleted from the rule.

The Commission does not find it appropriate to attempt to add defining terms to a statutory exemption for manufacturing work in the definition of maintenance work. Aside from a concern, that such an approach may be illogical, such an amendment would exceed the notice of intent to adopt new rules for which the proposed rules were published for comment. No language will be added in response to these comments. On the other hand, the references to testing, inspection and calibration are not part of electrical work as defined by statute and they should be removed. Paragraph (17) is adopted as follows:

(17) Electrical Maintenance Work--The replacement or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises. All replacements or repairs must be of the same rating and type as the existing installation. No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305. Electrical maintenance work does not include the replacement of raceways, conductors, disconnecting means, or service feeder components. It also does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation. The term does not include work exempted by Texas Occupations Code, §1305.003.

Section 73.10(18), Electrical Sign Work was commented on twice by the Sign Task Group and by one other commenter. The first comment proposed adding a sentence to allow installation of the electrical service for an isolated sign or an outline lighting installation. The Electrical Safety and Licensing Advisory Board agreed with this recommendation.

One commenter proposed deleting the reference to manufacture while another specifically indicated that term should be retained. The reason offered for deletion of the term is that licenses are required by the Act to perform electrical work. In contrast, the definition of electrical sign contracting includes manufacture of an electrical sign. The reason offered for maintaining the term is, "...the needs of the individual to understand fully the proper methods and technical skills required to fabricate, assemble, and install safe electrical signage..." Any assembly containing electrical components presents an added level of risk to the public. Nonetheless, an individual who paints the metal structure of a sign in the factory has no greater need of an electrical license than does an individual who paints a residence. While the legislature has established a requirement that manufacture of electrical signs in Texas be performed by an electric sign contractor, it did not require that all work done to manufacture electric signs must be performed by licensees. The statute contains in its definition of electrical contracting, terms such as "designing," that are not included in the definition of "electrical work." Neither is it necessary or desirable that the definition of electrical sign work include all the terms included in the definition of electrical sign contracting. But, since the term "manufacture" may include assembly of electrical components the department proposes to leave the term in the rule and express the idea that electrical sign work requiring a license does not include all elements of electrical sign manufacture, but only those having to do with the electrical system. This language is adopted:

(18) Electrical Sign Work--Any labor or material used in manufacturing, installing, maintaining, extending, connecting or reconnecting an electrical wiring system and its appurtenances, apparatus or equipment used in connection with signs, outline lighting, awnings, signals, light emitting diodes, and the repair of existing outdoor electric discharge lighting. This also includes

the installation of an electrical service integral to an isolated sign and/or outline lighting installation.

Section 73.51, Electrical Contractor's Responsibilities and §73.52, Electrical Sign Contractor's Responsibilities are similar rules except for the types of licensees. The department's responses to the comments are the same for both rules and the nature of the comments were the same for both rules. One response will serve for both rules. Two written comments and one oral comment were received for §73.51(a) and one comment was received for §73.52(a). The first comment suggested rewording the section to avoid conflict with §1305.201 of the Act that sets forth the authority of municipalities to regulate electricians. Both rule sections require contractors licensed by the state under the Act to display the license number on its vehicles. It does not apply to persons having only a municipal license. The oral commenter inquired whether the required signs could be magnetically affixed to vehicles. The rule does not proscribe any method of attachment; thus, such signs may be affixed magnetically. No change is made.

One comment was received for §73.51(b) and three comments were received for §73.52(b). These rules require that all of a contractors non-exempt electrical or electrical sign work be performed by licensees. The first comment was that the section is in direct conflict with §1305.003(a)(8) which establishes an exemption for maintenance work. The rule by its terms does not include exempt work. No change is proposed. Another comment noted that electrical apprentices need to work under master sign electricians. The subject of this comment is addressed in the discussion concerning §73.10(11) above. The last comment was that the rule should exempt certain manufacturing facilities and persons. This concern is addressed in proposed changes to §73.10(18).

Thirty-eight written comments and three oral comments were received for §73.51(c) and seven comments were received regarding §73.52(c). All of the commenters suggested deleting the language and some asked for clarification of the meaning. Some commenters felt that the language either prevented or unreasonably limited the use of subcontractors while others felt subcontracting should be prohibited; but none liked the rule. The purpose of the rule was to say that a licensed contractor could arrange its business affairs in a manner other than as employer-employee with licensees who would perform electrical work or electrical sign work for them. Since the Act is silent on this issue, no rule to allow what is not prohibited is necessary and similarly no limitations need be imposed on those who choose a business arrangement that is not prohibited. If in the future it appears that abuses in the performance of electrical work or electrical sign work are occurring the department may propose rules to address the abuses. The department deletes proposed §73.51(c) and §73.52(c) from the adoption.

Section 73.53, Individual Licensee Responsibilities. Three comments were received. The first was to delete the rule. The second was to include a reference to engineering specifications. Applicable codes require adherence to applicable engineering specifications. The third was not to include licensee responsibilities in sections other than §73.70(a), which contains similar requirements. This comment is well taken but the department cannot amend §73.70(a) without publication. In the meantime, the provisions of §73.53 are needed. The two rules can be merged in the future. No change is made.

The amendments and new sections are adopted under Texas Occupations Code, Chapter 1305 and Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 1305 and Chapter 51. No other statutes, articles, or codes are affected by the proposal.

§73.10. Definitions.

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

(1) Assumed name--A name used by a business as defined in the Business and Commerce Code, Title 4, Chapter 36, Subchapter A, §36.02.

(2) Business affiliation--The business organization to which a master licensee may assign his or her license.

(3) Employee--An individual who performs tasks assigned to him by his employer. The employee is subject to the deduction of social security and federal income taxes from his pay. An employee may be full time, part time, or seasonal.

(4) Employer--One who employs the services of employees, pays their wages, deducts the required social security and federal income taxes from the employee's pay, and directs and controls the employee's performance.

(5) Filed--A document is deemed to have been filed with the department on the date that the document has been received by the department or, if the document has been mailed to the department, the date a postmark is applied to the document by the U.S. Postal Service.

(6) General Supervision--Exercise of oversight by a master electrician on behalf of an electrical contractor, or by a master sign electrician on behalf of an electrical sign contractor of performance by all classes of electrical licensees of electrical work bearing responsibility for the work's compliance with applicable codes under Texas Occupations Code, Chapter 1305.

(7) On-Site Supervision--Exercise of supervision of electrical work or electrical sign work by a licensed individual other than an electrical apprentice. Continuous supervision of an electrical apprentice is not required, though the on-site supervising licensee is responsible for review and inspection of the electrical apprentice's work to ensure compliance with any applicable codes or standards.

(8) Electrical Contractor--A person, licensed as an electrical contractor, who is in the business of performing "Electrical Contracting" as defined by Texas Occupations Code, §1305.002(5).

(9) Master Electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, performs "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(10) Journeyman Electrician--An individual, licensed as a journeyman electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, while performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(11) Electrical Apprentice--An individual, licensed as an apprentice who works under the on-site supervision of a master electrician, a journeyman electrician, or a residential wireman, on behalf of an electrical contractor performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(12) Electrical Sign Contractor--A person, licensed as an electrical sign contractor, who is in the business of performing "Electrical Sign Contracting" as defined by Texas Occupations Code, §1305.002(9).

(13) Master Sign Electrician--An individual, licensed as a master sign electrician, who, on behalf of an electrical sign contractor, performs "Electrical Sign Work" as defined in paragraph (18) of this section.

(14) Journeyman Sign Electrician--An individual, licensed as a journeyman sign electrician, who works under the general supervision of a master sign electrician, on behalf of an electrical sign contractor, while performing "Electrical Sign Work" as defined in paragraph (18) of this section.

(15) Residential Wireman--An individual, licensed as a residential wireman, who works under the general supervision of a master electrician, on behalf of an electrical contractor, while performing electrical work that is limited to electrical installations in single family and multifamily dwellings not exceeding four stories, as defined by Texas Occupations Code, §1305.002(13).

(16) Maintenance Electrician--An individual, licensed as a maintenance electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor and performs "Electrical Maintenance Work" as defined in paragraph (17) of this section.

(17) Electrical Maintenance Work--The replacement, or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises. All replacements or repairs must be of the same rating and type as the existing installation. No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305. Electrical maintenance work does not include the replacement of any raceways, conductors, disconnecting means, or service feeder components. It also does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation. The term does not include work exempted by Texas Occupations Code, §1305.003.

(18) Electrical Sign Work--Any labor or material used in manufacturing, installing, maintaining, extending, connecting or reconnecting an electrical wiring system and its appurtenances, apparatus or equipment used in connection with signs, outline lighting, awnings, signals, light emitting diodes, and the repair of existing outdoor electric discharge lighting. This also includes the installation of an electrical service integral to an isolated sign and/or outline lighting installation

§73.51. Electrical Contractors' Responsibilities.

(a) A licensed electrical contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TECL".

(b) All of a contractor's non-exempt electrical work shall be performed by licensed individuals. A contractor is responsible for compliance with applicable codes for all such electrical work it performs.

§73.52. Electrical Sign Contractors' Responsibilities.

(a) A licensed electrical sign contractor shall display its name and license number on both sides of each vehicle owned or operated by the business and used in the conduct of electrical sign work. Lettering shall be of a contrasting color and at least two inches in height. The license number shall be preceded by the letters "TSCL".

(b) All of a contractor's non-exempt electrical sign work shall be performed by licensed individuals. A contractor is responsible for compliance with applicable codes for all such electrical sign work it performs.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404185
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: July 13, 2004
Proposal publication date: April 30, 2004
For further information, please call: (512) 463-7348

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CHAPTER 79. WEATHER MODIFICATION

16 TAC §§79.1, 79.10 - 79.15, 79.17, 79.18, 79.20 - 79.22, 79.32, 79.33, 79.42, 79.51 - 79.54, 79.61, 79.62, 79.80

The Texas Department of Licensing and Regulation ("Department") adopts amendments to 16 Texas Administrative Code §§79.1, 79.10 - 79.13, 79.15, 79.17, 79.18, 79.20 - 79.22, 79.32, 79.33, 79.42, 79.51 - 79.54, 79.61, and 79.62, and new 16 Texas Administrative Code §79.14 and §79.80, regarding the weather modification program as published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4638) without changes and will not be republished.

The adopted amendments give effect to statutory changes made by the 78th Legislature by removing the word "commissioner" from the rules and updating statutory references; establish a procedure for issuance of a provisional license and clarify the documentation that must be included in a permit application; authorize the issuance of a permit in certain circumstances when a license application is pending; and clarify that permits may be issued for all or part of a year or years. The adopted new sections contain all program fees, and increases the license and license amendment fee from $150 per year to $650 per year.

The adoption is necessary to update statutory references in existing rules and to adjust the program fees to a level where the fees cover the costs of administering the weather modification program.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received.

The amendments and new sections are adopted under Texas Agriculture Code, Chapter 301 and Chapter 302, and Occupations Code, Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Agriculture Code, Chapter 301 and Chapter 302, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404186
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Executive Director
Texas Department of Licensing and Regulation
Effective date: July 13, 2004
Proposal publication date: June 23, 2004
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PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER B. OPERATIONS OF RACETRACKS

DIVISION 1. GENERAL PROVISIONS

16 TAC §309.105

The Texas Racing Commission adopts a new rule, §309.105, relating to the reimbursement of Breeders' Cup Costs. The new rule is adopted without changes to the proposal published in the April 30, 2004, issue of the *Texas Register* (29 TexReg 4050) and the new rule will not be republished.

The new rule sets out the process by which a host racing association for the Breeders' Cup may receive reimbursement for certain costs authorized by the Texas Racing Act, §6.094.

The amendment is adopted to foster further development of the horse racing industry in Texas and provide incentives for job development in the horse racing industry and economic development in the host racetrack's local community.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; and §6.094 which authorizes the Commission to make rules to audit or verify Breeders' Cup costs and amounts paid or set aside by political subdivisions and developmental organizations and for the disbursement of funds from the Breeders' Cup Developmental Account.

The new rule implements Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404075
Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: July 11, 2004
Proposal publication date: April 30, 2004
For further information, please call: (512) 490-4009

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SUBCHAPTER C. HORSE RACETRACKS

DIVISION 4. OPERATIONS

16 TAC §309.293

The Texas Racing Commission adopts an amendment to §309.293, relating to the head numbers on a racehorse during a thoroughbred meet. The amendment is adopted without changes to the proposal published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4404) and the amendment will not be republished.

The amendment allows the association the option to use or not use head numbers on a race horse during a thoroughbred meet.

The amendment is adopted to enhance the economic benefits of pari-mutuel racing to racetracks, by reducing costs of operation.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; and §6.06 which authorizes the Commission to adopt rules on all matters relating to the operation of pari-mutuel racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404076
Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: July 11, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 490-4009

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16 TAC §309.297

The Texas Racing Commission adopts an amendment to §309.297, relating to the purse accounts. The amendment is adopted without changes to the proposal published in the April 30, 2004, issue of the *Texas Register* (29 TexReg 4051) and the amendment will not be republished.

The amendment clarifies that the purse accounts held by the horsemen's organization are maintained as trust accounts for the benefit of horsemen.

The amendment is adopted to conform the rule to the intent of the Texas Racing Act and the current practice of the horsemen's organization.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02 which authorizes the Commission to make rules relating exclusively to horse and greyhound racing; §6.06 which authorizes the Commission to make rules on all matters relating to the operation of pari-mutuel racetracks.

The amendment implements Texas Civil Statutes, Article 179e.

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

Filed with the Office of the Secretary of State on June 21, 2004.

TRD-200404077
Nicole Galwardi
General Counsel
Texas Racing Commission
Effective date: July 11, 2004
Proposal publication date: April 30, 2004
For further information, please call: (512) 490-4009

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER G. CERTIFICATION REQUIREMENT FOR CLASSROOM TEACHERS

19 TAC §§230.191 - 230.194, 230.197, 230.199

The State Board for Educator Certification adopts amendments to the following sections of 19 TAC Chapter 230, Subchapter G: §230.191, relating to educator preparation required in all programs; §230.192, relating to the teacher certificate - elementary; §230.193, relating to the teacher certificate - secondary; §230.194, relating to the all-level teacher certificate in art, music, physical education, speech communications-theatre arts and theatre arts; §230.197, relating to vocational home economic certificates; and §230.199, relating to endorsements. The proposed amendments are being adopted without change. Sections 230.191-230.194, 230.197, and 230.199 were published on February 27, 2004 (29 TexReg 1798) in the *Texas Register*.

The adopted amendments to §§230.191-230.194, 230.197 and 230.199 reflect new standards-based certificates approved by the State Board for Educator Certification (SBEC) and scheduled for implementation in fall 2004 and the replacement or elimination of certain certificates on or about September 1, 2005. Specifically, the new standards-based certificates are designed replace or eliminate the following certificates on or about September 1, 2005: Secondary Industrial Technology (grades 6-12), Vocational Home Economics (grades 6-12), Secondary Health (grades 6-12), Secondary Music (grades 6-12), All-Level Music (pre-kindergarten - grade 12), the Gifted and Talented Endorsement and the Vocational Occupation Orientation (grades 6-12). However, these certificates will remain valid and SBEC will not require holders of these certificates to obtain the corresponding new certificate(s). Educators who hold standard certificates in the areas slated for elimination on September 1, 2005 may renew the certificate upon completion of the requirements specified in 19 TAC Chapter 232, Subchapter R, Certificate Renewal and Continuing Professional Education Requirements. The proposed amendments allow for a one-year overlap of the superseded certificates and the new standards-based certificates, thus providing for the limited availability of current ExCET tests and certificates during the overlap period, 2004-2005.

The State Board for Educator Certification received no public comments regarding the proposed amendments.

The amendments to §§230.191-230.194, 230.197 and 230.199 are adopted under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404206
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.435

The State Board for Educator Certification (SBEC) adopts an amendment to §230.435, relating to fees for certification services without changes to the text as published in the February 27, 2004, issue of the *Texas Register* (29 TexReg 1805).

The adopted amendments to §230.435 are based on the fiscal impact to the agency and the State of Texas that applicants' failure to pay for certification services has on the revenues collected by SBEC.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404195
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER P. REQUIREMENTS FOR STANDARD CERTIFICATES AND SPECIALIZED ASSIGNMENTS OR PROGRAMS

19 TAC §§230.482 - 230.484

The State Board for Educator Certification adopts amendments to the following sections of 19 TAC Chapter 230, Subchapter P: §230.482, relating to specific requirements for standard certificates and endorsements; §230.483, relating to specific requirements for standard career and technology certificates based on experience and preparation in skill areas; §230.484, relating to eligibility requirements for specialized assignments or programs. The amendments to §§230.482 - 230.484 are adopted without changes to the proposed text as published in the February 27, 2004, issue of the *Texas Register* (29 TexReg 1807).

The adopted amendments to §§230.482 - 230.484 reflect new standards-based certificates approved by the State Board for Educator Certification (SBEC) and which are scheduled for implementation in fall 2004, and the replacement or elimination of certain certificates on or about September 1, 2005. Specifically, the new standards-based certificates are designed replace or eliminate the following certificates on or about September 1, 2005: Secondary Industrial Technology (grades 6-12), Vocational Home Economics (grades 6-12), Secondary Health (grades 6-12), Secondary Music (grades 6-12), All-Level Music (pre-kindergarten - grade 12), the Gifted and Talented Endorsement and the Vocational Occupation Orientation (grades 6-12). However, these certificates will remain valid and SBEC will not require holders of these certificates to obtain the corresponding new certificate(s). Educators who hold standard certificates in the areas slated for elimination on September 1, 2005 may renew the certificate upon completion of the requirements specified in 19 TAC Chapter 232, Subchapter R, Certificate Renewal and Continuing Professional Education Requirements. The proposed amendments allow for a one-year overlap of the superseded certificates and the new standards-based certificates, thus providing for the limited availability of current ExCET tests and certificates during the overlap period, 2004-2005.

The State Board for Educator Certification received no public comments regarding the proposed amendments.

The proposed amendments are adopted under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404192
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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CHAPTER 239. STUDENT SERVICES CERTIFICATES

SUBCHAPTER A. SCHOOL COUNSELOR CERTIFICATE

19 TAC §239.1

The State Board for Educator Certification (SBEC) adopts an amendment to 19 TAC §239.1, relating to certification as a school counselor. The proposed amendment to §239.1 is being adopted without change. Section 239.1 was published in the *Texas Register* on February 27, 2004 (28 TexReg 1813).

The adopted amendment to 19 TAC §239.1 will clarify the assignment criteria for individuals holding a School Counselor certificate by adding language specifying that these educators may provide counseling services to students in regular education programs, career and technology education programs and special education programs in pre-kindergarten through grade 12.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment to §239.1 is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404213
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER B. SCHOOL LIBRARIAN CERTIFICATE

19 TAC §239.40

The State Board for Educator Certification (SBEC) adopts an amendment to 19 TAC §239.40, relating to certification as a school librarian. The proposed amendment to §239.40 is being adopted without change. Section 239.40 was published in the *Texas Register* on February 27, 2004 (29 TexReg 1814).

The adopted amendment to 19 TAC §239.40 will clarify the assignment criteria for individuals holding a School Librarian certificate by adding language specifying that these educators may serve as a librarian in a Texas public elementary, middle or secondary school.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment to §239.40 is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404212
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER C. EDUCATIONAL DIAGNOSTICIAN CERTIFICATE

19 TAC §239.80

The State Board for Educator Certification (SBEC) adopts an amendment to 19 TAC §239.80, relating to certification as an educational diagnostician. The proposed amendment is being adopted without change. Section 239.80 was published in the *Texas Register* on February 27, 2004 (29 TexReg 1814).

The adopted amendment to 19 TAC §239.80 will clarify the assignment criteria for individuals holding a Educational Diagnostician certificate by adding language specifying that these educators may serve as an educational diagnostician, including providing educational assessment and evaluation, for students in early childhood programs through grade 12.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment to §239.80 is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404211
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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SUBCHAPTER D. READING SPECIALIST CERTIFICATE

19 TAC §239.90

The State Board for Educator Certification (SBEC) adopts an amendment to 19 TAC §239.90, relating to certification as a reading specialist. The proposed amendment to §239.90 is being adopted without change. Section 239.90 was published in the *Texas Register* on February 27, 2004 (29 TexReg 1815).

The proposed amendment to 19 TAC §239.90 would clarify the assignment criteria for individuals holding a Reading Specialist certificate by adding language specifying that these educators may teach reading to students in early childhood programs through grade 12.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment to §239.90 is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404210
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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CHAPTER 241. PRINCIPAL CERTIFICATE

19 TAC §241.1

The State Board for Educator Certification (SBEC) adopts an amendment to 19 TAC §241.1, relating to certification as a principal. The proposed amendment is being adopted without change. Section 241.1 was published in the February 27, 2004, issue of the *Texas Register* (29 TexReg 1816).

The proposed amendment to 19 TAC §241.1 would clarify the assignment criteria for individuals holding a Principal certificate by adding language specifying that these educators may serve as a principal or assistant principal in a Texas public elementary, middle or secondary school.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment to §241.1 is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404209
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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CHAPTER 242. SUPERINTENDENT CERTIFICATE

19 TAC §242.20

The State Board for Educator Certification (SBEC) adopts an amendment to §242.20, relating to certification as a superintendent without changes to the text as published in the February 27, 2004, issue of the *Texas Register* (29 TexReg 1816).

The amendment would clarify the assignment criteria for individuals holding a Superintendent certificate by adding language specifying that these educators may serve as a superintendent in a Texas public school district.

The State Board for Educator Certification received no public comments regarding the proposed amendment.

The amendment is adopted under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404198
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: July 13, 2004
Proposal publication date: February 27, 2004
For further information, please call: (512) 936-8239

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TITLE 22. EXAMINING BOARDS

PART 4. TEXAS COSMETOLOGY COMMISSION

CHAPTER 83. SANITARY RULINGS

22 TAC §83.14

The Texas Cosmetology Commission adopts an amendment to §83.14, concerning Disinfection Practices and Procedures, without changes to the proposal published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4715). The text of the rule will not be republished. The adopted amendment adds new subsection (j) which specifies the procedure and frequency with which a licensed cosmetologist or manicurist must disinfect a "whirlpool footspa" or "spa." The amendment is adopted as a result of a need to protect the public from potential infection due to use of an improperly sanitized "whirlpool footspa" or "spa."

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1602, §1602.151, which provides the commission with the authority to "adopt rules consistent with this chapter" to protect the public's health and safety.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404270
Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Effective date: July 18, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 380-7644

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CHAPTER 89. GENERAL RULES AND REGULATIONS

22 TAC §89.15

The Texas Cosmetology Commission adopts an amendment to §89.15, concerning Definitions of License Authorizations, without changes to the proposal published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4717). The text of the rule will not be republished. The adopted amendment adds new subsection (l) concerning apprenticeship permits for shampoo technicians. Subsection (l) specifies that the commission as of January 1, 2004, may issue a Shampoo Apprentice Permit to an applicant who is at least 16 years of age. The amendment is adopted as a result of House Bill 653, Shampoo Apprentice Permit enacted by the 78th Texas Legislature.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1602, §1602.151, which provides the commission with the authority to "adopt rules consistent with this chapter" to protect the public's health and safety.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404274
Antoinette Humphrey
Executive Director
Texas Cosmetology Commission
Effective date: July 18, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 380-7644

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PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. EXAMINATION

22 TAC §571.3

The Texas Board of Veterinary Medical Examiners ("Board") adopts amendments to §571.3 concerning Eligibility for Examination and Licensure without changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2538). This section contains the Board's requirements for persons seeking a veterinary license in Texas. The amendments reflect changing requirements for taking the North American Veterinary Licensing Examination (NAVLE). These requirements are set by the National Board of Veterinary Medical Examiners (NBVME) and are reflected in this section. The main focus of the amendments is to clearly distinguish the requirements for taking the NAVLE for persons enrolled in accredited schools of veterinary medicine as opposed to persons who are graduates of non-accredited schools of veterinary medicine. These amendments should eliminate some confusion that has existed for some applicants for licensing. The amendments also set out the requirements for candidates who do not appear for scheduled examinations or who fail to attain a passing grade on the SBE or NAVLE.

No comments were received concerning this section.

The amended section is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404146
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER G. OTHER PROVISIONS

22 TAC §573.67

The Texas Board of Veterinary Medical Examiners ("Board") adopts amendments to §573.67 concerning Temporary License Suspensions without changes to the proposed text as published in the *Texas Register* on March 12, 2004 (29 TexReg 2539). This amended section sets out procedures that the Board utilizes in temporarily suspending the license of a veterinarian where the licensee's continued practice of veterinary medicine constitutes a continuing or imminent threat to the public welfare. An executive disciplinary committee of the Board is formed and meets to receive information on the licensee's activities and then determines whether a temporary license suspension is justified. A follow-up informal conference is held, after notice to the licensee. The amended section specifies the actions that the enforcement committee may take following the informal conference. The section has been completely re-written to specify the steps and actions that the committee and Board may take in instituting a temporary license suspension.

No comments were received concerning this section.

The amended section is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404147
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.12

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.12 concerning Presiding Officer, Oath, Imposing the Rule, without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2541). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404148
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.13

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.13 concerning Reporters and Transcript without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2541). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404149
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.14

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.14 concerning Rules of Evidence without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2542). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404152
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.15

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.15 concerning Documentary Evidence and Official Notice without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2542). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404151
Julie A. Barker
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.16

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.16 concerning Limitations on Number of Witnesses without changes to the proposal as published in the March 12, 2004 issue of the *Texas Register* (29 TexReg 2542). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404150
Julie A. Barker
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Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.17

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.17 concerning Depositions without changes to the proposal as published in the March 12, 2004 issue of the*Texas Register* (29 TexReg 2543). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404153
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.18

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.18 concerning Administrative Finality without changes to the proposal as published in the March 12, 2004 issue of the *Texas Register* (29 TexReg 2543). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404154
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.19

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.19, concerning Motions for Rehearing without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2544). This repeal is adopted because the subject matter of this section has been included in a new §575.6 adopted by the Board.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404155
Julie A. Barker
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.20

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.20, concerning Subpoena Fees and Expenses of Witnesses without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2544). This repeal is adopted because the subject matter of this section has been included in a new §575.5 adopted by the Board.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404156
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.21

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.21, concerning Administrative Penalties without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2544). This repeal is adopted because the payment of these fees is addressed in written instructions to persons who have violated the Veterinary Licensing Act and have been assessed administrative penalties. These payments are handled on an individual basis and elimination of this section gives the Board more discretion in dealing with this matter.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404157
Julie A. Barker
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.22

The Texas Board of Veterinary Medical Examiners ("Board") adopts amendments to §575.22, concerning Reinstatement of Veterinary Licenses with changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2545). This section contains the requirements for persons who have had their veterinary licenses revoked or cancelled to request reinstatement of their licenses. The amendments to the section are non-substantive changes designed to clarify and make the section more readable. For example, the word "applicant" is changed to "petitioner" to denote the correct designation for one who petitions the Board for reinstatement. Several additional references to "applicant" that were not noted in the proposed text have been corrected.

No comments were received concerning this section.

The amendment is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

§575.22. Reinstatement of Veterinary Licenses.

(a) A person whose license to practice veterinary medicine has been cancelled or revoked, whether by voluntary action or by disciplinary action of the Board, may after five (5) years from the effective date of such cancellation or revocation, petition the Board for reinstatement of the license, unless another time is provided in the cancellation or revocation order, or unless no provision was made in the order for reinstatement. This rule does not apply to licensees who let their licenses lapse for non-payment of renewal fees or licensees against whom a cancellation or revocation proceeding is not pending before the Board or in any other jurisdiction.

(b) The petition shall be in writing and in the form prescribed by the Board.

(c) The Board may grant or deny the petition. If the petition is denied by the Board, a subsequent petition may not be considered by the Board until twelve (12) months have lapsed from the date of denial of the previous petition.

(d) The petitioner or his legal representative must appear before the Board to present the request for reinstatement of the license.

(e) The petitioner shall have the burden of showing good cause why the license should be reinstated.

(f) In considering a petition for reinstatement, the Board may consider the petitioner's:

(1) moral character;

(2) employment history;

(3) status of financial support to his family;

(4) participation in continuing education programs or other methods of staying current with the practice of veterinary medicine;

(5) criminal history record, including felonies or misdemeanors relating to the practice of veterinary medicine and/or moral terpitude;

(6) offers of employment as a veterinarian;

(7) involvement in public service activities in the community;

(8) compliance with the provisions of the Board order revoking or canceling the petitioner's license;

(9) compliance with provisions of the Veterinary Licensing Act regarding unauthorized practice;

(10) history of acts or actions by any other state and federal regulatory agencies; and

(11) any physical, chemical, emotional, or mental impairment.

(g) In considering a petition, the Board may also consider:

(1) the gravity of the offense for which the petitioner's license was cancelled, revoked or restricted and the impact the offense had upon the public health, safety, and welfare;

(2) the length of time since the petitioner's license was cancelled, revoked, or restricted, as a factor in determining whether the time period has been sufficient for the petitioner to have rehabilitated himself to be able to practice veterinary medicine in a manner consistent with the public health, safety and welfare;

(3) whether the license was submitted voluntarily for cancellation at the request of the licensee; and

(4) other rehabilitative actions taken by the petitioner.

(h) If the Board grants the petition for reinstatement, the petitioner must successfully complete the Texas State Board Licensing Examination during the regularly scheduled examination times. The Board may also require the petitioner to complete additional testing to assure the petitioner's competency to practice veterinary medicine.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404158
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.28

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.28, concerning Entry of Appearances; Continuances without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2546). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404159
Julie A. Barker
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.29

The Texas Board of Veterinary Medical Examiners ("Board") adopts the repeal of §575.29, concerning Failure to Attend Hearing; Default Judgment without changes to the proposal as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2546). This section was originally written to govern contested matters before the Board. These types of matters are now heard before the State Office of Administrative Hearings which has its own rules for conducting hearings. This section is adopted for repeal because it is no longer necessary in the conduct of Board business.

No comments were received concerning this section.

The repeal is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404160
Julie A. Barker
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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22 TAC §575.30

The Texas Board of Veterinary Medical Examiners ("Board") adopts amendments to §575.30, concerning Criminal Convictions without changes to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2547). This section sets out procedures that the Board utilizes in determining disciplinary actions for licensed veterinarians convicted of criminal activity. The section is based on provisions of the Veterinary Licensing Act and the Occupations Code that specifically provide for such disciplinary actions. Section 53.022, Occupations Code, requires that a conviction directly relate to the licensed occupation. Section 53.023 lists factors for a licensing authority to consider in determining the fitness of a convicted licensee to perform the duties of the occupation. Section 53.025 requires that licensing authorities issue guidelines for implementing Sections 53.022 and 53.023. Section 801.406, Occupations Code, requires that the Board suspend or revoke the license of a veterinarian for convictions of certain statutes.

The amended section provides that the Board may take disciplinary action against a licensee when a criminal conviction directly relates to the duties and responsibilities of the veterinary profession. The list of crimes that directly relate to the practice of veterinary medicine is revised and expanded to include additional crimes such as animal cruelty, injury to a child, and mail fraud. One subsection is re-written to clarify that certain violations of the Health and Safety Code mandate suspension or revocation. In addition, the Board is required by the section to revoke a license of a person imprisoned for a felony conviction. Provisions pertaining to appeal and review of Board disciplinary actions are deleted because similar provisions are contained in the Administrative Procedure Act.

No comments were received concerning this section.

The amendment is adopted under the authority of the Occupations Code, §801.151(a) which authorizes the Board to adopt rules necessary to administer the Veterinary Licensing Act.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404161
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Texas Board of Veterinary Medical Examiners
Effective date: July 12, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 305-7555

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 321. CONTROL OF CERTAIN ACTIVITIES BY RULE
SUBCHAPTER B. CONCENTRATED ANIMAL FEEDING OPERATIONS

The Texas Commission on Environmental Quality (commission or TCEQ) adopts amendments to §§321.31 - 321.47. The commission also adopts the repeal of §321.48 and §321.49. Sections 321.31 - 321.34, 321.36, and 321.38 - 321.47 are adopted *with changes* to the proposed text as published in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2550). The amended §321.35 and §321.37 and the repeal of §321.48 and §321.49 are adopted *without changes* and will not be republished.

The primary purpose of the adopted amendments is to implement the new federal Concentrated Animal Feeding Operation (CAFO) Regulations and Effluent Guidelines and reauthorize Subchapter B to implement the National Pollutant Discharge Elimination System (NPDES) CAFO Program under the Texas Memorandum of Agreement (MOA) with the United States Environmental Protection Agency (EPA) regarding delegation of the federal NPDES program. In addition, the adopted rules will address air and water quality issues and serve to improve air and water quality conditions statewide including within major sole-source impairment zones.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopted this subchapter for NPDES purposes and to make the Texas rules consistent with federal regulations. The rules became effective on September 18, 1999. The commission adopted the current version of the subchapter on March 6, 2002, to implement the requirements of House Bill 2912, 77th Legislature, 2001, regarding permitting requirements for CAFOs located in major sole-source impairment zones (i.e., Bosque River Watershed) and the protection of sole-source drinking water supplies. The EPA adopted changes to the federal CAFO regulations and effluent guidelines that became effective on April 13, 2003, changing the requirements to operate CAFOs under the Clean Water Act. Specifically, the new federal regulations changed which animal feeding operations (AFOs) were defined as CAFOs and what management practices are required for those operations. The effluent guidelines changed the design standards for new source swine, veal, and poultry operations and added a requirement for nutrient management plans (NMPs).

The EPA recognized in the NPDES delegation MOA with TCEQ that Subchapter B is the authority for the Texas Pollutant

Discharge Elimination System (TPDES) CAFO program. The MOA requires that TCEQ adopt federal regulation changes into its state regulations and requirements. In general, the adopted amendments: 1) reorganize and streamline the rules by grouping similar requirements together; 2) maintain most of the existing requirements; 3) delete the option of authorization by registration; 4) identify who among CAFOs is required to obtain an individual permit or general permit; 5) add new federal requirements; 6) specify certain procedures and requirements for dairy CAFOs located in major sole-source impairment zones; 7) update requirements for an air quality standard permit; and 8) clearly state the existing requirements for AFOs that are not defined or designated as CAFOs. The adopted changes will improve the overall readability of the adopted rules. Therefore, amendments to the subchapter are necessary to establish the requirements that will allow TCEQ to continue to authorize CAFOs. General and individual permits, along with permits by rule for certain AFOs, meet all state and federal requirements.

The adopted amendments to Subchapter B will also continue to allow an AFO to obtain an air quality standard permit through the procedures identified in this amended subchapter and do not preclude an AFO from obtaining an air quality standard permit. This standard permit will satisfy the Texas Clean Air Act requirements so that other air quality authorization will not be necessary. The air quality requirements of this subchapter reflect the application of best available control technology (BACT) for AFOs, and address the protection of air quality through the implementation of good management practices. If an operator cannot meet the requirements of a permit by rule in 30 TAC Chapter 106, Permits by Rule, or satisfy the air quality criteria of this amended subchapter, then the operator must obtain an individual air quality authorization under 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. If the AFO constitutes a major source or major modification as defined in Chapter 116, then an individual air quality permit is required.

The commission took into consideration the following state and federal actions in adopting these amendments to Subchapter B: 1) changes to the federal NPDES CAFO Regulations adopted February 13, 2003 under 40 Code of Federal Regulations (CFR), Parts 122 and 412, effective April 13, 2003; 2) EPA Region VI General Permit for CAFOs (March, 1993), which establishes the currently effective technical and procedural requirements for CAFOs necessary to maintain federal authorization to discharge under the NPDES program; 3) former Texas Water Code (TWC), §26.040, under which Subchapter B was originally adopted and which directed that the commission may by rule regulate and set requirements and conditions for discharges of waste whenever the commission determines that requiring individual permits is unnecessarily burdensome both to the waste discharger and to the commission; 4) TWC, §26.040, which allows the commission to authorize the discharge of wastewaters through the issuance of general permits. This statute further specifies that all current rules adopted by the commission under §26.040 as it read prior to the effective date of the statute remain in effect, as they may be amended by the commission from time to time as appropriate, and provides that the commission's authority for subsequent amendments or modifications is not affected by the changes made to the statute; 5) Texas Health and Safety Code, Chapter 382, to authorize an air standard permit authorization for AFOs to protect air quality; and 6) NPDES MOA between the TCEQ and EPA Region VI (September 14, 1998), which establishes policies, responsibilities, and program commitments to allow for continued assumption of the NPDES program by the TCEQ.

SECTION BY SECTION DISCUSSION

Adopted §321.31 changes the title of the section from "Waste and Wastewater Discharge and Air Emission Limitations" to "Manure, Litter, and Wastewater Discharge and Air Emission Limitations." The adopted amendment keeps the prohibition that there shall be no discharge or disposal of manure, litter, or wastewater from an AFO into or adjacent to waters in the state except in accordance with an individual or general permit or other authorization issued or adopted by the commission. The adopted change to this section moves the effluent guideline requirements from this section into adopted §321.37 titled "Effluent Limitations."

The title of §321.32, "Definitions," will remain the same. Many of the definitions remain without change or with slight modifications to enhance understanding and readability. The adopted amendment to §321.32 adds new definitions for area land use map under paragraph (5); beneficial use under paragraph (6); catastrophic conditions under paragraph (8), to distinguish those catastrophic conditions not associated with rainfall; certified nutrient management specialist under paragraph (9), modified in response to comments, to add the phrase "in Texas" to clarify that the only organization recognized is in Texas; certified water quality management plan under paragraph (11); comprehensive nutrient management plan (CNMP) under paragraph (12), modified in response to comments, to add the acronym and reflect that the plan must be implemented to achieve the benefits expected; large, medium, small, and state only CAFO under paragraph (13); crop removal under paragraph (15), modified to refer to proposed crop instead of previous year; crop requirement under paragraph (16); land management unit (LMU) under paragraph (25); letter of consent under paragraph (26); liquid waste handling system under paragraph (28), modified in response to comments, to reflect that this term defines a system that is used for transporting and land applying waste not recycling; manure under paragraph (30); new source under paragraph (31); NMP under paragraph (33); nutrient utilization plan (NUP) under paragraph (34), modified in response to comments, to add the word "Code"; 100-year, 24-hour rainfall event under paragraph (35); 100-year floodplain under paragraph (36), modified to reflect the definition in 30 TAC Chapter 309; playa under paragraph (42); production area under paragraph (44); significant CAFO expansion under paragraph (48), modified in response to comments, to add the phrase "by more than 50%" to specify the amount and time frame in which these changes occur; sludge under paragraph (49), modified in response to comments, to replace liquid with slurry to more accurately reflect what constitutes sludge; soil plant air water (SPAW) field pond hydrology under paragraph (50); technical service provider under paragraph (52); and 25-year, ten-day rainfall event under paragraph (53), modified in response to comments to indicate the correct reference material. These definitions are common terms used in the adopted amendments to this subchapter. The following terms are no longer used in the adopted amendments, and therefore, have been deleted from this section: animal unit; CAFO general permit; flushwater handling system; new CAFO; no discharge; process wastewater; and qualified groundwater scientist. Additionally, land application under paragraph (24) was modified to clarify that the term means "the act of applying" rather than removal of manure, litter, and wastewater; recharge feature under paragraph (46) was changed to delete the word pathways and replace it with hydrologic connection; and United States Department of Agriculture - Natural Resources Conservation Service

under paragraph (55) was modified in response to comments to include the acronym.

The adopted amendment revises the definition of area land use map under paragraph (5) and letter of consent under paragraph (26) to indicate that written consent for location and operation of permanent odor sources within the required minimum buffer distance must be obtained from a place of worship only when it is located within a permanent structure; and to expand the requirements for location and operation of permanent odor sources within the minimum buffer distance to include written consent from any governmental entity responsible for operating a school or public park. The definitions were revised to be consistent with changes made in §321.43 in response to public comments received on this rule.

Adopted §321.33 adds "and Required Authorizations" to the section's current title "Applicability." The adopted amendment to this section clearly establishes which CAFOs are required to obtain authorization, what authorization they must obtain, and the schedule for when the CAFO authorization must be obtained. Individual permits are required for certain CAFOs as specified in state law, rules of the commission, or as designated by the executive director. General permits provide flexibility for coverage for any CAFO not required to obtain authorization under an individual permit. The adopted amendment also prohibits dual coverage under both types of authorization. Section 321.33(b) was revised in response to comments to clarify that operators may not commence physical construction and/or operation of any "new" control facilities until a permit has been issued. Section 321.33(b)(5) was revised to spell out animal feeding operation because it is the first time the term is used in the section. Section 321.33(c) was also revised in response to comments to clarify that operators may not commence physical construction and/or operation of any "new" control facility until an operator receives authorization under an individual permit or a general permit.

If an application for an individual permit is filed before July 27, 2004, adopted §321.33 allows CAFOs to continue to operate under the terms and conditions of an existing permit by rule or individual permit until the commission acts on the application for an individual permit or the CAFO is authorized under the CAFO general permit. This section references that adopted §321.47 provides authorization for the operation of AFOs not defined or designated as CAFOs. The adopted amendment continues to authorize runoff from LMUs that have been properly managed according to the requirements under this rule. The adopted amendment limits the term of any CAFO authorization issued in accordance with this rule to five years, as required by the federal Clean Water Act and NPDES.

A new §321.33(b)(5)(F) was added to allow the executive director the authority to require the owner or operator of any new CAFO whose production area or LMU is located in a watershed of a segment listed on the current 303(d) to obtain an individual water quality permit. This change adds another reason why the executive director may require an individual permit. The remaining subparagraph was re-lettered accordingly.

Adopted §321.34 changes the current title "Procedures for Making Application for Individual Permit" to "Permit Applications." The adopted amendment maintains the basic notice, public participation process, and application requirements for individual permits as currently required in this section. However, the adopted section streamlines the existing procedural requirements by referencing applicable provisions in 30 TAC Chapters 281 and 305. The adopted amendment incorporates the new federal permit application requirements in 40 CFR §122.21(i)(1). For general permit purposes, new or expanding CAFO facilities must comply with adopted §321.34(b)(3) that requires an applicant to comply with the public participation processes to be set forth in a general permit. The commission believes that the public participation process would assist agency staff and the CAFO during the CAFO authorization process. The adopted rules contain a notation that expansions which are not considered significant only require CAFO owners or operators authorized under a general permit to amend a pollution prevention plan (PPP) and meet all the technical requirements of this subchapter and the permit or authorization. Adopted §321.34(b)(4) was revised in response to comments to now require notice and an opportunity for public comments and a public meeting for individual permits for state-only CAFOs in order to comply with TWC, Chapter 5, Subchapter M. The adopted rules allow the executive director to review an application without a contested case hearing if the application does not propose any change that constitutes a major amendment or if the operation is not a major source. Section 321.34(f)(3) was revised in response to comments to acknowledge that a certified water quality management plan prepared by the Texas State Soil and Water Conservation Board (TSSWCB) that is developed for a dry litter poultry CAFO that evaluates site-specific recharge characteristics and management practices of the operation will meet the recharge feature requirement of paragraph (3). The commission also revised §321.34(f)(4) to reference the Texas Engineering Practice Act and the Texas Geoscience Practice Act.

Adopted §321.35 changes the current title "Procedures for Making Application for Registration" to "Fees." The adopted amendment deletes references to the registration process and establishes the fee requirements for CAFO individual permits. Specifically, the adopted amendment deletes the registration option as a type of CAFO authorization because the agency will transition to the use of general permits and individual permits to authorize certain CAFOs. The commission will utilize the authority under TWC, §26.040, to issue general permits to authorize similar types of discharges from CAFOs and to efficiently use agency resources while providing an adequate level of environmental protection. The adopted requirements for submittal of an application fee and annual assessment fee will be consistent with existing requirements for individual permits.

Adopted §321.36 amends the current title "Notice Requirements" to "Texas Pollutant Discharge Elimination System (TPDES) General Requirements for Concentrated Animal Feeding Operations (CAFOs)." This section now establishes the minimum requirements for TPDES authorizations under either a general or individual permit. The adopted amendment will maintain many of the existing TPDES requirements currently in §321.39, Pollution Prevention Plans. In addition, the adopted amendment adds new federal NPDES requirements in 40 CFR Parts 122 and 412 such as NMPs, sinkhole buffers, inspection frequency, annual reports, and closure of retention control structures (RCSs). The most significant federal change requires all CAFOs to implement and operate according to an NMP developed and certified in accordance with the Natural Resource Conservation Service's (NRCS) 590 Practice Standard, by December 31, 2006. Section 321.36(d) was revised in response to comments to insert "Code" before 590 and correct a grammatical error by replacing "a" with "an." Section 321.36(e)(2) was modified to include "acre-inches,

acre-feet, or gallons" which are other measurements currently used in calculating volumes.

The adopted amendment also moves into this section the requirement for manure and wastewater sampling and logging of manure transport from §321.39 to specify that this is a requirement for TPDES authorization. The adopted amendment also establishes a new requirement for a 100-foot buffer around sinkholes, along with the option for a variance, as allowed in the federal CAFO rules. This requirement is necessary to prevent manure, litter, and wastewater from being applied too close to sinkholes, which could potentially contribute to the degradation of water quality. The adopted amendment also moves the requirement for soil sampling and testing, annual sampling, sampling procedures, and laboratory analysis from §321.39 into this section to specify that these are requirements for TPDES authorization. Section 321.36(g)(4) was revised in response to comments to add "Inductively Coupled Plasma" (ICP) as a more accurate measure of phosphorus (P). The amendment will add a requirement to collect soil samples according to procedures in the agency's publication "Soil Sampling for Nutrient Utilization Plans" and establish specific procedures for collecting representative soil samples. This requirement is necessary to instruct operators on methodologies to collect representative and statistically valid soil samples representative of the concentration of nutrients in the LMU. The adopted amendment also includes requirements from the federal CAFO rule for visual inspections of the CAFO's control facility and land application equipment, on a daily and weekly basis, respectively, to verify that the CAFO is operating correctly. The adopted amendment will require CAFO operators to conduct a daily inspection of all water lines, including drinking water and cooling water lines, located within the drainage area of the RCS. The CAFO operator must also conduct a weekly inspection of all control facilities and equipment used for the land application of manure, litter, or wastewater. An inspection must be made of all storm water diversion devices, runoff diversion structures, and devices channeling contaminated storm water to each RCS. These requirements are necessary to ensure that the control facility is in working order to protect water quality.

The adopted amendment also describes the records that must be kept and incorporates the requirement from the federal CAFO rules into Subchapter B to keep records in the PPPs for a five-year period. This amendment is necessary to update Subchapter B to be consistent with new federal requirements. The adopted amendment also establishes the requirement for CAFOs to submit an annual report to summarize the waste management activities at the CAFO during the previous year. This requirement is from the federal CAFO rule and incorporates specific elements of the annual report from the federal rule into Subchapter B to make it consistent with federal requirements. Section 321.36(j)(8) was revised in response to comments to state that the "initial" soil analysis and not the "original" soil analysis is the document required to be submitted with the annual report. The adopted amendment also moves the pond marker requirement from §321.39 to this section. Section 321.36(k) was modified in response to comments to reinstate the requirement that the pond marker must also identify the minimum treatment volume required for AFOs covered under the air standard permit.

The adopted amendment to dispose of carcasses within 24 hours of death in accordance with state laws and regulations was added to support the existing requirement for carcass disposal, which is from §321.40, Best Management Practices. This requirement is necessary to establish that carcasses must be collected within 24 hours and does not allow them to remain unattended for more than three days before disposal is required. The adopted amendment also includes the federal CAFO rule language prohibiting the disposal of carcasses into a liquid manure system. This requirement is necessary to assure that the liquid manure system is not used to store dead animals. The adopted amendment also requires the CAFO to develop a closure plan and to perform proper closure whenever a single RCS is taken out of service or in the event the entire CAFO ceases operation. The amendment also proposes that the CAFO comply with the proper operation and maintenance requirements of this subchapter until closure is complete, at which time the CAFO may terminate the authorization. This requirement is necessary for Subchapter B to be consistent with federal requirements and to assure that RCSs and other components of the control facility are not abandoned until proper removal and disposal of waste has occurred. Section 321.36(m) was modified in response to comments to include the word "Code" to 360 to correctly identify the NRCS practice standard.

Adopted §321.37 changes the title "Actions On Applications for Registrations" to "Effluent Limitations for Discharges from Concentrated Animal Feeding Operation (CAFO) Production Areas" since the existing content of the section is no longer needed because the registration process will no longer be a form of authorization. The adopted amendment maintains many of the existing TPDES requirements in §321.39. The amendment proposes to replace existing registration requirements with the requirements to meet the effluent limitation guidelines for discharges from production areas of CAFO operations. The amendment also proposes to allow cattle and dairy CAFOs to request alternative performance standards in lieu of the established effluent limitations guidelines in the federal CAFO rules for traditional discharges from cattle or dairy operations. The adopted amendment also allows similar variance requests from swine, poultry, and veal CAFO operations for voluntary superior environmental performance standards. This amendment is necessary to update Subchapter B to be consistent with the new federal requirements.

Adopted §321.38 changes the title "Proper Operations and Maintenance" to "Control Facility Design Requirements." The adopted amendment moves the well buffer requirements from §321.39 into this section and incorporates a new 100-foot buffer requirement for agricultural irrigation wells. This amendment is necessary to minimize the potential of waste applied on the surface in the vicinity of agricultural irrigation wells to affect water quality and to update Subchapter B to be consistent with federal requirements. The adopted amendment also allows a variance from the buffer requirements for existing facilities that operate according to a recharge feature certification plan in order to provide flexibility to existing facilities constructed prior to the buffer requirements. This variance is necessary to allow existing CAFOs authorized under this rule before the buffer requirements were adopted to continue to operate without the economic hardship of retrofitting the CAFO and provides equivalent protection of the wells. The adopted amendment moves the requirement that control facilities and RCSs be located outside the 100-year floodplain from §321.39 to this section. Section 321.38(d) was revised in response to comments to delete the reference to 30 TAC Chapter 301 and provide that the AFO must be protected from damage "that may occur during the flood" instead of designating the rainfall event. The adopted amendment also moves the specifications, location, and design capacity requirements for

the RCS from §321.39 to this section. Section 321.38(e)(4) was changed in response to comments to add "without any modification of the RCS" to include all changes to which the provision would apply. The commission revised §321.38(e)(4) to specify that it addresses capacity requirements for the design rainfall event. Section 321.38(e)(5) was changed in response to comments to replace "demonstrated" with "documented" to clarify the requirement. The adopted amendment also establishes a new requirement for new source swine, veal, and poultry operations to design, construct, and operate an RCS to meet the 100-year, 24-hour design as required by the new federal CAFO regulations. The adopted amendment also moves the design requirements for systems using irrigation, evaporation systems, dewatering systems, and embankment and liner design from §321.39 to this section. Section 321.38(e)(7)(B) was revised in response to comments to more accurately describe the required RCS volume and reinstate the previous language regarding the 21-day minimum storage period. The commission modified §321.38(g)(1) and (2) to specify that the provision applies to new or modified RCSs. Additionally, the commission deleted "new construction and for all structural modifications of" because §321.38(g) applies to new and existing RCSs. Section 321.38(g)(3)(B) and (C) were modified in response to comments to state when the lack of hydrologic connection or when liners are required. The adopted amendment to the embankment design provision includes specifications on the distances required to be maintained above and below the spillway depending on the type of system. The adopted amendment also moves the manure storage capacity requirement from §321.39 into this section. The adopted rule requires manure areas to be located within the drainage area of the RCS and accounted for in design calculations of the RCS if manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in case of the design rainfall event.

Adopted §321.39 changes the title of the section from "Pollution Prevention Plans" to "Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)" to better reflect the description of operational requirements in the section. The provisions regarding RCS operation and maintenance, storage of waste, and sludge are currently located within this section. The adopted amendment adds a provision regarding imminent overflow as a result of chronic or catastrophic rainfall or catastrophic conditions to require the operator to irrigate wastewater to LMUs as a management practice that will minimize pollutant loads to receiving waters. Section 321.39(b)(3) was modified to clarify the sampling point of discharges from the LMU. The amendment would also require the operator to report the activity to the regional office within 24 hours of beginning irrigation. Section 321.39(b)(5) was revised in response to comments to reinstate the liner re- certification in case of damage that was inadvertently omitted. The adopted amendment regarding sludge volumes requires CAFOs to remove accumulated sludge "in accordance with the RCS design sludge level" instead of the previous requirement "when 50% of the treatment volume has been exceeded." The adopted change that requires a CAFO to develop procedures for spill prevention and recovery moves from §321.40 into this section. Section 321.39(d) was revised to reflect the requirement from previous rule language and delete the requirement for a written plan. The adopted amendment establishes a new requirement that waste stored for more than 30 days will be considered as permanent storage and states that agency permits will require proper containment to prevent contaminated runoff from leaving the CAFO. Although EPA CAFO permitting guidance recommends that storage of dry poultry litter be limited to no more than 15 days to avoid discharges, these amendments prohibit a discharge from an LMU regardless of length of time dry litter is stored. The adopted rule requires permanent manure storage areas to be located within the drainage area of the RCS and accounted for in design calculations of the RCS if manure storage areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in case of the design rainfall event. The adopted amendment also allows for composting at the CAFO without separate authorization, provided it is conducted in accordance with the agency's composting rules and regulations. The adopted amendment restricting livestock from coming into contact with water in the state was moved from §321.40 into this section. The adopted change adds a specific provision identifying an existing requirement that a CAFO must maintain vegetation in pastures where animals from the CAFO are grazing.

Adopted §321.40 changes the title of the section from "Best Management Practices" to "Concentrated Animal Feeding Operation (CAFO) Land Application Requirements" because many of the best management practices (BMPs) were moved to other sections of the rules directly related to that specific management activity. The adopted amendment moves the existing requirements for land application from §321.39 to this section. The provisions regarding buffer requirements are currently in §321.40. The commission revised §321.40(h) to allow irrigation of wastewater when applied by low-pressure, low-profile center pivot irrigation systems in areas of the state where the annual average rainfall is less than 25 inches per year. This provision satisfies the new federal CAFO regulation in 40 CFR §412.4(c)(5)(ii). The adopted amendment will establish new requirements that CAFOs install additional protective measures in any new LMUs to prevent pollutants from entering an irrigation well. The amendment also proposes to establish what protective measures can be utilized by the CAFO to meet this requirement. The adopted amendment also adds a new requirement for CAFO operators to install backflow prevention devices in accordance with 16 TAC Chapter 76, Water Well Drillers and Water Well Pump Installers, if wastewater or chemicals are introduced to wellheads of irrigation systems. The adopted amendment requires all CAFO operators to develop and implement an NMP to satisfy the new federal requirements for proper land application. Further, the adopted amendment requires land application to be based on total nutrient concentration instead of the former §321.39 requirement for nitrogen. Land application rates must not exceed nutrients necessary to meet the planned crop requirement as stated in this rule. The adopted amendment also moves the NUP requirements from §321.39 into this section. Section 321.40(k)(2) has been revised to reflect the "Critical Phosphorus Level" because the rule does not contain a P limit. Section 321.40(k)(3) has been changed in response to comments to correct the name of the certifying party for professionals that are authorized to develop NUPs. The commission also replaced the reference to 200 parts per million (ppm) with "critical P level" because the level varies depending on location in the state.

Adopted §321.41 changes the title "Other Requirements" to "Special Requirements For Discharges to a Playa." The adopted amendment sets forth the requirements for playas currently in 321.40. The adopted amendment contains the requirements associated with TWC, §26.048, and the circumstances under which an AFO may utilize a playa as an RCS. and the circumstances under which an AFO may utilize a playa as an RCS.

Adopted §321.42 changes the title "Monitoring and Reporting Requirements" to "Requirements Applicable to the Major Sole-Source Impairment Zone." Most of the requirements in adopted §321.42 are new provisions included to improve water quality conditions in a major sole- source impairment zone. In addition, this section also addresses the North Bosque River Watershed TMDL and implementation plan which is also the major sole-source impairment zone.

The Subchapter B adopted rule provisions and the North Bosque River Total Maximum Daily Load (TMDL) Implementation Plan seek to significantly reduce the amount of P (and other pollutants) discharged to waters in the state from dairy CAFO sources in the watershed. Primary management strategies for dairies, both voluntary and regulatory, were identified in the implementation plan which included: 1) requiring P-based application rates when applying manure to LMUs; 2) voluntarily implementing efforts to reduce the amount of P in dairy cow diets; 3) and removing significant quantities of dairy-generated manure from the watershed for the production of compost, beneficial use on crops, or disposal. The P-based waste management plans are required for applications currently being processed by TCEQ. These applications also specify how the excess manure will be managed. The voluntary P diet reductions are being implemented through consultations between a nutritionist and the dairy operator. Any such dietary P reductions will result in reduced P concentrations in manure. These strategies are facets of CNMPs required for all dairy CAFOs in the major sole-source impairment zone (§321.42), i.e. the Bosque River Watershed.

A CNMP for an individual dairy CAFO must consider manure P content, the LMU area available for land application based on P-rate application, and the amount of excess manure that would remain. It must also account for all pathways of manure use or disposal, which would include removal to compost facilities, transport to another watershed for land application, or land application at on-site LMUs. These requirements that apply when the commission authorizes a CAFO in the major sole- source impairment zone, are contained in §321.42(i)(5), (n) - (p), and (s).

Continuing education requirements in §321.45(b) mandate that dairy operators be trained on management practices that are also consistent with the implementation plan regarding feed management and waste management practices.

The implementation plan also includes a recommendation that the CAFO rulemaking consider more stringent requirements for RCSs, in order to reduce overflows of dairy wastewater. In response, several new requirements applicable to dairy CAFOs in the major sole-source impairment zone have been proposed that are consistent with the implementation plan. Section 321.42(c) specifies that RCSs must be designed to contain the volume associated with a 25-year, ten-day rainfall event or contain a volume that would result in a discharge of no more often than once per 25 years as evaluated through the soil, plant, air, and water (SPAW) hydrology tool.

Some of the additional requirements for RCSs at dairy CAFOs in §321.42 include: 1) a permanent pond marker, graduated in one foot increments from the minimum treatment volume to the top of the spillway; 2) an RCS management plan for all dairy CAFOs detailing procedures for proper operation and management of wastewater levels based on design and assumptions of monthly expected operating levels; 3) daily monitoring records of wastewater levels; 4) a contract between the dairy operator and the off-site recipient of manure to be applied, which specifies land application practices for beneficial use and provides for quarterly reporting to TCEQ by the operator; 5) notification to TCEQ regional staff of soil sampling events; 6) notification of discharges within one hour; and 7) a report of discharges submitted to the TCEQ regional office documenting that overflows from cumulative rainfall events were beyond the operator's control.

For AFOs that are not CAFOs, §321.47(d) and (e) specifies RCS design, operation, and maintenance requirements. When necessary to achieve water quality or other policies or purposes, the executive director has the discretion to require an AFO to be designated a CAFO, with the potential and imposition of more stringent requirements (§321.33(b)(5)).

The implementation plan includes a recommendation that the CAFO rulemaking consider whether additional limitations or requirements are needed for runoff control and whether additional irrigation management is needed to prevent excessive runoff. In response, the rule includes enhanced requirements consistent with the implementation plan for CNMPs (previously mentioned). Section 321.40(h) requires a 100-foot wide vegetative buffer between every application area and a water body in the state. Also, §321.42(q) specifies that automatic irrigation shutdown requirements may be imposed and §321.42(r) prohibits nighttime land application from midnight to 4:00 a.m.

To ensure compliance, CAFO operators must report a discharge within 24 hours of the discharge and must sample the discharge including any discharge from an RCS (§321.44).

To achieve the goals of the implementation plan, this section contains more stringent provisions for the operation and management of dairies to protect the impaired watershed. These provisions will be implemented through the use of individual permits which will include special provisions for CNMPs, NMPs, NUPs, BMPs, and other site-specific land application requirements necessary to achieve the goals of the TMDL. Some of the new provisions were consensus recommendations of the technical standards committee that developed the North Bosque River Watershed White Papers in 2003. The monitoring and reporting requirements in §321.42 have been moved to adopted §321.44, Notification. The adopted amendment applies to operators of dairy CAFOs in the major sole-source impairment zone and specifies that these requirements supercede any other requirements applicable to CAFOs in general, if they conflict with a requirement in this section. The adopted amendment further requires dairy CAFOs in the major sole-source impairment zone to operate and maintain a margin of safety volume consistent with the SPAW Field Pond Hydrology model or a 25- year, ten-day rainfall event. The SPAW model is an NRCS tool that will enable a consultant to analyze the management, operation, and sizing of the RCS to determine its suitability to protect water quality. Using the SPAW model, a consultant must ensure that the data shows that the probability of an overflow from the RCS will be less than once in 25 years. Alternatively, a consultant can design an RCS to contain wastewater from a 25-year, ten-day rainfall event to meet the required margin of safety to protect water quality. The adopted margin of safety exceeds NPDES requirements for the design rainfall event and has been included due to the water quality in impaired segments of the North Bosque River Watershed. The adopted amendment also requires that the margin of safety must be maintained and shown on the pond marker. Section 321.42(d) has been revised in response to comment to reflect that the margin of safety must be maintained in the RCS. This new provision is adopted to manage storage capacity to minimize overflows of wastewater from RCSs. The adopted amendment also contains a requirement for dairy CAFOs to add

one-foot graduations to the pond marker to identify the depth, between the required minimum treatment volume level and the spillway which includes the margin of safety. The adopted amendment also requires the dairy operator to monitor daily the wastewater levels and to maintain a log to assist with RCS management and compliance with these rules.

The adopted amendment also requires dairy operators in major sole-source impairment zones to develop and implement an RCS management plan which will establish the appropriate wastewater management levels according to the RCS design and the requirements in this section. The dairy operator is also required to operate the RCSs according to the plan and maintain wastewater levels at or below the expected end of month projected level. This provision will improve RCS management and minimize conditions that lead to overflows. In addition, agency staff will be able to review the plans and records of management to document compliance with the requirements of this subchapter. The adopted amendment also moves the management and disposal practices from §321.48, Regulation of Certain Dairy Concentrated Animal Feeding Operations (CAFOs), to this section to consolidate special requirements for dairies located within major sole-source impairment zones in one section. Section 321.42(i)(5)(B) has been revised in response to public comment to include "Code" to correctly identify the NRCS standard.

The adopted amendment adds a new provision to allow the operators of existing dairy CAFOs in the major sole-source impairment zone to provide manure, litter, and wastewater to operators of third- party fields under contract that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. Specifically, the amendment requires: 1) a written contract between the dairy operator and the recipient; 2) dairy operators are not allowed to deliver manure, litter, or wastewater to a third party if the soil test P analysis shows a level equal to or greater than 200 ppm, or the operator is not in compliance with §321.36 and §321.40 or the contract; 3) annual samples of third-party fields by a nutrient management specialist; and 4) submittal of records to the appropriate regional office quarterly. This provision was added to allow effective utilization of nutrients on deficient soils throughout the watershed and will reduce additional land application to LMUs at the CAFO. This is intended to reduce the potential for P runoff from the CAFO LMUs.

Section 341.42(j) has been revised to delete "are not expanding" to clarify that any existing dairy CAFO can utilize third-party fields. TWC, §26.503, provides for disposal practices for dairy CAFOs which includes allowing manure to be put to other beneficial uses such as application on third- party fields. The commission has determined that land application in accordance with this provision will protect water quality in the major sole-source impairment zone. The commission revised §321.42(j)(2) to specifically reference §321.36 and §321.40 as required by §321.42(j)(1). Section 321.42(j)(3) has been revised in response to comments to accurately reflect that LMUs are not associated with third party fields. Section 321.42(k) has been revised in response to comments to delete the phrase "an employee of" to clarify that an employee cannot contract with an operator.

The adopted amendment moves certain soil sampling and testing requirements from §321.49, Dairy Waste Application Field Soil Sampling and Testing, to this section to consolidate special requirements for major sole-source impairment zones in one section. The adopted amendment requires the dairy operator to assure that those samples are analyzed according to the sampling and analysis requirements of the PPP. Section 321.42(m) has been revised to require the dairy CAFO operator to furnish the appropriate regional office and the commission's Office of Compliance and Enforcement, Enforcement Division, soil testing analysis of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of the subchapter. Section 321.42(n) and (o) has been revised in response to public comment to correct the citation from (j)(3) to (m). Also, §321.42(o)(2) has been revised to clarify that a crop removal rate is necessary to satisfy the P reduction requirement for the NUP. Also, §321.42(p) has been revised to explain that a crop removal rate is necessary to satisfy the P reduction requirement for the NUP. The adopted amendment requires the dairy operator to which this section applies to notify the appropriate TCEQ regional office in writing of the date, time, and location where soil samples will be taken ten working days before collecting soil samples. The adopted amendment was included to allow agency staff to verify the appropriateness of the sampling protocol and other requirements of this subchapter. The adopted amendment requires dairy operators to suspend land application between midnight and 4:00 a.m. and to prevent discharges from the irrigation system. The adopted amendment states that the executive director may require an automatic emergency shutdown device to be installed if an unauthorized discharge occurs from the LMU. Section 321.42(q) has been revised in response to comments to delete the phrase "an unauthorized" to correct the mis-interpretation that an unauthorized discharge must be documented for it to be considered a violation. This provision is included to assure that the operator supervises irrigation practices and to prevent unauthorized discharges when the operator is not present. Section 321.41(t) has been revised in response to comments to clarify which CAFOs must adhere to this provision.

The adopted amendment requires all dairy CAFOs in a major sole-source impairment zone to develop and implement a CNMP certified by the TSSWCB no later than December 31, 2006. The adopted amendment requires CNMPs to assure that dairies utilize NRCS technical standards and program financial assistance in order to improve water quality by establishing a conservation plan for management of manure, litter, and wastewater.

The adopted amendment requires that a dairy CAFO operator notify the TCEQ regional office orally within one hour of discovery of a discharge. This proposal enables agency staff to quickly investigate and document discharges that may adversely affect water quality and assure that operators comply with appropriate measures to minimize any potential impact. The adopted amendment requires the dairy CAFO operator to submit a report to the regional office after a discharge. This report will be used to substantiate whether the overflow was beyond the operator's control. This provision is adopted to allow agency staff to review the documentation and circumstances which caused the overflow and determine if the operator was in compliance with the requirements of this subchapter. For additional protection in a major sole-source impairment zone, the commission added subsection (w) that requires dairy CAFO operators who utilize LMUs to: 1) adhere to the vegetative buffer required by §321.40(h); 2) install and maintain a filter strip or vegetative barrier, according to NRCS Codes 393 or 601, between the vegetative buffer and land application area; and 3) install and maintain contour buffer

strips, according to NRCS Code 332, in the land application area nearest to the vegetative barrier or filter strip.

The adopted amendment requires dairy operators who use the SPAW certification method for the margin of safety to meet the 25-year, ten-day rainfall standard if an unauthorized discharge occurs. This provision is included to require additional storage capacity if the dairy operator fails to correctly manage the system according to the SPAW model.

The adopted amendment also requires the dairy CAFO operator to report a discharge from an RCS or LMU and submit a report to the appropriate regional office including the facility records that will be used to substantiate whether the overflow was a result of cumulative rainfall that exceeded the volume of safety storage capacity without the opportunity for dewatering, and was beyond the control of the operator. After review of the report, if required by the executive director, the operator shall have an engineering evaluation. This provision was added to provide more information to the commission for a thorough evaluation of the circumstances and conditions which contributed to the discharge.

Adopted §321.43 changes the title "Notification" to "Air Standard Permit for Animal Feeding Operations (AFOs)." The adopted amendment to this section would allow AFOs to obtain an air quality standard permit authorization by meeting the requirements contained in this subsection. This authorization may be obtained in conjunction with a pending water quality authorization, or, if a water quality application is not pending, a separate request made in writing may be used to obtain the air standard permit. Formal registration for authorization to operate under the air standard permit is not required. Any AFO that does not qualify for a permit by rule under Chapter 106, or that cannot satisfy the air quality criteria of this amended subchapter must obtain an individual air quality authorization under Chapter 116. Any AFO that is a new major source or major modification as defined in Chapter 116 must obtain an air quality permit under Chapter 116.

Regardless of any water quality authorization granted under the amended subchapter, AFOs must comply with any applicable federal air quality regulations, including, but not limited to, National Emission Standards for Hazardous Air Pollutants (NESHAPs) and New Source Performance Standards (NSPS). Any AFO that constitutes a major source as defined in 30 TAC Chapter 122 must obtain a federal operating permit under that chapter. Additionally, any AFO must meet the requirements of 30 TAC Chapter 111. The air standard permit for AFOs and authorizations thereunder are subject to applicable rules of Chapter 116, including §116.110, Applicability, and Chapter 116, Subchapter F, Standard Permits.

The amended rule as adopted consolidates the requirements for an air standard permit into one section. There have been no changes to the types of facilities that are eligible for the air standard permit. Some specific housekeeping and operational procedures that reduce the potential for nuisance conditions from these facilities are included in the rules; these are already in place at existing facilities and are necessary to maintain compliance with Chapter 111. For consistency purposes, specified controls have been added for facilities that operate a feedmill on site. Controls for feedmilling equipment are the same as those required in Chapter 106 for a feedmill making changes under a permit by rule.

The amended rule identifies the buffer requirements and alternatives for meeting those requirements. No substantive changes to the buffer requirements, which were previously located in a separate section, are adopted. In addition, details regarding the buffer requirements have been included to indicate when the buffers must be met, when written consent may be used to locate a permanent odor source within the buffer, how the buffer is measured, and what information the area land use map must provide. New written consent is not required upon encroachment by a third party into the buffer zone after the AFO has started construction unless the AFO expands beyond the scope of the initial construction and beyond the written consent. The adopted amendment also allows for the use of innovative technology in the treatment of wastewater while continuing to qualify for the air standard permit. The adopted amendment still allows the implementation of the odor control plan to reduce or eliminate the required buffer.

Because emissions from AFOs must be controlled to protect public health, in accordance with §116.605(d)(1) these amendments to the air standard permit for AFOs would be effective upon the effective date of the rule. Once effective, the amendments will apply to new facilities and to existing facilities operating under the air standard permit. Minor changes were made to this section after proposal to address comments made by the public, add clarification to the dual authorization paragraph, correct the citation for the table with the buffer requirements, and correct grammatical errors.

The commission revised §321.43(h) to indicate that the holder of the air standard permit is not limited to holding an individual permit but can also hold other applicable authorizations for facilities not authorized by the air standard permit.

The figure indicator in §321.43(j)(2) was revised in response to a comment. The figure indicator and graphic were moved to clarify that the buffer requirements apply to all of paragraph (2).

Section 321.43(j)(2)(C) and (D) were revised in response to public comments. First, the subparagraphs have been revised to reflect that written consent for location and operation of permanent odor sources within the required minimum buffer distance must be obtained from a place of worship only when it is located within a permanent structure. Second, for additional protectiveness, the consent requirement is expanded to require written consent for location and operation of permanent odor sources within the minimum buffer distance from any governmental entity responsible for operating a school or public park.

Section 321.43(j)(3) was revised in response to public comments to restore the requirement omitted from the proposed rule that the wastewater treatment facilities must be operated in accordance with the design. The rule was also modified to make clear that the AFO, not the RCS, produces the process-generated wastewater.

Section 321.43(j)(3)(B)(i) was revised in response to public comments to reflect that the amount of contaminated runoff into the primary lagoon shall be minimized by routing the majority of runoff around the primary lagoon and into a secondary RCS. Additionally, the commission added "with a minimum treatment volume" in response to Office of Public Interest Counsel's (OPIC's) comment regarding the pond marker in §321.36. This section was also revised to correct a grammatical error.

Adopted §321.44 changes the title "Dairy Outreach Program Areas" to "Notification." The information for dairy outreach program areas is contained in adopted §321.32. The adopted amendment moves the existing discharge notification and monitoring

requirements to this section. The adopted amendment adds additional monitoring parameters from the new federal CAFO rules and stakeholder input to now require a CAFO operator to monitor for total coliform, nitrate, total P, and total dissolved solids. The adopted amendment also requires notification to the commission prior to beginning operations at a new CAFO. This is to assure that agency field staff is aware of the operation of newly constructed facilities.

Adopted §321.45 changes the title "Effects of Conflict or Invalidity of Rule" to "Concentrated Animal Feeding Operation (CAFO) Training Requirements." The adopted amendment moves the existing training requirements from §321.41 to this section. Section 321.45(b) has been revised in response to comments to specify the applicability of this provision to dairy operators in the dairy outreach program area.

Adopted §321.46 changes the title "Air Standard Permit Authorization" to "Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting." The existing air standard permits authorization requirements are located in the newly adopted §321.43. The adopted amendment describes the current requirements for the CAFO operator to develop and implement a PPP. The adopted requirements were moved from §321.39 into this section. The adopted amendment requires that management documentation be maintained in the CAFO PPP. These requirements consolidated in the PPP assist the CAFO operators in quickly identifying the PPP measures required for successful implementation of the PPP. Section 321.46(a)(4) has been modified in response to comments to delete the word "amend" and replace with "revise" to avoid confusion that this provision substitutes for an amendment to a permit, if required. The management documentation shall consist of a copy of the administratively and technically complete permit application, notice of intent seeking coverage under a general permit, or the written authorization issued by the commission or executive director for the CAFO; the RCS management plan, if applicable; a copy of the approved recharge feature certification, if applicable; the groundwater monitoring plan, if required; a copy of the NMP or NUP; site-specific documentation that no hydrologic connection exists between the contained wastewater and water in the state; and any written agreements with landowners which document the allowance for nighttime irrigation, the odor control plan, documentation of employee training, including dates when training occurred, and for dairy outreach program area training verification, the dates, time of attendance, and completion of training. Section 321.46(b)(3) has been modified in response to comments to change the provision from requiring a "written plan" to requiring a copy of the procedures for spill prevention and recovery to be included as documentation. Section 321.46(b)(4) has been modified in response to comments to add "if applicable."

The adopted amendment also requires a site evaluation by a professional engineer to perform a complete site evaluation of structural controls, review liner documentation, and certify a report of the findings. This requirement was moved into this section from §321.39. Section 321.46(c)(1) has been revised in response to comments to restrict the applicability of this provision to CAFOs that use RCSs. The adopted amendment also requires the CAFO operator to inspect the control facility and LMUs annually and develop a report of the findings. This adopted requirement is moved from §321.42 into this section.

The adopted amendment also requires the CAFO operator to keep records for a five-year period to implement the federal CAFO rule requirements pertaining to recordkeeping. The adopted amendment adds a requirement to furnish those records within five days of a written request from the executive director. The records required to be kept by the CAFO operator include: a list of any significant spills of potential pollutants at the CAFO; a log of wastewater, manure, litter, and sludge removal that shows the dates, times, and location of application or disposal; a log of all daily measurable rainfall events, including the measured rainfall; documentation of liner maintenance by a licensed professional engineer; groundwater monitoring records, if required by §321.41; records showing that the control facilities have been inspected for structural integrity and maintenance, including the date of each inspection and a description of the findings; and the records of all manure, litter, and wastewater either used at the facility or removed from the facility, updated at least monthly. In addition, the log should include all weekly wastewater levels observed in the RCS or daily wastewater levels in a major sole-source impairment zone. These requirements are moved from §321.39 into this section. Section 321.46(d) has been revised in response to comments to clarify which of the reporting requirements are applicable to CAFOs that do not use an RCS. Section 321.46(d)(2) and (8) has been revised in response to comments to eliminate duplicity regarding removal of manure, litter, wastewater, and sludge. Section 321.46(d)(9) has been revised in response to comments to add "if applicable."

To implement the new federal CAFO regulations, the adopted amendment requires the CAFO operator to keep records where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the CAFO owner or operator. These records must include the following information: date of manure, litter, or wastewater application to each field; location of the specific LMU and the volume applied during each application event; acreage of each individual crop on which manure, litter, or wastewater is applied; basis for and the total amount of nitrogen and P applied per acre to each field, including sources of nutrients other than manure, litter, or wastewater on a dry basis, and the percentage of moisture content of the manure; and actual annual yield of each harvested crop, and weather conditions during the land application and 24 hours before and after the land application.

The adopted amendment requires the CAFO operator to keep records of: annual nutrient analysis for at least one representative sample of irrigation wastewater, if applicable and one representative sample of manure/litter for total nitrogen, total P, and total potassium; the results of initial and annual soil analysis reports as required by this subchapter; and copies of all notifications to the executive director, including any made to a regional office, as required by this subchapter, or by a permit or authorization. These requirements were included to implement the new federal CAFO regulations. The commission deleted proposed §321.46(d)(11) because the federal CAFO regulations do not require monthly records of disposal and storage of toxic pollutants. Texas Department of Agriculture regulates the storage and disposal of pesticides. Section 321.46(a)(6) requires CAFOs to identify potential pollutant sources and measures to prevent environmental impacts.

The adopted amendment requires that the CAFO operators submit all required reports and soil testing analysis of samples to the regional office and central office with the annual report due February 15 of each year. This change provides consistency in

reporting sample results to the agency and reduces duplication of reports. However, §321.42(m) now requires results within 60 days for dairy CAFOs in a major sole-source impairment zone.

Adopted §321.47 changes the title "Initial Texas Pollutant Discharge Elimination System Authorization" to "Requirements For Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs)." The TPDES authorization section is no longer needed because all pre-existing CAFOs subject to the TPDES initial authorization requirements should have obtained coverage within the past five years. Throughout this section, the commission has modified provisions to make them consistent with similar requirements from the portion of the rules applicable to CAFOs.

The Agricultural Stakeholders Committee and other interested persons commented that this section is not necessary because the state regulations allow small AFOs to seek technical assistance from the TSSWCB to minimize agricultural nonpoint source pollution.

EPA, in its preamble to the new federal CAFO rules, explained the scope of the AFO definition. Specifically, EPA stated that true pasture and rangeland operations are not considered AFOs, because animals are in areas such as pastures, croplands, or rangelands, that sustain crops or forage growth during the normal growing season. Additionally, EPA stated that in some pasture-based operations animals may freely wander in and out of particular areas for food or shelter, so this is not considered as confinement. EPA noted that pasture and grazing operations may also have confinement areas that may qualify as an AFO. Second, EPA stated that incidental vegetation in a clear area confinement, such as feedlot or pen, would not exclude an operation from meeting the definition of an AFO. Third, in the case of a winter feedlot, the "no vegetation" criterion in the AFO definition is meant to be evaluated during the winter when the animals are confined. Therefore, use of a winter feedlot to grow crops or other vegetation during periods of the year when animals are not confined would not exclude the feedlot from meeting the definition of an AFO. Most importantly, EPA noted that animals must be stabled or confined for at least 45 days out of any 12-month period to qualify the operation as an AFO. Lastly, EPA assumes that AFOs and permitting authorities will use common sense and sound judgment in applying the definition.

The adopted amendment moves existing requirements for AFOs not defined or designated as CAFOs from §321.39 and §321.40 into this section. The adopted rule creates a new "applicability" subsection. Section 321.47(b)(2) was added in response to comments to clarify that an AFO that obtains and implements a certified water quality management plan (CWQMP) from the TSSWCB and complies with §321.47(c)(1) - (3) meets the technical requirements of this section. Further, AFOs, that do not have a CWQMP but use control facilities to manage manure, litter, or wastewater, must comply with all the provisions of this subsection. Section 321.47(b)(3) was revised to clarify that an owner of an AFO that does not use control facilities are only required to protect water quality and prevent odors and nuisance conditions. In addition, the facility may be subject to other requirements in §321.47 if the owner changes the operation and needs to use a control facility. The last proposed provision was deleted because it is not needed for AFO owners that do not use control facilities. The adopted general requirements were moved without any substantial change from the existing permit by rule under Subchapter B. Section 321.47(c)(6) was revised to delete the reference to Chapter 301 and revise language to "damage that may occur during a flood event" instead of rainfall event. If the owner of an AFO does not have a control facility, §321.47(c)(7) indicates that equivalent measures contained in a plan developed by the TSSWCB and other plans required by other agencies can satisfy the technical requirements in this subchapter. Section 321.47(d)(2) was revised to specify what is needed for proper pen maintenance and eliminate redundant language. Section 321.47(d)(4) was revised by adding "without any modifications" to make it consistent with requirements for CAFOs. The adopted requirements for control facilities was revised to require design and construction of any new or modified RCS to be certified by a licensed Texas professional engineer. The adopted amendment detailing operation and maintenance of an AFO was also moved from §321.39 to this section with additional language to require a rain gauge capable of containing the design rainfall event. The gauge shall be kept on site and properly maintained. The adopted amendment also includes the existing requirement for the permanent pond marker, but adds a new requirement that an indicator level identify the 100-year, 24-hour rainfall event as required for any new source swine, veal, or poultry operation.

The adopted amendment detailing the land application requirements for AFOs was moved from §321.39 and §321.40 to this section with a change to allow the AFO to utilize an NMP in lieu of a NUP if one is developed and implemented. The adopted amendment includes the designation of storage piles of waste as temporary if stored less than 30 days, and the requirement for dairy operations in the major sole-source impairment zone to adhere to waste management and disposal requirements consistent with other dairies in the watershed in accordance with adopted §321.42. The adopted provisions were added to specify the applicability of these requirements to AFOs.

The adopted amendment requires AFO operators to restrict animals from coming in direct contact with surface water and for the operator to maintain vegetation in areas where animals are kept in pastures. This new provision was added to establish water quality protection measures for AFOs that maintain animals outside the confinement areas.

The adopted amendment moved existing soil sampling and testing requirements from §321.39 to this section with a new requirement that the operator is not required to collect the annual sample from an LMU where wastewater or waste was not applied in the preceding year.

The adopted amendment moved the recordkeeping requirements from §321.39 to this section with a new requirement for AFOs to keep records for five years. The adopted amendment moved the requirements for documentation of liner maintenance, groundwater monitoring, inspections, and notification from §321.39 to this section without changes to the requirements. The adopted amendment also adds a new requirement that AFO operators must properly close their AFO and/or individual RCSs within one year of inactivity or ceasing operation in accordance with Texas Cooperative Extension/United States Department Of Agriculture - NRCS technical guidance publication #B-6122. This provision was added to assure that AFOs protect water quality by closing the facility when the AFO stops operating.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirement of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject

to 2001.0225. The adopted amendments do not meet the definition of a "major environmental rule" as defined in §2001.0225, and the rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b) because it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments, which are intended to protect the environment and reduce risks to human health, will not have a material adverse effect on the economy or sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted changes incorporate new federal requirements. The adopted amendments implement the requirements of its NPDES program, thereby allowing CAFOs to comply with federal requirements while obtaining one permit for both federal and state authorization. Also, because all states are required to implement programs equivalent to the federal regulations, Texas CAFOs will not be competitively disadvantaged by the adoption of these regulations. The adopted amendments will not have a material adverse effect on the environment or public health and safety of the state or a sector of the state because they will not make any of the technical requirements for operating a CAFO less stringent and, in fact, will incorporate more protective federal requirements.

Additionally, this rulemaking does not meet any of the four applicability criteria for a major environmental rule. The adopted amendments include the following: reorganize existing requirements; incorporate changes from the new federal CAFO regulations (40 CFR, Parts 122 and 412) published in the February 12, 2003 issue of the *Federal Register*, including dry poultry operations; specify TPDES general requirements for CAFOs; specify requirements applicable to dairy CAFOs in a major sole-source impairment zone; amend the air standard permit for AFOs; specify applicable requirements for AFOs that are not defined or designated as CAFOs; include applicable recommendations from the standards committee that developed the Bosque River Watershed White Papers and from the Implementation Plan for Total Maximum Daily Load of the North Bosque River Watershed; delete the registration process and references to Chapter 321, Subchapter K; and update the name of the agency. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency.

Copies of the Bosque River White Papers and North Bosque River Watershed Total Maximum Daily Load Implementation Plan may be obtained by contacting the agency's Agriculture Team at (512) 239-1000 or from the agency's web site at *http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/agrigroup.html*.

TAKINGS IMPACT ASSESSMENT

Texas Government Code, §2007.003, specifies that certain governmental actions are exempted from coverage of §2007.003 and, therefore, exempt from the requirement to perform a takings impact assessment. These include an action that is reasonably taken to fulfill an obligation mandated by federal law. This rulemaking is exempt because it incorporates the new federal requirements into existing state requirements.

Notwithstanding the determination that this rulemaking is exempt from the requirements of §2007.043, the commission, in preparing a takings impact assessment, determined that this action does not constitute either a constitutional or a statutory taking.

The specific purpose of the amendments is to allow the commission to continue to fully implement the NPDES CAFO program in Texas by revising the existing Subchapter B rules to incorporate the new federal CAFO requirements in 40 CFR, Parts 122 and 412. The adopted changes will allow the commission to continue to administer one permitting program for both NPDES and state permits, plus continue to authorize small AFOs under a permit by rule.

The adopted rules reorganize existing requirements in Subchapter B; specify TPDES general requirements for CAFOs; specify requirements applicable to dairy CAFOs in a major sole-source impairment zone; incorporate an air standard permit for AFOs; specify applicable requirements for AFOs that are not defined or designated as CAFOs; include applicable recommendations from the standards committee that developed the Bosque River Watershed White Papers and from the Implementation Plan for Total Maximum Daily Load of the North Bosque River Watershed; delete the registration process and references to Chapter 321, Subchapter K; and update the name of the agency.

The adopted amendments would substantially advance their stated purpose by incorporating the new federal requirements into existing state requirements and facilitating the transition from registrations to individual and general permits for CAFOs.

Promulgation and enforcement of these adopted amendments would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted amendments do not affect a landowner's rights in private real property because they do not place restrictions on the use of private real property in a manner that requires compensation under the constitution. Neither does this rulemaking restrict or limit an owner's right to property in a manner that reduces the property value by 25%.

In addition, Texas Government Code, Chapter 2007, does not apply to these adopted amendments because there is no reasonable alternative to this action which is being taken to fulfill an obligation under federal law. Specifically, the commission regulates federal CAFO facilities based on the delegation of the NPDES permitting authority from the EPA to the commission in 1998. Federal law requires a state with NPDES authority to incorporate new federal regulations such as 40 CFR, Parts 122 and 412 into the state requirements.

For these reasons, if this rulemaking were subject to the requirements to perform a takings impact assessment, the adopted rules would not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §33.201 *et. seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the adopted rules include that discharges shall comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters shall not impair designated uses of coastal waters and shall not significantly degrade coastal water quality unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls shall be located where they will not adversely affect critical areas.

These adopted rules are consistent with CMP goals and policies because these adopted rules do not allow a discharge or allow disposal of manure, litter, or wastewater from AFOs into or adjacent to water in the state, except in accordance with an individual permit issued by the commission, or a CAFO general permit issued or other authorization by the commission. Further, these adopted rules require that manure, litter, and wastewater generated by an AFO under these adopted rules be retained and used in an appropriate and beneficial manner as provided by commission rules, orders, authorizations, CAFO general permits, or individual permits.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies. These rules do not create or have a direct or significant adverse effect on any coastal natural resource areas because the adopted rules have been developed to reduce the possibility of discharge into coastal waters by ensuring that AFOs in all regions of the state, including coastal areas, are properly designed, constructed, operated, and maintained to protect all water bodies, including coastal waters.

PUBLIC COMMENT

The public comment period closed on April 13, 2004. The commission held public hearings on the proposal in Stephenville on April 1, 2004; in Amarillo on April 6, 2004; and in Austin on April 13, 2004. The following provided oral and/or written comments during the comment period: Senator Kip Averitt (Senator Averitt); The Board of Directors of the Sulphur-Cypress Soil and Water Conservation District, (Sulphur-Cypress SWCD); Cactus Feeders, Incorporated (Cactus Feeders); Caprock Cattle Feeders; Carrizo Creek Corporation, (CCC); Citizens for Clean Water (CCW); City of Waco (Waco); Contibeef, LLC. (Contibeef); the Honorable Fred Cox, Hamilton County Judge (Judge Cox); Dublin Economic Development Corporation (Dublin EDC); EPA, Region 6 (EPA); Gonzales County Soil and Water Conservation District #338 (Gonzales County SWCD); the Honorable Linda Ethridge, Mayor of Waco (Mayor Ethridge); Lower Colorado River Authority, (LCRA); Representative Jim McReynolds (Representative McReynolds); Piney Woods Soil and Water Conservation District #429 (Piney Woods SWCD); Sierra Club, Lone Star Chapter (Sierra Club); Senator Todd Staples (Senator Staples); Shelby Soil and Water Conservation District, (Shelby SWCD); Texas Association of Dairymen (TAD); Texas Cattle Feeders Association, (TCFA); Texas Commission on Environmental Quality, OPIC; Texas Cooperative Extension, (TCE); Texas Farm Bureau, (TFB); Texas Pork Producers Association, Inc. (TPPA); Texas Poultry Federation (TPF); Texas Sheep & Goat Raisers' Association (TSGRA); Texas and Southwestern Cattle Raisers Association, (TSCRA); TSSWCB; United States Department of Agriculture, NRSC (NRCS); Waco Hotel/Motel Association, Inc. (WH/MA); Waco Restaurant Association (WRA); The Wallace Group, Inc. (Wallace) and 674 individuals.

Piney Woods SWCD generally opposed the proposal. The remaining commenters expressed concern with specific issues in the proposed rules as outlined in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General Comments

LCRA supported the proposed rules.

The commission acknowledges this comment.

TPF supported a separate general permit for dry poultry facilities which incorporates the TSSWCB developed waste management plan as the technical support for the permit. Representative McReynolds commented that the rules should include enough flexibility to allow development of a general permit for dry litter poultry operations that will meet federal regulations without undue economic burden. Senator Staples commented that his constituents have expressed concerns about potential requirements for individual permits for dry litter poultry facilities.

The commission responds that operations, such as dry litter poultry operations, are now defined as CAFOs and point sources. These are subject to commission jurisdiction and must be addressed by EPA and all NPDES-authorized states under the requirements of the federal Clean Water Act and the requirements of the TPDES program. During the development of subsequent general and individual permits, the commission will consider existing requirements of the TSSWCB water quality management plans (WQMPs) for incorporation into commission permits. Existing dry litter poultry CAFOs must obtain authorization under an individual or general permit by April 13, 2006.

CCC supported the TSSWCB suggestions to retain language in the current rule which exempts facilities with a TSSWCB WQMP from permitting under this rule. TPF, TFB, and Gonzales County SWCD offered similar comments. Gonzales County SWCD, Shelby SWCD, and six individuals commented that the proposed rules would cause undue economic hardship on dry poultry litter operations. TSSWCB programs meet environmental protection standards and are so recognized by EPA since 1985. Sulphur-Cypress SWCD and Gonzales County SWCD did not agree with the proposed CAFO rule and the rule's application to dry poultry operations. One-hundred and eighty-six individuals supported a general permit with TSSWCB WQMP as technical documentation.

The commission responds that §321.33(i) of the adopted amendments exempts an AFO that is not a CAFO from TPDES permitting requirements. Operations, such as dry litter poultry operations, that are now defined as CAFOs are point sources. These are subject to commission jurisdiction and must be addressed by EPA and all NPDES-authorized states under the requirements of the federal Clean Water Act and the requirements of the TPDES program. During the development of subsequent general and individual permits, the commission will consider existing requirements of the TSSWCB WQMPs for incorporation into commission permits.

CCC and TSCRA supported the development and issuance of general permits. TCFA, TSGRA, TPPA, and TFB supported the development of general permits.

The commission acknowledges these comments.

TCFA acknowledged efforts to "streamline" permitting process.

The commission acknowledges this comment.

OPIC supported the elimination of the registration process.

The commission acknowledges this comment.

OPIC supported the exclusion of the opportunity for "no potential for discharge."

The commission acknowledges this comment.

Piney Woods SWCD opposed rule development.

The commission acknowledges this opposition but the commission must amend the rule for the critical reasons described in the preamble proposing the amendments.

WRA commented that the quality of water in Waco has an affect on the restaurant business and therefore WRA encouraged the commission to help accomplish the goal of having the quality of water that provides people with a good experience.

The commission responds that the adoption of this rule is a major achievement in improving water quality. To assist in achieving the goals of the TMDL and implementation plan, more stringent requirements for a dairy CAFO operating in the major sole-source impairment zone, as well as other implementation procedures that address municipal wastewater effluent quality, should result in improved water quality in the North Bosque River and in downstream drinking water sources. The commission and other state and federal agencies developed and are implementing a water quality monitoring strategy aimed at evaluating any long-term changes in water quality due to implementation of requirements of this rule and other activities in the watershed aimed at protection and improvement of water quality. No changes have been made to the rules in response to this comment.

One individual commented that the application of waste to LMUs should not be allowed if soil test P is above 200 ppm.

The commission did not make changes to the rules in response to this comment. Title 40 CFR, Parts 122 and 412 do not specifically prohibit land application of waste to an LMU if soil tests indicate phosphorus levels above 200 ppm. Rather, the federal regulations require that a CAFO develop and implement an NMP for its facility and land apply at agronomic rates according to the NMP. In addition, TWC, Chapter 26, does not specifically prohibit land application on an LMU with P at 200 ppm. However, Subchapter L addresses the requirements for land application on LMUs at dairy CAFOs in a major sole-source impairment zone. The statute and rules identify the requirements for land application such as NUPs for fields above 200 ppm P. Even though available data on soil test P from peer-reviewed research papers and consultation with soil scientists from universities and federal and state agencies have indicated that P levels in excess of the established criteria of 200 ppm may leach from soil, the extent of the leaching is greatly influenced by soil types and other variable factors. These rules require the operator to have a NUP prepared by a trained specialist which considers site-specific variables, and provides the operator with guidelines for land application of manure, litter, and wastewater that will prevent further accumulation of P in the soil and reduce the potential for P runoff.

Mayor Ethridge and Waco commented that the proposed rules do not fulfilll the commission's commitment and legal obligation to attain the P TMDLs for the North Bosque River and assure that the agency's continued permitting of CAFOs in the watershed does not contribute to violation of state water quality standards. Mayor Ethridge and Waco commented that rule revision is an opportunity to correct problems in Bosque and Lake Waco, but the current rule will not achieve that goal as currently written.

The commission disagrees with these comments. The commission is currently implementing a TMDL to address P in the North Bosque River watershed, demonstrating the agency's commitment to restore water quality. The adoption of these rule amendments will result in more stringent requirements for all dairy CAFOs in the major sole-source impairment zone. This greater stringency will further reduce pollutant loadings from CAFOs into the North Bosque River rather than contributing to a violation of the water quality standards.

Mayor Ethridge and Waco commented that protection of the river cannot be accomplished with only a site-based approach that relies upon "CNMPs" and NRCS guidance. Mayor Ethridge and Waco commented that there need to be specific numerical standards for waste application fields that will ensure that the CNMPs will not allow additional manure to be applied where adequate P levels for crop requirements already exist.

The commission did not make any changes to the rule in response to this comment. EPA stated in the *Federal Register* that the amount or rate at which manure can be applied that ensures appropriate agricultural utilization of nutrients varies based on site-specific factors at the CAFO. EPA believes that relying exclusively on the numerical limitations is infeasible. The commission responds that a site-based approach that relies on CNMPs developed in accordance with United States Department of Agriculture (USDA)/NRCS guidelines and by specialists that have completed NRCS training satisfies the land application requirements from the federal CAFO regulation. The background and justification for this approach is discussed in detail in the "Strategy for Addressing Environmental and Public Health Impacts from Animal Feeding Operations" developed jointly by EPA and USDA, in "Concentrated Animal Feeding Operations: Final Rule" developed by EPA and in "Concentrated Animal Feeding Operation Supplemental Documents: Development Documents" developed by EPA. The site-based approach acknowledges the inherent variability that prevails in agricultural areas of the state. It also relies on the expertise of agricultural specialists with access to scientifically based data and methods that are applicable to understanding and controlling the complex interactions between soil and water.

Mayor Ethridge and Waco commented that the proposed rules contain no mechanism for compliance with 40 CFR §122.4(i).

The commission disagrees that this rule needs to specifically address the federal rule and made no changes to the rule in response to this comment. Adopted §321.34 states that any AFO that is required to operate under an individual water quality permit by the TWC, the executive director, or this subchapter must submit an application in accordance with Chapters 281 and 305. Section 305.538 provides that no permit may be issued under the conditions prohibited in 40 CFR §122.4, as amended. 40 CFR §122.4(i) identifies instances when a permitting authority may not issue an NPDES permit to a new source or new discharger.

Mayor Ethridge and Waco commented that the proposed rules continue efforts on the part of TCEQ to defer regulatory requirements to comply with 40 CFR §122.4 and the TMDL. Mayor Ethridge and Waco stated that regulatory requirements were deferred from TMDLs to implementation plans, from implementation plans to proposed rules, and now from proposed rules to individual permits.

The commission did not make any changes to the rule in response to this comment. The commission disagrees that it is deferring or postponing requirements on dairies. The intent of 40 CFR §122.4(i) and §307.5 is to ensure a TPDES permit is issued consistent with an applicable WQMP or TMDL. With the North Bosque River TMDL Implementation Plan in place and these amended regulations adopted, permitting in accordance with the TMDL is allowable under a revised and more stringent framework of requirements.

TCFA and TPPA commented that the existing regulations are protective of environment and changes should be limited to those required to meet new federal regulations. TCFA commented that requirements should be based on sound science with consideration to the economic burden that regulations have on producers. TPPA commented that additional requirements should be considered with regard to the economic impact on producers. Contibeef commented that the existing rules are adequate and that the agency should make changes only as needed to accommodate changes in the federal regulations. Contibeef added that the rules need to be sufficiently flexible to take into account natural variability of biological systems and the agency should be sensitive to the costs involved for producers to implement the rules. Cactus Feeders noted that the existing rules provided adequate protection of the environment and revisions should be limited to what was needed to meet federal requirements. Caprock Cattle Feeders commented about the cost of implementation and supports the recommendation that the rule revisions be limited to those necessary to meet federal requirements.

The commission made no change in response to these comments. The commission's primary purpose for amending this rule is to incorporate changes in federal regulations into state regulations to comply with the NPDES delegation agreement between EPA and the State of Texas. Additionally, the amendments will assist in implementing the goals set by the North Bosque River TMDL. The rule was restructured to govern the individual permit requirements for CAFOs and continue to authorize small AFOs under the authorization by rule for AFOs. Through this process, few additional requirements beyond those necessary to meet new federal regulations were added that will apply to geographical areas outside of the major sole-source impairment zone.

One individual commented that inspections over and above those conducted by the TSSWCB should not be required. Additionally, the individual commented that due to recent outbreaks of avian influenza in the Gonzales area, additional on-farm traffic should be minimized.

The commission acknowledges this comment and takes steps to comply with disease vector abatement when entering a person's property. A dry litter poultry operation, now defined as a point source by federal regulations, is under the commission's jurisdiction. The commission initiated discussions with EPA and the TSSWCB to reduce or eliminate redundant inspections to the maximum extent possible. The commission has biosecurity procedures in place and investigators also comply with any requirements the producer may have in order to protect the facilities they inspect from the spread of diseases. The commission works closely with the Texas Animal Health Commission to provide investigators with information relating to biosecurity concerns.

OPIC commented that the rules should include a provision which acknowledges the opportunity for a motion to overturn the executive director's granting or denial of an authorization to operate under a general permit and that TWC, §5.122(b), provides for a right to appeal to the commission.

The commission declines to make this change because 30 TAC §205.4(j) states that the executive director's decisions on notices of intent (NOIs) are subject to 30 TAC §50.139 (relating to Motion to Overturn Executive Director's Decision).

OPIC commented that the rules are an improvement over the existing rules, but do not adequately implement the new federal rules.

The commission responds that the EPA commented that this rule is consistent with 40 CFR, Parts 122 and 412. The commission did not make any changes to the rule in response to this comment.

OPIC commented that the proposed rules have inappropriately eliminated several requirements contained in the existing state rules. OPIC added that the rules should include clear standards applicable to CAFO facilities and that the technical requirements that have been taken out should be reinstated.

The commission acknowledges that several requirements of the existing rule were removed. OPIC's comments on specific requirements that were removed from the existing rule are addressed in the responses to specific comments in the RESPONSE TO COMMENT section of this preamble.

Sierra Club commented that the proposed rules will not meet water quality standards in streams where CAFOs are allowed to discharge wastes. Sierra Club commented that in §321.33 a moratorium should be imposed on issuance of any new or expanding CAFO located on or impacting streams currently on 303d list of impaired waters.

Federal law and state law do not require a moratorium to be imposed on issuance of all permits for new or expanding CAFOs located on or impacting streams currently on the 303d list of impaired waters. An authorization issued in accordance with this rule under either an individual or general permit must prohibit a violation of a state water quality standard. While there may be instances where a permit cannot be issued or issued with special conditions due to water quality reasons, these would be site-specific determinations. A measure to address a new or expansion CAFO in a 303(d)-listed watershed, authorization under a general permit will not be allowed when compliance with the general permit is inadequate or inconsistent with a TMDL implementation plan addressing loadings of the pollutant or concern from CAFOs. In this instance, §321.33 requires authorization by an individual permit so that site-specific or watershed-specific requirements of the implementation plan may be required. A dairy CAFO within the major sole-source impairment zone (North Bosque River Watershed included) is prohibited under state law (and §321.33) from being authorized by general permit. In instances elsewhere in Texas where a new or expanding CAFO may be authorized under the general permit, the operator must comply with all requirements of the general permit that address potential effects on water quality, including such provisions as locating waste management activities outside of a 100-year flood plain, using appropriate land application practices, developing an

NMP, and establishing a 100-foot wide vegetative buffer between every application area and a water body in the state, where appropriate.

The new or expanding CAFO must ensure that additional waste retention capacity and land application areas are constructed or available, so that no additional loading or contribution to the existing impairment occurs. By expanding the RCS as necessary, no higher frequency of discharge events will result from the RCS. When the unusual circumstance of an authorized discharge from an RCS occurs, it would be associated with a chronic or catastrophic rainfall event.

The commission also added other provisions to address concerns with RCS overflows. In the major sole-source impairment zone, the commission is addressing overflows with more stringent requirements for RCS capacity, operation, and maintenance, as described in 321.42. Additionally, the implementation of new federal requirements and the amendment of certain existing state requirements should also reduce the incidence of RCS overflows and reduce impacts of those overflows on instream water quality statewide. These amendments include a requirement for an RCS pond marker (§321.36(k)), more stringent provisions for RCS design applicable to poultry, swine, or veal CAFOs, (§321.37(c)), the requirement to document the sufficiency of an RCS design as being consistent with 40 CFR, Part 412 (§321.38(e)(4)), additional clarifications describing when an operator may remove wastewater from the RCS for irrigation (§321.39(b)), and the addition of weekly recordkeeping of wastewater levels observed in the RCS (§321.46(d)(4)). These amendments are designed to affect better management of CAFO waste and fewer overflows.

TSSWCB commented that except for some administrative reporting requirements that may be required by federal regulations, CWQMPs developed by the TSSWCB should meet all of the technical requirements necessary for any general permit developed for dry litter poultry operations. TSSWCB recommended that a cooperative arrangement be developed between the TSSWCB and the commission which would allow the TSSWCB to remain the primary contact between the state and the industry, specifically as it relates to inspections, after a facility receives written authorization to operate. TSSWCB has certified more than 1,200 WQMPs for dry litter poultry operations, or nearly 90% of the dry litter operations in Texas. There is currently a "complaint/referral" program embodied in the MOA between the commission and the TSSWCB and this process may need some refinement. TSSWCB will work with the commission to develop any revisions that may be needed.

The commission acknowledges the efforts of the TSSWCB to develop WQMPs for dry litter poultry facilities in the state. The commission is committed to coordinating with the TSSWCB to develop a general permit that will be applicable to dry litter poultry operations in the state, and recognizes that CWQMPs may be suitable for fulfilling the technical requirements in the permit. Existing dry litter poultry operations which become defined or designated as CAFOs as a result of the adoption of new federal and state regulations will be required to seek coverage under an individual or general permit by 2006. After the effective date of this rule, new dry litter poultry facilities that are constructed before April 13, 2006 will be required to obtain an individual permit or CAFO general permit. The commission anticipates working with the TSSWCB after the adoption of revisions to this subchapter to make revisions to the existing MOA (30 TAC §7.102) that are necessary to clarify the respective roles of the agencies in the implementation of this rule and the general permit.

TSSWCB commented that the proposed rule requires all dairy CAFOs in a major sole-source impairment zone to develop and implement a CNMP by 2006. The TSSWCB CNMP program was established in response to the implementation plan developed for the Bosque River TMDL and is restricted to the North Bosque River Watershed by rule. The North Bosque River is currently the only area identified as a major sole-source impairment zone, and the TSSWCB requests notification of other areas that may be so designated in the future. In addition, in accordance with Texas Agriculture Code, §201.006, any conservation plan developed and certified by the TSSWCB is a confidential agreement between the landowner and the TSSWCB. TSSWCB stated that information in the plan required by the commission must be obtained directly from the landowner and cannot be provided by the TSSWCB.

The commission acknowledges the efforts of the TSSWCB to assist with the development and implementation of CNMPs in the North Bosque River Watershed. The commission is committed to continued coordination with the TSSWCB to make data and information available on water quality assessments. The commission understands and acknowledges the confidentiality conditions for conservation plans developed by the TSSWCB and will not request information in these plans from the TSSWCB. However, the commission retains the right to request information from the CAFO that will be necessary for the commission to fulfill its enforcement responsibilities to determine that the requirements of this rule are being implemented.

TSSWCB is opposed to additional restrictions and regulations for off-site, third-party land application.

The commission responds that provisions related to requirements for application of manure, litter, and wastewater to off-site, third-party fields are applicable to only to dairy CAFOs in the major sole-source impairment zone. The inclusion of these provisions is based on concerns about the potential for additional loading of pollutants that contribute to the impairment from the unrestricted application of manure, litter, or wastewater to land application areas outside the control of the permittees. Additional requirements for the management of these application areas are considered to be important as a protection for both the permittee, as well as the owner of the land.

One individual commented that the rules should work toward reducing, recycling, and eliminating the discharge of highly concentrated wastewater from CAFOs in Texas and said that rules should be written in prescriptive and enforceable manner with financial incentives for compliance where possible. The individual supported specific requirements for the Bosque River (major sole- source impairment zone), but recommended similar controls for the Leon River Watershed.

The commission agrees with the commenter that CAFO waste management should enhance the use, rather than the disposal, of manure, litter, or wastewater generated by a CAFO. The amended rule achieves this goal. Effluent limitations and operational requirements require land application or other non-discharge management of waste except in specific instances. The commission disagrees that §321.42 should apply to the Leon River Watershed because the major sole-source impairment zone is defined by state statute in TWC, Chapter 26, Subchapter L. Provisions that have been added as §321.42 of this subchapter are also based in part on recommendations

in the implementation plan for approved TMDLs for the North Bosque River watershed. Current water quality data available to the commission do not suggest impairment in the Leon River due to nutrients. The commission added monitoring stations in the Leon River Watershed which will provide more data more quickly so that changes in water quality can be determined.

CCW commented that engineers and consultants should be accountable and documents submitted in support of permit applications should be subject to commission validation. CCW stated that commission verification information, permit applications and issued permits, and compliance and enforcement actions should be information open and available to the public. CCW added that all designs and plans should be required to have a professional engineer seal and that no permit renewal should be allowed without review by the commission.

The commission agrees with the comment and conducts a technical review that includes a review of certified documents to the extent possible. The rule requires certification of engineering practices by a licensed Texas professional engineer. Other state requirements pertaining to professional qualifications and standards for work, such as engineering or geoscientist practices, are established under Texas law. The commission is the authority for permitting of CAFOs and the enforcement of this rule and permits. The commission will provide information to the public under the Public Information Act in Texas Government Code, Chapter 552, unless it is protected from disclosure by an exception to the law.

WH/MA commented that customers are complaining more about water and that the potential to lose business and customers is increasing. WH/MA supported all efforts aimed at improving taste problems with water. One individual commented that rules governing dairy CAFOs should consider active measures to protect waterways for safety in drinking supplies. The individual added that Lake Waco and Lake Belton are dependent on proper control of CAFOs and enforcement should be concerned with safeguarding the waterways that feed these reservoirs.

The commission responds that the adoption of this rule is a major achievement in assisting with the implementation of the North Bosque River TMDL. In accordance with the TMDL implementation plan, more stringent requirements for a CAFO operating in the major sole- source impairment zone as well as other implementation that addresses municipal wastewater effluent quality should result in improved water quality in the North Bosque River and in downstream drinking water sources. The statewide rule provisions applicable in the watershed of Lake Belton will maintain and protect water quality. For additional protection in a major sole- source impairment zone, the commission agrees to add a provision to §321.42 to require dairy CAFO operators to utilize LMUs to: 1) adhere to the vegetative buffer required by §321.40(h); 2) install and maintain a filter strip or vegetative barrier, according to NRCS Codes 393 or 601, between the vegetative buffer and land application area; and 3) install and maintain contour buffer strips, according to NRCS Code 332, in the land application area nearest to the vegetative barrier or filter strip.

EPA commented that the rules are consistent with the federal CAFO regulations. EPA agrees with the requirements to be placed on CAFO waste RCSs in the North Bosque River Watershed and commented that the commission should develop an annual report on progress toward achievement of TMDL requirements for P reduction in the North Bosque River.

The commission acknowledges these comments. Progress reports on implementation of the North Bosque River TMDL, as well as the progress of other TMDLs being implemented are periodically published by the commission with some updated more frequently than once a year and are available on the commission Web site.

One individual commented about a program being developed that will combine a number of approaches for waste management which will take care of solid waste and effluents and remove P from effluents.

The commission appreciates this information. The commission supports new and innovative technologies to manage agricultural waste and the agency will pay close attention to sound alternatives of the nature described. The rules are consistent with federal regulations in allowing flexibility for alternative voluntary performance standards which have been proven effective. The commission is working with a number of other local, state, and federal agencies to support demonstration projects which focus on new and innovative waste management procedures.

One individual requested that the commission effectively protect water resources and that rules be developed that will result in significantly improved water quality. The individual requested that the actions of the commission be conducted in public, and all data and information be made available and accessible to the public.

The commission agrees with the comment. The commission's rulemaking achieves the goals suggested. To develop this rule, the commission worked with stakeholder groups and solicited public comment on the proposals. The commission has existing processes to ensure files and information relating to facilities authorized by the agency are available to the public both at the commission's central office in Austin and in the regional offices.

One individual commented that regulations should have a sound, scientific basis and requirements should be designed to address documented problems. The commenter stated that the Bosque River may not really be impaired based on more recent data, and that requirements for operations in the Bosque River Watershed should not be more stringent than in other parts of the state. Rule requirements create an added economic burden on producers that are already under economic duress. Rules should be simplified rather than expanded and made increasingly burdensome to the producers. The dairy industry in the Bosque River Watershed is subject to more stringent rules than other areas and this is unfair to this group. Another individual commented that the existing rules are adequate and that the additional rules do not address a specific, documented concern but only add additional, unnecessary paperwork to the operator. Additionally, this individual added that the additional paperwork may prove to be counterproductive, because operators do not see a need for it and that additional rule requirements are not needed as long as water quality is improving. A third individual commented that the TMDL development was supposed to assist with providing the information needed to improve water quality and that the TMDL process has been used to add unnecessary requirements for the operators.

The commission agrees with the comments regarding reliance on proven technologies for the management of manure, litter, and wastewater. As noted in the response to comments previously and in a number of responses that follow, the commission

has enumerated instances that illustrate the reliance on documented research and consultation with specialists from universities and other state and federal agencies. The commission acknowledges that recent water quality data is showing promising trends of improvement in the North Bosque River, but notes that the referenced data is not sufficient to identify long-term changes in water quality. The adopted WQMP applicable to this watershed and the additional stringency of requirements are still necessary to ensure continued restoration and long-term maintenance of water quality standards. The commission and other state and federal agencies developed and are implementing a water quality monitoring strategy aimed at evaluating any long-term changes in water quality due to implementation of the requirements of this rule and other activities in the watershed aimed at protection and improvement of water quality.

One individual expressed concern about inconsistencies in rule interpretation and enforcement actions. "Each inspection brings new requirements." The commenter stated that rules change too rapidly and do not allow producers sufficient time to implement requirements. The commenter added that there have been four sets of rules for the Bosque River Watershed in the last five years and that the rules keep expanding. A second individual commented that the rules are not being enforced consistently, and that enforcement actions are not strong enough for dairy operators that do not follow the rule. Additionally, the second individual commented that other dairies are being forced to follow more stringent requirements because enforcement actions are misdirected. TAD commented that there have been four sets of rules over the past ten years and that changes in rules are taking place before results of previous rules are known. TAD also commented that rule changes should be based on sound data and data analysis and that there should be some time allowed for rule implementation before rules are changed.

The commission responds that current revisions to the rules were required because of changes to the federal regulation related to CAFOs (effective April 13, 2003). The commission is responsible under TPDES to adopt new and revised federal regulations within one year of the EPA change. Additionally, some of the proposed rule changes will assist in implementing the approved TMDLs for the Bosque River Watershed. The commission also notes that some of the changes that have been made to the rule over the past several years were based on changes in state legislation. The agency is obliged to re-authorize TPDES permits every five years and to include necessary water quality requirements within them. In many instances, the amended rule is clearer and better organized, which should provide for more consistent enforcement by the commission.

Judge Cox commented that the economic impact of the rules is not limited to producers or to Erath County. Other businesses and other areas also are impacted economically. Hamilton and Comanche Counties are impacted. Judge Cox further commented that the agency needs to recognize new technologies to deal with animal waste. Additionally, Judge Cox commented that the agency does not seem to be aware of research using enzymes that is being conducted in the State of Kansas. Judge Cox added that changes in rule requirements is a problem and requirements should have a sound, scientific basis.

The commission responds that it recognizes that the successful implementation of regulations to address protection of environmental resources is directly related to a demonstration that technical requirements are based on scientifically defensible principles and can be implemented without creating an undue economic burden on the permittee or other businesses affected by the regulation. The commission is very supportive of the development and application of new and refined technological, economical approaches which assist with the accomplishment of the goal of environmental protection. The agency is providing financial and technical support to the evaluation of technically sound, economically achievable processes that will contribute to the successful implementation of the regulations. Some of the demonstration projects include testing the efficacy and efficiency of enhanced microbial populations which rely on enzymatic reactions to reduce or restructure waste material so it can be used in a beneficial manner.

One individual commented that applications are being processed by the agency with incorrect information about the facility being permitted; buffer distances between RCSs and sizes of these structures are not accurate in the application documentation; and dairy expansion was allowed even though information in application was incorrect and the operator's compliance history was not good.

The commission responds that it has processes in place to ensure permit applications are reviewed based upon information that the permit applicant certifies to be accurate. However, if an interested person believes the executive director is basing a permit recommendation on inaccurate information, the commission welcomes comment and challenge of the basis during the permitting process. Once a permit is issued, there are inspection and citizen complaint procedures that can be initiated.

One individual commented that dead animals are not being disposed of properly and inspection response to complaints and requests for assistance are not adequate.

The commission did not make a change to the rules in response to this comment. In this rulemaking, the commission revised the animal disposal requirement in §321.36(l) from disposal within 72 hours to collection within 24 hours of death and proper disposal within three days of death. Additionally, the commission added a reference to specific requirements for diseased animal disposal in the same subsection.

The commission responds that it developed detailed procedures for handling complaints and requests for assistance by members of the public. These procedures are discussed with regional and headquarters staff in required training programs and are subject to periodic internal review. Specifically, the commission regional staff conducts inspections based on citizen complaints in order to enforce the agency's regulations and permits. The regional offices prioritize their complaint responses based on the potential threat to human health and the environment. Additionally, the Stephenville field office has a policy to respond to complaints 24-hours a day, seven days a week, and within two hours of receiving the complaint, where feasible.

One individual commented that the agency should not allow lawsuits or threats for lawsuits under the citizens' suit portion of the Clean Water Act to control activities related to this rule, and that negative political statements and negative, politically motivated press coverage are a concern.

The commission acknowledges this comment. The commission responds that this rulemaking cannot abridge or limit the provisions of the federal Clean Water Act.

One individual requested that rule changes be limited so that permits could be issued because the commenter has been trying for three to four years to get a new permit issued for a facility in the Goose Branch area of the Upper North Bosque River and has had to publish notice four times. The commenter is concerned about land values in the area and recently learned that the value of property is lower if the property is used as a dairy.

The commission notes the comment. The commission acknowledges that development of the TMDLs and implementation plan for this watershed, the changes in state statute which affect this watershed, and the changes in the federal regulation have created some confusion for operators affected by this rule. These actions have also affected the processing of permits for this area. It is anticipated that changes made in this rule will help to clarify requirements for waste management and will assist the operators to obtain appropriate authorizations more efficiently. It is also recommended that the commenter contact the Wastewater Permits Section of the commission's Water Quality Division for specific questions related to the processing of permits. The adopted amendments will protect human health, safety, and the environment as required by TWC, Chapter 26. The commission does not anticipate the amendments will reduce land values. Most importantly, TWC, Chapter 26, does not authorize the agency to use land value as a factor in the water quality permitting process.

Dublin EDC commented that the commission should consider the economic impact of the rules on the stability of rural communities. Dublin EDC stated that a rural economy is relatively unstable and rules which create additional economic burden may destroy rural communities.

The commission responds that the rule proposal included a fiscal note that analyzed the issues of concern to the commenter. The commission must ensure surface water quality is attained where presently impaired. The commission's policy stated in TWC, §26.003, requires certain water quality goals be met. The commission is establishing more stringent requirements in the major sole-source impairment zone and requirements from the federal CAFO rule, but there are several opportunities for financial and technical assistance to aid in compliance with the rule. These include cost share funds through the United States Department of Agriculture's Environmental Quality Incentive Program (EQIP), incentives for composting of CAFO manure through the EPA/commission nonpoint source pollution grant program, and assistance from both the NRCS and TSSWCB.

TAD commented that the rules changes should be based on sound data and data analysis and that there should be some time allowed for rule implementation before rules are changed. TAD added that conditions in the Bosque River Watershed are improving and that data provided from the Texas Institute for Applied Environmental Research (Institute) show that soluble reactive P concentrations and loadings are less in 2001 - 2003 than prior to 2000. One individual commented that time for implementation of the rule requirements should be provided and that results of some of the requirements such as nutrient management may not be immediately evident and instant gratification not possible with complex systems.

The commission acknowledges this comment. The commission agrees that time should be allowed for implementation of rule changes, but notes that federal regulations adopted under the federal Clean Water Act establish a five-year term for permits issued in accordance with this rule. It is further noted that some of the historical changes in this rule have been mandated by changes in state statutes and are not under the control of the commission.

The commission acknowledges the water quality data from the Institute; however, the Institute indicated that the data provided is raw data and has not been evaluated sufficiently to be represented as an official conclusion of the Institute. The commission is encouraged by the apparent trend in water quality improvement and has developed procedures to collect and assess additional water quality data from the North Bosque River Watershed which should provide the basis for a determination of changes in water quality in this watershed. The commission is working closely with the Brazos River Authority, the Institute, the City of Waco, the TSSWCB, the Texas Cooperative Extension, the NRCS, the City of Stephenville, the City of Clifton, and others to coordinate the evaluation of effectiveness of a number of projects in the watershed which support regulatory requirements and contribute to water quality improvements.

TAD also commented that the Agriculture Producer Certification Option (APCO) has 90 - 95% participation in this watershed and that this is a voluntary program that involves a third-party evaluation of the facility. TAD added that this program will add sound environmental stewardship to each facility and to the industry and this goes beyond the requirements of the commission.

The commission acknowledges these comments.

TAD commented that the commission should conduct public meetings for new and expanded facilities applying for the general permit, not the owner/operator.

The commission acknowledges this comment and will consider it during the development and comment period for the CAFO general permit.

TCFA requested that the commission not change draft language to accommodate EPA requests.

The commission acknowledges the comment and will evaluate any comments received based on its merits regardless of who submitted the comment.

Mayor Ethridge and Waco commented that the commission should do their part to assist the city in meeting these standards by cleaning up the raw water supply.

The commission responds that when it approved the North Bosque River TMDL Implementation Plan, it put in place a plan to substantially restore the water quality of the river. Technical requirements in the adopted rules will assist in implementing TMDLs for the Bosque River Watershed. Provisions in the rules are intended to help achieve the goals set by the TMDL Implementation Plan and prevent additional impairment of the water quality in the Bosque River.

Mayor Ethridge and Waco commented that pathogens are another issue of concern and that preliminary data from the Lake Waco study shows that pathogens peak with wet weather flows.

The commission responds it is aware that in most rivers and reservoirs, bacterial indicators used as criteria to determine use support for contact recreation usually become elevated during wet weather conditions. However, no reservoir assessed for purposes of the commission- approved 2002 303(d) list was found

to have impaired contact recreational uses. This includes Lake Waco.

Mayor Ethridge and Waco commented that the rules and standards for compliance are unclear. Mayor Ethridge and Waco said that the rule requirements include a PPP, CNMP, NMP, and a NUP and that references to so many documents, including guidance documents makes it difficult to interpret and enforce the rule. Mayor Ethridge and Waco also commented that rule requirements are based on guidance documents, which are subject to change without notice to interested parties and that changes to these guidance documents can effectively change the requirement of the rule.

The commission responds that the amended rule adds clarity that was accomplished through significant restructuring of the provisions. The commission took efforts to make clear what plan is required and when it should be implemented. As in other rulemakings, the commission believes it is appropriate to specify additional guidelines that are acceptable and is confident that future changes (if they occur) to guidance documents will be based upon available science and up-to-date information. It is typical for the executive director to interact and coordinate with other state and federal agencies in the development and approval of guidance documents, to help ensure a sound basis for the guidance.

The PPP is a plan that documents all pollutant sources, BMPs to address pollutants, recordkeeping logs, and other information regarding the design, operation, and maintenance of the CAFO. Nutrients are pollutants and as such, the management of these nutrients is discussed in the PPP.

The CNMP is a whole farm plan that addresses nutrient management from the origin in the feed rations to final disposition. The CNMP satisfies portions of the PPP and exceeds the federal requirements for NMPs.

The NMP is a component of a CNMP and addresses only the land application of nutrients on LMUs. The NMP is an NRCS Practice Standard Code 590 which is used to determine the application rates for each LMU.

The NUP is a short-term management tool that is developed for a specific LMU if the soil P level exceeds the critical soil P. Once the LMU soil P level drops below the critical soil P level, land application practices will transition to the requirements of the NMP.

Mayor Ethridge and Waco commented that the proposed rules effectively abdicate the commission responsibility to control waste and wastewater application by leaving it to the NRCS to determine how much waste may be applied.

The commission does not agree that reliance on the expertise of the NRCS related to land application practices constitutes an abdication of enforcement responsibilities. The numerical criteria established for soil test P and the management practices required in these rules provide the commission significant bases for enforcement actions. While the NRCS specifications are written as guidelines, significant portions of the guidelines are embodied in this rule providing the needed authority which the commission can base enforcement actions. EPA stated in the *Federal Register*, relating to the federal CAFO rule, that the permitting authority may use the United States Department of Agriculture-NRCS Nutrient Management Conservation Practice Standard (Code 590) or other appropriate technical standards as guidance for the development of applicable technical standards. Any deviation from the NRCS specifications must be documented by the nutrient management specialist with specific details and justifications. This documentation must be kept on site with the PPP.

The commission reviews permit applications and develops and issues permits governing waste management at a CAFO. It has a specific inspection and compliance strategy to ensure permit requirements are being met by the CAFO operators. This rule requires several plans that are subject to commission review. The commission receives reports from CAFOs that identify soil sampling results and annual reports describing waste management among other requirements. The commission appreciates the technical assistance the NRCS offers CAFO operators.

§321.31. Manure, Litter, and Wastewater Discharge and Air Emission Limitations.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.31(a) should be revised by inserting "or adopted" after the phrase "or other authorization issued" in the first sentence.

The commission agrees to add the words "or adopted" as suggested by the commenters. This change will clarify that an authorization by rule is based upon a rule adopted by the commission.

CCC, TCFA, TSGRA, TPPA, and TFB commented that this subsection should contain recognition of exceptions and recommended inserting a new sentence in adding to §321.31(a) that states: "A discharge that is the result of a chronic or catastrophic rainfall event, or the result of catastrophic conditions, from an RCS that has been properly designed, constructed, operated, and maintained is allowed."

The commission disagrees with the need for the revision since the first sentence of §321.31(a) recognizes that exceptions to the "no discharge" standard will exist in permits issued by the commission. The exception also exists in §321.47(c)(3), relating to the authorization by rule for an AFO that is not a CAFO.

§321.32. Definitions.

Mayor Ethridge and Waco commented that in §321.32 the definition of NRCS has been removed. The definition should make it clear that practice standards are those adopted by Texas NRCS.

The commission responds that the definition has not been removed. It has been renamed and relocated to United States Department of Agriculture (USDA) - Natural Resource Conservation Service (NRCS). The commission acknowledges that when an AFO operator uses a specific NRCS practice standard, the Texas NRCS standard is to be followed.

OPIC supports the deletion of the "no discharge" definition.

The commission acknowledges this comment.

Mayor Ethridge and Waco commented that in §321.32(1) the definition of "Agronomic rates" requires clarification. Agronomic rate for nitrogen and P differ and this difference should be recognized. The commenters stated that a qualifier should be added - "as long as the soil phosphorus concentration in a major sole-source impairment zone does not exceed the level necessary to ensure that the crop requirement for phosphorus is met." They also noted that language from an earlier draft is preferred - "an agronomic rate is one 'which will' enhance soil productivity. . .."

The commission did not change the rule in response to this comment because the definition of "Agronomic rate" acknowledges the need to determine application rates in accordance with an

NMP. Each plan includes a determination of the nitrogen and P needs that are specific to the LMU and to the crop.

Mayor Ethridge and Waco requested to delete "A land management unit is not part of an AFO" in §321.32(3) because this is not in the federal rules or the existing Subchapter B rules.

The commission responds that the purpose of this statement is to explain that the portion of the AFO that is subject to point source regulations is the control facility, which does not include LMUs. The commission did not change the rule in response to this comment.

Mayor Ethridge and Waco requested to add the following sentence to §321.32(6): "Application of manure or wastewater to soil in which the soil phosphorus concentration exceeds the level necessary to ensure that the crop requirement for phosphorus is met shall not be considered a beneficial use in a major sole-source impairment zone"

The commission disagrees because this definition is applicable statewide. The definition of "Beneficial use" includes the requirement for agronomic rate which is based on an NMP. The NMP considers the soil P concentrations in determining the appropriate application rate for manure and wastewater, consistent with state and federal requirements. The commission declines to make this change.

TCE requested to add the " " after "Beneficial use" in §321.32(6).

The commission agrees that the "-" was inadvertently omitted from the published version and will be reinserted. The commission agrees to make this change.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.32(8) should be revised by deleting the phrase "other than rainfall events" at the end of the definition of "Catastrophic conditions" to recognize that severe rainfall can be a naturally occurring event that could constitute a catastrophic condition. The commenters stated that this phrase is not in the federal regulation and is more restrictive than what is contained in existing rules.

The commission responds that rainfall events that are chronic or catastrophic are defined separately for distinction in the applicability of this rule. The commission included the definition for "Catastrophic conditions" to recognize that there may be situations other than rainfall beyond the control of the AFO operator that may cause damage to the facility and affect the waste management system. The commission addressed the catastrophic rainfall event in another definition. The commission disagrees that this definition is more restrictive than the current rules and does not envision any additional restrictions on AFOs from the current interpretations as a result of separating the definition of "Catastrophic conditions" from catastrophic/chronic rainfall. The commission declines to make this change.

OPIC commented that in §321.32(8) the rules do not define "facility" and the rules should be clear that conditions are catastrophic only when they result in damage to the "control facility."

The commission agrees to replace the undefined term "facility" with the defined term "AFO." The commission declines to use the term "control facility" because that would limit the applicability to other portions of the rule.

TCE wants to add "in Texas" at the end of §321.32(9).

The commission agrees to make this change because the commission is aware that considerable effort has been expended to establish agreements between the NRCS and professional organizations in Texas to qualify individuals within those organizations to develop and certify conservation plans on behalf of the NRCS.

Mayor Ethridge and Waco commented that the numeric definition for the "Chronic or catastrophic rainfall event" had been removed and should be included in §321.32(10). The chronic rainfall event for the major sole-source impairment zone needs to be clearly defined as the 25- year, ten-day event to ensure protection from the improper use of the SPAW model.

The commission responds that this definition is applicable statewide. The chronic or catastrophic rainfall event varies both across the state and by animal type. Therefore, it would not be appropriate to establish a specific numerical standard for this definition based on a specific geographic area to be applied on a statewide basis. The rainfall event for a major sole- source impairment zone is referenced in §321.42 (c), relating to the major sole-source impairment zone. The commission declines to make this change.

OPIC commented that this definition is not clear that discharges under chronic events should be allowed only if the discharge could not have been prevented with proper management practices. OPIC recommended the following definition in §321.32(10): "A series of wet weather conditions that preclude dewatering of a properly designed, operated, and maintained retention control structure. To be considered a chronic or catastrophic rainfall event, rainfall conditions must be equivalent to or greater than the required design rainfall event."

The commission responds that the chronic or catastrophic rainfall event definition is consistent with existing state and federal language. Other provisions in this rule address the issue of proper operation and maintenance. The rule has been expanded to more clearly define these requirements and to include additional record keeping requirements associated with the operation and maintenance of waste management facilities.

TCE wants to add "(CNMP)" after "plan" in §321.32(12).

The commission agrees to add this acronym to the definition and clarify that the general criteria for CNMP development is located in the NRCS National Planning Procedures Handbook, Part 600.54, Subpart B.

NRCS requested to delete "combined into a" and replace it with "implemented in a" in §321.32(12).

The commission agrees because the environmental benefits are only derived by the implementation of the plan, as indicated by the commenter. The commission agrees to make this change.

NRCS commented that the definition in §321.32(13)(B) is difficult to understand and suggested deleting all language between "either....operation:".

The commission declines to make this change because the proposed definition is consistent with federal CAFO regulations.

Mayor Ethridge and Waco commented that in §321.32(13)(D) additional language should be added indicating that the requirements in §321.36 will also apply to state-only CAFOs in a major sole-source impairment zone.

The commission responds that §321.32 is specifically for defining the terms used in the rule and the rule is applicable to AFOs

throughout the state. The operational requirements and standards for compliance are found in other sections of the rule. The commission declines to make this change.

TCE wants to delete "concentrated animal feeding operation (CAFO)" and add "CAFO" in §321.32(21).

The commission declines to make this change. The first time that a term is used in a section in a commission rule it is spelled out. The commission responds that the rule presentation style adopted by the commission stipulates that terms be spelled out in each definition to ensure clarity, even if they have been used in previous definitions. The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.32(24) the term should be defined as: "The application to land of manure, litter, or wastewater generated by an animal feeding operation, including its incorporation into the soil mantle for beneficial use."

The commission agrees that land application is the act of applying manure, litter, or wastewater to land, but disagrees that incorporation is the only methodology for land application. The commission agrees to rephrase the definition to clarify that land application is the act of applying manure, litter, or wastewater to land; however, the commission declines to limit land application to incorporation only.

OPIC commented that in §321.32(26) letters of consent should not be considered acceptable demonstrations of buffer distance compliance with regard to schools or public parks. OPIC continued that in the case of schools and parks, it is the general public who will be affected. For schools, the affected persons have no choice but to enter the location, and due to their age, are particularly susceptible to the harmful impacts of pollution. OPIC suggested the term should be defined as: "A document signed by the owner or authorized legal representative of the owner(s) of an occupied residence, occupied business structure, or place of worship specifically consenting to location and operation of permanent odor sources of an animal feeding operation within the minimum buffer distance required under §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs))." OPIC suggested as an alternative to this definition, that the rules specify which persons would be qualified to sign the letter for school or park.

The commission disagrees that written consent agreeing to location and operation of permanent odor sources within the minimum buffer distance should not be accepted from schools or public parks. The commission supports preserving the opportunity for any neighboring receptors to choose to withhold consent, to choose to consent, and to choose to engage in private agreements to negotiate terms acceptable to both the source of odors and to the neighboring receptor.

However, the commission agrees that in the case of schools and public parks, additional protectiveness is desirable to ensure awareness, by both the landowner and the governmental entity charged with operation of the receptor, of the location and operation of permanent odor sources at an AFO within the required minimum buffer distance. Therefore, the rules have been modified to require written consent from both the owner of the land containing the receptor, and the governmental entity responsible for operating the receptor, when permanent odor sources are located within the minimum buffer distance of a school or public park.

NRCS commented that in §321.32(28) a liquid waste handling system should include a system of pumps, pipelines, sprinklers, and other appurtenances used to transport and land apply liquid waste.

The commission agrees that a liquid waste handling system includes appurtenances associated with transportation and land application of liquid waste. The commission revised the rule in response to this comment.

TCE wants to add "Code" before "590" in §321.32(33).

The commission agrees with this comment because the correct name of this Practice Standard includes the word Code. The commission agrees to make this change.

Mayor Ethridge and Waco commented that in §321.32(36) the definition of 100-year flood plain is not the definition used by the Federal Emergency Management Agency or the United States Corps of Engineers or Chapter 301 and suggested that the definition in these rules should be changed to match the others. OPIC commented that in §321.32(36) it is not appropriate to limit relevant storm event to only a 24-hour storm. OPIC commented that the rules should use the same approach as has been adopted in 30 TAC Chapters 297 and 309 and that this change will make this definition consistent with Chapters 297 and 309, and 30 TAC Chapter 317.

The commission agrees that the definition of 100-year flood plain should be consistent with other commission rules and has revised this definition.

OPIC commented that the definition in §321.32(43) is not consistent with the federal definition of process generated wastewater. OPIC suggested eliminating the phrase "which comes in contact with waste" which would make it more consistent with the federal rule.

The commission responds that the term is generally consistent with the federal term because it captures the main sources of wastewater at the AFO. Water which comes into contact with waste is included because it has the most potential for environmental impact. The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.32(47) the second sentence should read as follows: "An RCS does not include conveyance systems such as irrigation piping or ditches that are designed and maintained to convey manure, litter or wastewater for purposes other than storage."

The commission responds that the definition is adequate to define an RCS. The commenters' language is consistent with the proposed language in that conveyance systems must be designed and maintained to convey, and not store, manure, litter, or wastewater. The commission declines to make this change.

CCC, TCFA, TSGRA, TPPA, and TFB recommended that "Significant CAFO expansion" should only include those facilities proposing to increase waste production by more than 25% within any 12-month period.

The commission agrees that the definition of significant CAFO expansion should include a time frame to prevent the stacking of expansions that would exceed 25%, and thus circumvent the public participation process for new or significant CAFO expansions. This recommendation could be interpreted to allow a CAFO to expand up to 144% during the term of a general permit without providing notice to the public. Therefore, the commission agrees to change this definition to allow an expansion of waste

production to no more than 50% during the five-year term of a general permit.

TCE suggested adding" " after "expansion" in §321.32(48).

The commission agrees that the "-" was inadvertently omitted from the published version and will be reinserted. The commission agrees to make this change.

OPIC commented that in §321.32(48) the commission has not justified the limit of 25% increase to define significant expansion. OPIC requested that the commission clarify how the increase in waste production will be measured. OPIC stated that Arkansas uses 10%. OPIC requested that the definition should be changed to: "Any change to a CAFO that results in a greater than ten percent cumulative increase, above that quantity last permitted with public notice, in: (A) the volume of animal waste, as excreted, generated by the facility; or (B) the land application area; or (C) the total volumetric capacity of all retention control structures at the facility." OPIC commented that if these factors in paragraphs (A) - (C) are relevant when determining the significance of an expansion operating under an individual permit, they should also be considered relevant when judging the significance of an expansion under a general permit.

The commission responds that the waste generated at a facility has the most significant potential to impact the environment and the general public. The proposed definition could be interpreted to allow a CAFO to expand up to 144% during the term of a general permit without providing notice to the public. Therefore, the commission agrees to change this definition to allow an expansion of waste production to no more than 50% during the five-year term of a general permit.

The commission provided public notice and an opportunity for public comment on the CAFO general permit as provided in TWC, §26.040. The commission is not required to provide public notice for facilities that apply for individual coverage under the general permit. The commission has the discretion to determine if public comment is appropriate for individual NOIs. The commission declines to make this change.

NRCS suggested deleting "liquid" and replacing it with "slurry" in §321.32(49).

The commission agrees with this comment because the term "liquid" is more applicable to wastewater than sludge. The term "slurry" is more closely associated with sludge and the intent of the definition. The commission agrees to make this change.

NRCS commented that in §321.32(53) 25-year, ten-day rainfall event not in Technical Paper 40, but in United States Department of Commerce, Weather Bureau, Technical Paper 49, "Two-to-Ten-Day Precipitation for Return Periods of 2 To 100 Years in the Contiguous United States", 1964. Mayor Ethridge and Waco commented that in §321.32(53) the 25-year, ten-day rainfall event is defined by the National Weather Service in Technical Paper 49, "Two-to-Ten-Day Precipitation for Return Periods of 2 to 100 Years in the Contiguous United States" (1964).

The commission agrees with this comment and revised the definition to incorporate the correct reference.

TCE suggested adding "(USDA)" after "United States Department of Agriculture" and "(NRCS)" after "Natural Resources Conservation Service" in §321.32(55).

The commission agrees with this comment and made this change.

§321.33. Applicability and Required Authorizations.

TPF commented that individual permits should be required for dry poultry operations only on a case-by-case basis in §321.33. TPF additionally commented that there is no circumstance under which an individual permit should be required across an entire drainage basin for dry litter operations. One-hundred and eighty six individuals commented that individual permits for boiler/breeder operations should be required only on a case-by-case basis and not across an entire drainage basin in §321.33.

The commission agrees that there is no circumstance under which this is currently required across a drainage basin for dry litter poultry operations. However, the commission is responsible for maintenance of water quality in Texas and may find it appropriate to designate a drainage basin as impaired, and then implement a watershed-based plan that would aim to improve water quality. Under §321.33(b), the commission may need to address specific sources of pollutants in a watershed through permit requirements. This subsection lists certain CAFOs that must obtain an individual permit based on statutory requirements and a CAFO's location. The commission will consider whether other CAFOs must obtain an individual permit on a case-by- case basis unless required by §321.33(b). Section 321.33(f) requires existing dry poultry operations to obtain an individual or general permit before April 13, 2006.

Sierra Club commented that individual permits should be required for all CAFOs in watersheds included on the 303(d) list of impaired water bodies. Sierra Club stated that new or expanding CAFOs located near impaired water bodies should be subject to same requirements as CAFOs in the Bosque River Watershed. Regarding §321.33(a)(4), OPIC commented that a CAFO should not qualify for a general permit if it is located in any watershed of a segment listed on the 303(d) list for bacteria, depressed dissolved oxygen, nitrate + nitrite nitrogen, total dissolved solids, chloride, nutrients, excess aquatic growth, or impaired macrobenthos community. OPIC stated that the language should be changed to read: "Any CAFO where any part of the production area or land management unit is located in a watershed of a segment listed on the current United States Environmental Protection Agency approved 303(d) list of impaired water bodies, as required by 33 United States Code §1313(d) for bacteria, depressed dissolved oxygen, nitrate + nitrite nitrogen, total dissolved solids, chloride, nutrients, excess aquatic growth or impaired macrobenthos community, unless coverage under a watershed-based general permit is available." Next, one individual commented that in §321.33 new CAFOs should be prohibited from basins with streams listed as impaired for bacteria, dissolved oxygen, toxicity, and/or nutrients. In addition, EPA commented that in §321.33 the requirements of §321.42 should apply to all CAFOs in watersheds for 303d listed streams that are impaired for P and pathogens.

The commission disagrees that all CAFOs in the 303(d) list of impaired water bodies must obtain an individual permit. Any permit, general or individual, issued by the commission will include requirements to meet applicable water quality standards. Section 321.33(b)(5) allows the executive director to require an AFO to obtain an individual permit based on factors such as the location of the facility or to comply with additional requirements necessary to protect water quality. The commission also disagrees that the requirements in §321.42 should be applied to all CAFOs located near impaired waters. The special provisions in that section are necessary to protect water quality in a major

sole-source impairment zone based on TWC, Chapter 26, Subchapter L; North Bosque River Watershed Total Maximum Daily Loads and Implementation Plan; and recommendations from the "white papers" developed by a coalition of representatives from local, state, and federal agencies assembled by United States Congressmen Chet Edwards and Charles Stenholm.

The commission responds that in other areas of Texas where a new or expanding CAFO can be authorized under the general permit, the operator must comply with all requirements of the general permit that address potential effects on water quality, including such provisions as locating waste management activities outside of a 100-year flood plain, using appropriate land application practices, developing an NMP, and establishing a 100-foot wide vegetative buffer between every application area and a water body in the state.

Section 321.33 states that the CAFO may not obtain authorization under a general permit if the general permit does not include protective measures required by the TMDL and implementation plan; therefore, the CAFO must obtain an individual permit. In the development of a TMDL and implementation plan, staff identifies sources of pollutants of concern for the impairment. Staff considers nonpoint and point source discharges as part of the development process. Staff considers potential CAFO contributions to water quality impacts during the TMDL development process for a segment impaired by pollutants of concern associated with authorized and unauthorized discharges from CAFOs.

The new or expanding CAFO must ensure additional waste retention capacity and land application areas are constructed or available, so that no additional loading or contribution to the existing impairment occurs. By expanding the RCS as necessary, no higher frequency of authorized discharge events will result from the RCS. Authorized discharges are those that result from a catastrophic or chronic rainfall event.

Mayor Ethridge and Waco commented that they support removal of the registration option and the requirement for permits to authorize CAFOs in §321.33(a).

The commission acknowledges the support to remove the registration option and to require permits for CAFOs.

TCE commented that the commission should delete "concentrated animal feeding operations (CAFOs)" and add "CAFO" in §321.33(a).

The commission responds that the rule presentation style adopted by the commission stipulates that a term, phrase, or name is spelled out at the beginning of a section of the rules to clearly define the acronym used in the remainder of the section. The commission declines to make this change.

OPIC commented that the federal rules authorize the EPA regional administrator to designate an AFO as a CAFO, so the rules should acknowledge this authority in §321.33(a)(5).

The commission disagrees with this comment. It is not necessary for the rules to refer to such authority because the executive director took the role and permitting authority of the administrator with the assumption of NPDES program responsibilities to the commission.

Mayor Ethridge and Waco commented that they support individual permits for dairy CAFOs in a major sole-source impairment zone, but recommend it include all CAFOs in §321.33(b)(2).

The commission disagrees with this comment because TWC, Chapter 26, Subchapter L addresses dairy CAFOs. Specifically, §26.502 states that this subchapter applies only to a feeding operation confining cattle that have been or may be used for dairy purposes, or otherwise associated with a dairy, including cows, calves, and bulls, in a major sole-source impairment zone.

TPF commented that §321.33(b)(3) should be revised to "Any *non-poultry* CAFO where, on the date the executive director determines that the application is administratively complete, any part of the production area of the *non-poultry* CAFO is located or proposed to be located within the protection zone of a sole-source surface drinking water supply, as required by TWC, §26.0286." Dry poultry facilities are covered and therefore should be exempt from this requirement.

The commission disagrees with this comment because TWC, Chapter 26, requires an individual permit for all CAFOs within a specified protection zone of a sole-source surface drinking water supply. Specifically, §26.0286 states that the commission shall process an application for authorization to construct or operate a CAFO as a specific permit under §26.028 subject to the procedures provided by TWC, Chapter 5, Subchapter M, if, on the date the commission determines that the application is administratively complete, any part of a pen, lot, pond, or other type of control or retention facility or structure of the CAFO is located or proposed to be located within the protection zone of a sole-source drinking water supply. Therefore, this provision applies to all types of CAFOs if the CAFO meets the description in §26.0286.

TPF commented that §321.33(b)(4) should be revised to "Any CAFO where any land management units are located in a watershed of a segment . . ." because dry litter poultry production areas are covered and there is no direct threat to surface or groundwater.

The commission disagrees with this comment. A dry litter poultry CAFO utilizes the production area and LMUs which have the potential to contribute to water quality impacts. Therefore, it is necessary to evaluate and authorize dry litter poultry CAFOs located in 303d listed water bodies under an individual permit if the general permit does not contain sufficient provisions to address the impairment.

CCC, TCFA, TSGRA, TPPA, and TFB commented that they support language as proposed in §321.33(b)(4), relating to individual permits in 303d listed segments, and consistent with an adopted TMDL implementation plan. They also recommended that any CAFO that transports manure out of a TMDL watershed should not be required to obtain an individual permit.

The commission appreciates the support expressed in the first comment, but disagrees with the recommendation. The commission will require an individual permit if a general permit does not contain additional water quality protection measures necessary to address the impairment. If a CAFO hauls all of its manure out of a watershed, an individual permit may still be necessary to address potential discharges from the control facilities and to restore water quality.

Regarding §321.33(b)(4), Mayor Ethridge and Waco commented that any CAFO in a 303(d) listed segment should have to get an individual permit when the segment has been listed for CAFO-generated nutrients or other pollutants, not just after development of a TMDL or implementation plan.

The commission disagrees that all CAFOs in the 303(d) list of impaired water bodies must obtain an individual permit. Any permit, general or individual, issued by the commission will include

requirements to meet applicable water quality standards. Prior to a TMDL and implementation plan, the commission may not have adequate information of what the significant sources are of the constituent of concern for the 303(d) listed segment. Thus, it would be inappropriate to require all CAFOs on a 303(d) listed segment to obtain an individual permit prior to the TMDL and implementation plan. However, §321.33(b)(5) allows the executive director to require an AFO to obtain an individual permit based on factors such as the location of the facility or comply with additional requirements necessary to protect water quality.

TWC, Chapters 5 and 26, provide the agency flexibility to require CAFOs to obtain either an individual permit or general permit, so long as the permit does not violate water quality standards. The draft general permit contains provisions to protect water quality such as NMPs, land application practices, vegetative buffers, design and operation of RCSs, and other BMPs. If after implementation, these requirements and others identified in the implementation plan do not result in attainment of water quality standards, then the executive director may require the CAFO to obtain an individual permit that will include additional provisions to prohibit a violation of water quality standards.

Where a new or expanding CAFO can be authorized under the general permit, the operator must comply with all requirements of the general permit that address potential effects on water quality, including such provisions as locating waste management activities outside of a 100-year flood plain, using appropriate land application practices, developing an NMP, and establishing a 100-foot wide vegetative buffer between every application area and a water body in the state.

The new or expanding CAFO must ensure additional waste retention capacity and land application areas are constructed or available, so that no unauthorized additional loading or contribution to the existing impairment occurs. By expanding the RCS as necessary, no higher frequency of authorized discharge events will result from the RCS. When the unusual circumstance of an authorized discharge from an RCS occurs, it would be associated with a chronic or catastrophic rainfall event.

LCRA commented that it is supportive of the proposed rules and believes that it is appropriate that CAFOs obtain an individual permit when any part of the production area or LMU is located in a watershed of a segment listed on the current EPA 303(d) list of impaired water bodies. However, LCRA commented that it is concerned that this requirement would not be triggered until a TMDL implementation plan is adopted that establishes additional water quality protection for CAFOs in §321.33(b)(4). If this is kept, LCRA commented that affected CAFOs should be identified and involved up front in the TMDL process.

The commission appreciates LCRA's support of the rules. As mentioned previously, any CAFO general permit will contain provisions to protect water quality such as NMPs, land application practices, vegetative buffers, design and operation of RCSs, and other BMPs. The requirements in the general permit will allow a CAFO to operate in a 303(d) listed segment while protecting water quality and not be violating water quality standards.

In the development of a TMDL and implementation plan, staff identifies sources of pollutants of concern for the impairment. Staff considers nonpoint and point source discharges as part of the development process. Staff considers potential CAFO contributions to water quality impacts during the TMDL development process for a segment impaired by pollutants of concern associated with authorized and unauthorized discharges from CAFOs.

TCE commented that the commission should delete "animal feeding operation (AFO)" and add "AFO" in §321.33(b)(5).

The commission agrees with the comment and changes the rule to delete "animal feeding operation" on the fifth line of the paragraph but inserts the term on the first line of §321.33(b)(5) before "AFO."

CCC, TCFA, TSGRA, TPPA, and TFB commented on §321.33(b) and (c). The commenters recommended that the commission clarify the applicability of subsection (g) to existing operations and to make clear that such "operations" are allowed a transition period to obtain an individual permit or general permit. The commenterss suggested that a reference to subsection (g) should be inserted into both §321.33(b) and (c). In both instances the changes should be made in the second sentence, to read, "Except as provided by subsections (e), (f), and (g) . . .."

The commission disagrees with this comment. By adding subsection (g) to these provisions the commission is concerned that CAFOs may argue that their existing facilities would be exempt from the requirement for an individual permit. Subsection (g) provides that an existing CAFO authorized under a registration may continue to operate if there is no new construction or expansion until the commission acts on the pending application. In reviewing this section, the commission agrees that subsections (b) and (c) needed to be clarified to qualify that "operation of a control facility" applies to a new control facility that will be constructed. The commission has changed subsections (b) and (c).

CCC, TCFA, TSGRA, TPPA, and TFB commented on §321.33(g) and stated that they support a general permit and requests that a general permit be developed prior to July 27, 2004 to avoid legal challenges.

The commission acknowledges and appreciates this comment. Commission staff has prepared a draft general permit. A public meeting on the general permit was held on May 4, 2004. A request for comments and notice of the draft general permit were published in the *Texas Register*. Staff will prepare a response to comments then anticipates setting the general permit for commission consideration and approval during July 2004.

Mayor Ethridge and Waco commented that §321.33(g) should be revised to require facilities in a major sole-source impairment zone that are operating under a registration to submit application for an individual permit within 60 days of rule adoption.

The commission agrees that any dairy CAFO in the major sole-source impairment zone must submit an application for an individual permit before July 27, 2004, which will be within 60 days of adoption of these proposed rules. The commission made no change to the rule in response to this comment.

TPF commented that §321.33(h)(1) should be revised for consistency with definitions for a major amendment to "increasing the maximum number of animals authorized for confinement *by over 25 percent*."

The commission disagrees with this comment because the reference to 25% is included in the definition of "significant CAFO expansion" in §321.32(48) and does not apply to an amendment for an individual permit. Significant CAFO expansion applies to an increase at a CAFO that is authorized under a general permit and the required public participation process in §321.34(b)(3). This can be distinguished from §321.33(h) that relates to an increase in the number of animals at a CAFO authorized under an individual permit. Any increase in the maximum permitted number of animals is considered as a permit amendment. An

amendment to an individual permit must comply with §305.62. The commission made no change to the rule in response to this comment.

Mayor Ethridge and Waco commented on §321.33(i) that the second sentence should be revised to read: "Nonpoint source discharges of manure, litter, or wastewater from an AFO that is not a CAFO as defined in the subchapter are authorized to occur if the AFO is in compliance with the requirements in §321.47 of this subchapter."

The commission made no change in response to this comment because AFOs must meet the requirements in §321.47 to be authorized for a discharge. Section 321.47 specifically applies to AFOs that are not defined or designated as a CAFO but that discharge agricultural waste into or adjacent to water in the state. In general, §321.47(c)(1) requires the AFO operator to locate, construct, and manage the control facility and LMUs in a manner that will protect surface and groundwater quality. Additionally, AFO operators must land apply in accordance with the detailed requirements of §321.47(f).

Mayor Ethridge and Waco commented that no runoff should be authorized from any LMU on which waste or wastewater has been applied beyond the point that actual crop nutrient needs are met. Mayor Ethridge and Waco commented on 321.33(j)(2)(A) that NRCS Code 590 and Technical Note 15 are only recommendations and not requirements. They stated that this could allow high P fields to continue to receive P application, which would allow increased pollutant loading to impaired streams.

The commission disagrees with this comment. Section 321.33(j) addresses runoff from LMUs. Specifically, the rule provides that precipitation-related runoff from LMUs under the control of the CAFO operator, where manure, litter, or wastewater is applied according to an NMP, the runoff will be authorized as: 1) a pollutant discharge if the source is land associated with a CAFO in a major sole-source impairment zone; or 2) an agricultural stormwater discharge for all other sources. However, runoff from an LMU due to precipitation can be distinguished from a discharge due to irrigation activities. Section 321.40(d) prohibits a discharge of manure, litter, or wastewater from LMUs and the discharge shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition. Additionally, irrigation practices shall be managed to prevent tailwater discharges to water in the state according to §321.40(e).

According to §321.40, CAFO operators are required to operate and land apply under a NUP for LMUs with P soil concentrations above 200 ppm. The purpose of the NUP is to evaluate the risk potential for P movement to water courses and identify strategies to reduce soil P concentrations. In many instances, implementation of recommendations in the NUP will result in lower P concentration in the soil because of crop uptake. NRCS Practice Standard Code 590 and P index are consistent with the requirements for development of a NUP. Proper land application under a NUP will minimize potential for P to be transported from the LMU to contribute to additional pollutant loadings to an impaired stream.

While the NRCS specifications are written as guidelines, significant portions of the guidelines are embodied in this rule providing the needed authority upon which the commission can base its enforcement actions. Any deviation from the NRCS specifications must be documented by the nutrient management specialist with specific details and justifications. This documentation must be kept on site with the PPP. The commission made no change in response to this comment.

OPIC commented that in §321.33(j) clarification is needed with regard to the term "precipitation-related." OPIC suggested that the rules specify that runoff must be caused by precipitation to qualify for authorization.

The commission responds that "precipitation-related" refers to any runoff caused by rainfall or snow events. No change has been made to the rule based on this comment.

CCW commented that in §321.33(j) secondary runoff from areas not controlled by primary RCS which test for phosphorus above 500 ppm should have containment structures to retain a 25-year, 24-hour storm.

The commission disagrees with this comment because NUPs address site-specific characteristics of an LMU with a P of 200 ppm or more to ensure that the beneficial use of manure, litter, and wastewater is conducted in a manner to prevent adverse impacts on water quality. Additionally, NMPs address the amount, source, placement, form, and timing of the application of all nutrients and soil amendments on LMUs.

§321.34. Permit Applications.

CCC, TCFA, TFB, TPPA, and TSGRA commented on §321.34(b)(3) and recommended that the commission address expansion of existing CAFOs in the same manner as the EPA Region 6 General Permit, i.e., amendment of a PPP, but no additional public notice other than submission of revised NOI. CCC, TFB, and TSGRA also commented that provisions of public notice should apply only to new CAFOs or to CAFOs proposing to increase by more than 50%. TCFA and TPPA also commented that provisions of public notice should apply only to new CAFOs or to CAFOs proposing to increase by more than 25% within any 12-month period.

The commission is not required to provide public notice for facilities that apply for individual coverage under a general permit; however, the commission has discretion to determine if additional public comment is appropriate. The commission responds that the waste generated at a facility has the most significant potential to impact the environment and the general public. The commission also recognizes that the amount of waste generated and managed at AFOs is subject to variability on a daily and seasonal basis. The engineering practices and assumptions used in the design and construction of waste management systems include allowances for such daily and seasonal variability. The commission changed significant expansion in §321.32(48) to be defined as any change to a CAFO that increases the waste production at the CAFO by more than 50% above the maximum operating capacity stated in the notice of intent during the term of the general permit.

In §321.34, OPIC commented that the federal rules require applicants for either an individual permit or general permit to supply all information required by 40 CFR §122.21(i)(1), and that the proposed rules should include the content requirements of the NOI for the general permit.

The commission disagrees with this comment because staff has prepared a draft general permit that includes the requirements from 40 CFR §122.21(i)(1). The general permit will be issued in accordance with Chapter 205 and TWC, §26.040, and applicable federal rule requirements. Therefore, the commission declines to include a reference to the federal regulation in the rules. No change was made in response to this comment.

OPIC commented that information required for an individual permit should include a county general highway map and an original United States Geological Survey (USGS) 7 1/2-minute quadrangle topographic map.

The commission disagrees with this comment because §321.34 requires an applicant to comply with Chapters 281 and 305. Specifically, §321.34(f)(1) requires an applicant to comply with §305.45 to provide a topographic map, ownership map, county highway map, or a map prepared by a licensed professional engineer or a registered surveyor which shows the facility and each of its intakes and discharge structures and any other structure or location regarding the regulated facility and associated activities. The commission does not believe that both maps are necessary for review of an application for an individual permit. No change was made in response to this comment.

OPIC commented that §321.34 should require that the application be available to the public for a meaningful period of time with the opportunity for the public to submit comment upon the application.

The commission responds that the existing commission regulations require a copy of the application to be available to the public. First, §321.34(b) provides that notice, public comment, and contested case hearings on applications be conducted in accordance with commission rules governing applicable individual water quality permit applications. Second, 30 TAC Chapter 39 contains the applicable notice requirements for individual CAFO permits. Specifically, §39.403(b)(2)(B) states that applications for individual permits under Chapter 321, Subchapter B, are governed by Chapter 39, Subchapters H - M. Third, an applicant is required to make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located according to §39.405(g). A copy of the administratively complete application must be available for review and copying beginning the first day of the newspaper publication of the Notice of Receipt of Application and Intent to Obtain a Permit and remain available for the publication's designated comment period. Furthermore, a copy of the complete application (including any subsequent revisions to the application) and the executive director's preliminary decision must be available for review and copying beginning on the first day of required newspaper publication and remain available until the commission has taken action on the application or the commission refers the issue to the State Office of Administrative Hearings (SOAH) in accordance with §39.405(g)(2). Therefore, this recommendation is not needed.

OPIC commented that due to the prospect of multiple general permits in the future, the rules should include public participation requirements for general permits to prevent a patchwork of public participation procedures. OPIC offered a detailed example of specific notice requirements for the general permits in the rules.

The commission disagrees with this comment. The Subchapter B rules for issuance of a CAFO general permit to a new CAFO or significant expansion of an existing CAFO includes a public participation process. TWC, §26.040, and Chapter 205 do not require a public participation process to obtain authorization under a general permit. However, staff has prepared a draft CAFO general permit that contains a similar public participation process as described by the commenter. This process is intended to provide notice to the public of new CAFOs and significant expansions at existing CAFOs. Section 321.34 requires an applicant who plans a new CAFO or significant expansion to an existing CAFO to comply with the process as detailed in the general permit. Specific steps for such a process are not necessary in §321.34 because they are in the general permit that is subject to public comment and will be considered for issuance by the commissioners during an agenda meeting.

OPIC commented that in §321.34(b)(4) the process for amending the PPP is not clear. OPIC suggested that §321.34 require submission of the revised PPP to the executive director for review. OPIC stated that amendments to the plan that are considered minor amendments should not be "stacked" such that cumulatively they may constitute a major amendment to the permit.

The commission disagrees with this comment. The existing and new amendments to these rules do not require a CAFO operator to submit revisions of the PPP to the executive director for review. TWC, Chapter 5 and Chapter 26, do not require changes to the PPP to be submitted to the agency, but the commission does review them during the compliance inspections. A CAFO operator cannot circumvent §305.62, Permit Amendments, by revising its PPP. An increase in the number of animals, construction of new buildings or structures, or adding LMUs cannot be accomplished with a simple change to a PPP. Rather, the commission and §305.62 would require a permit amendment for such activities at a CAFO.

Mayor Ethridge and Waco commented on §321.34(b)(4) that permit renewals should not be issued without public notice or opportunity for public comment. Mayor Ethridge and Waco recommended that the second sentence be revised to read as follows: "Renewal under this paragraph is allowed only if there have been no violations by the CAFO during the past 36 months of the term of the individual water quality permit in which: (A) the violation contributed to pollution of surface or groundwater. . .."

The commission agrees with the first part of this comment. Former §321.34(b) stated that an application for a renewal of an individual permit for a facility may be granted by the executive director without public notice if it does not propose any change which constitutes a major amendment. However, TWC, §26.028, requires that notice be given of an application to renew a permit and allows the commission to approve a renewal, without a contested case hearing under certain circumstances. The provision provides that there must be no significant increase in quantity of waste or material change in pattern or place of discharge. Section 26.028 also requires the commission to determine that an applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit. The commission changed this part of the rule to require notice of an application seeking to renew a CAFO individual permit.

The commission disagrees with the second part of this comment because the adopted language meets the goals of the commission's compliance history rules in 30 TAC Chapter 60. Renewal under this provision shall be allowed only if there has been no related enforcement action against the facility during the last 36 months of the term of the permit. The commission must find that a violation occurred that contributed to pollution of surface or groundwater or an unauthorized discharge or violation of state or federal air requirement; such discharge or emission violation was within control of the permittee; and such violation could have been reasonably foreseen by the permittee. The commission has not changed the rule based on this portion of the comment.

Mayor Ethridge and Waco commented on §321.34(b)(5) that an annual compliance inspection should occur before a permit can be reviewed rather than afterwards.

The commission acknowledges this comment. The commission conducts annual inspections for all CAFOs in the dairy outreach program areas. Therefore, the commission will attempt with all reasonable efforts to conduct such inspections while the permit is under review. The commission made no change to the rule in response to this comment.

OPIC commented on §321.34(f)(2) that the rules should place the duty on the applicant to provide information required by 40 CFR §122.21(i)(1) rather than the executive director. Term "as applicable" is not clear. Subsection (f) should be replaced with: "Applications for an individual water quality permit under this section shall be made on forms prescribed by the executive director. The applicant shall submit an original completed application with attachments to the executive director at the commission headquarters in Austin, and one additional copy of the application with attachments to the appropriate commission regional office. In addition to any other information required by the executive director, the applicant shall submit the following information in accordance with this section:".

The commission disagrees with this comment. The end of subsection (f) states that the executive director will require the following information to be submitted, as it is applicable to the facility. This provision clearly states that certain information as applicable to the facility will be required. For example, §305.45(a)(7) states that an applicant must submit a list of all permits or construction approvals received or applied for under several programs that are listed. The reference to "applicable" in subsection (f) would only require, for example, a list of hazardous waste permits if held by an applicant. No change has been made in response to this comment.

TPF commented that the recharge feature certification for dry poultry production areas and LMUs does not provide significant environmental benefit and can be a significant cost to the producer. Senator Todd Staples commented that a recharge feature certification is unnecessary for environmental protection and is an added cost to producers in §321.34(f)(3). Senator Staples supported the comments submitted by TPF. TPF also commented that §321.34(f) should be revised to state "CAFOs which provide for total coverage of animals and land apply only dry litter or manure are exempt from the requirement to develop recharge feature certification so long as the CAFO production area and all LMUs are operated in accordance with best management practices for storage and land application of dry litter or manure." Representative McReynolds commented on §321.34(f)(3) that dry litter poultry operations are required to have water quality management plans developed by the TSSWCB which include groundwater protection provisions. Therefore, they should be exempt from recharge feature certifications. In addition, Representative McReynolds stated that the cost for a recharge feature certification (approximately $5,800) is too costly for poultry farmers and unnecessary.

TSSWCB commented that it does not support the requirement in §321.34(f)(3) for recharge feature certification, as defined by the proposed rule, for any dry litter poultry operation defined as a CAFO. TSSWCB stated that buffers required as part of the certified WQMPs developed by the TSSWCB should provide adequate protection of both surface and groundwater in these poultry facilities. TSSWCB does not advocate "incorporation" as a feasible BMP for dry litter poultry operations as an alternative to a recharge feature certification. Buffer requirements in TSSWCB WQMPs provide protection for surface and groundwater. CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.34(f)(3) should be revised by adding a second sentence "Land management units that only receive litter or dry manure and production areas that are protected from precipitation are not required to be included in the recharge feature certification." One-hundred and eighty-six commented on §321.34(f)(3) that recharge feature certification for dry broiler/breeder production areas and LMUs costs about $5000 and does not provide significant environmental benefits. Four hundred and sixty-six individuals commented on §321.34(f)(3) that recharge feature certification for dry litter poultry should not be required.

The commission disagrees that facilities should be exempt from recharge feature evaluation but acknowledges that dry litter poultry CAFOs that operate under a TSSWCB CWQMP which evaluates site-specific features that could contribute to groundwater contamination will fulfill this requirement. A permittee should locate recharge features in order to avoid certain practices in susceptible areas that may result in adverse impacts to groundwater quality. This activity protects important water resources from deterioration and should eliminate and avoid costly remedial activities that would be necessary if groundwater contamination occurred. The commission changed the rule to clarify this requirement and allow further flexibility.

OPIC commented on existing §321.38(g) indicating it is inappropriate to allow a geoscientist to carry out certain requirements that are engineering practices.

The commission responds that it has revised §321.34(f) to ensure that only appropriately qualified individuals are authorized to address the recharge features with plans that may include installation of protective measures, conducting groundwater monitoring, or plans describing other approaches to protect a recharge feature.

§321.35. Fees.

Representative McReynolds commented that the proposed fees are excessive, especially if rules are adopted that require recharge feature certification ($5800). He requested that the fees be reasonable. TPF commented on §321.35 that the annual "consolidated water quality fee" should apply only to poultry facilities with individual permits and should not be charged to those with general permits. TPF recommended that only the filing fee for general permits should be charged. One-hundred and eighty-six individuals commented on §321.35 that the consolidated water quality fee should not be required for dry broiler/breeder operations. The individuals supported a filing fee for a general permit.

Four hundred and sixty-six individuals commented on §321.35 that the water quality permit fee should not be required for dry litter poultry operations. The individuals supported a filing fee of $100 to $150 for a general permit. CCC commented that on §321.35 that it is opposed to the annual "consolidated water quality fee" because it is an expense that cannot be passed on. CCC also stated that it considers the fee unnecessary because farms are covered by a TSSWCB plan. TFB commented on §321.35 that poultry producers consider the $800 consolidated water quality fee to be excessive and a cost that cannot be recouped by the producer. One individual commented on §321.35 that the fees should be reduced or eliminated for dry poultry litter facilities which are operating under a TSSWCB CWQMP.

TWC and the agency's regulations authorize the commission to assess an application fee and annual fee assessments for CAFO general permits. First, §205.4(g) states that a person seeking authorization by a general permit shall submit a $100 application

fee payable to the agency at the time of filing an NOI unless otherwise provided in the general permit or in §305.53.

Second, §205.6, Annual Fee Assessments, requires a person authorized by a general permit to pay an annual waste treatment inspection fee under TWC, §26.0291, consistent with §§305.501 - 305.507, or as specified in the general permit. Section 26.0291 requires an annual water quality fee to be assessed on each wastewater discharge permit holder.

Third, §205.6 allows the commission to assess an annual watershed monitoring and assessment fee under TWC, §26.0135(h), consistent with 30 TAC Chapter 21 or as specified in the general permit.

Thus, §321.35 provides the commission with the flexibility to assess a different fee for dry poultry litter CAFOs in a general permit while still complying with the statutory requirements in TWC, Chapter 26. Therefore, the commission will determine the appropriate fees for dry litter poultry CAFOs during its consideration of that specific general permit prior to 2006.

§321.36. Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs).

TCE requested to delete "concentrated animal feeding operations (CAFO)" and add "CAFO" in §321.36(a).

The commission declines to make this change. The *Texas Register* prefers that the initial use of a word or term in each section that will be referenced to by an abbreviation or acronym be spelled out the first time it is used. The commission responds that the rule presentation style adopted by the commission stipulates that a term, phrase, or name is spelled out at the beginning of a section of the rules to clearly define the acronym used in the remainder of the section.

Mayor Ethridge and Waco commented that the requirements in §321.36(a) should also apply to state-only CAFOs located in a major sole-source impairment zone.

The commission responds that §321.36 delineates the requirements for large, medium, and small CAFOs required to be authorized under federal law. State-only CAFOs in the major sole-source impairment zone are authorized under state law. The requirements for collection, storage, treatment, and beneficial use by state-only CAFOs are generally distributed throughout the rule. The specific requirements for dairy CAFOs located in a major sole-source impairment zone are located in §321.42. The technical requirements of both state and federal facilities are comparable. The commission declines to make this change.

Regarding §321.36(b), Mayor Ethridge and Waco commented that attainment of TMDLs and 40 CFR §122.4(i) should not be left solely to case-by-case determinations during individual permitting, but BMPs and effluent limitations should be included in §321.42 and automatically applied to all CAFOs in any 303(d) list of impaired water bodies.

The commission disagrees with this comment. By intent, 40 CFR §122.4(i) is a specific determination on whether a specific permit decision is prohibited or not. The commission will review and evaluate individual permit applications on a case-by-case basis as stated in this section and Chapter 305. During its review, agency staff considers site-specific conditions, the design of the proposed facilities, and proposed operations (including BMPs) in order to determine compliance with federal and state regulations and siting standards in the rules. Staff will prepare an individual permit that includes special provisions to maintain compliance with those regulations and standards.

Wallace commented that in §321.36(d) the application rates should be limited to a maximum of no greater than one season's use of nitrogen or P.

The commission disagrees because the NMP, required under §321.36(d)(1), establishes the appropriate application rate based on site-specific information regarding nutrients rather than setting a standard application rate for all AFOs. The commission declines to make this change.

TCE requested to add "Code" before "590" in §321.36(d)(1).

The commission agrees with this comment because the correct name of this Practice Standard includes the word Code. The commission made this change in response to this comment.

Mayor Ethridge and Waco commented that in §321.36(d)(1) NMPs should be required with all permit applications submitted in major sole-source impairment zones and should be required in the rules.

The commission disagrees that NMPs should be required with all permit applications. Section 321.36(d)(1) requires a CAFO operator to develop and implement an NMP on or before December 31, 2006. This requirement is consistent with the federal requirements of 40 CFR, Part 122 and 412. For the major sole-source impairment zone, §321.42 requires that all land application at the CAFO be performed in accordance with a CNMP that is more stringent than and includes all the requirements of an NMP. This provision will be implemented upon issuance of an individual permit for a dairy CAFO located in the major sole-source impairment zone, in accordance with §321.42(i)(5). The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.36(d)(2) the CAFO should be required to keep a copy of the NMP on site.

The commission responds that this requirement is located at §321.46 which requires the operator to keep a copy of the NMP in the PPP located on site.

OPIC commented that §321.36(d)(3) in the proposed rules does not include a requirement that a NMP identify specific records that will be maintained to document the implementation of the minimum elements described in 40 CFR §122.42(e)(1)(i) - (viii). Therefore, compliance with §§321.36, 321.38, and 321.39 does not constitute compliance with all provisions of 40 CFR §122.42(e)(1)(i) - (ix).

The commission disagrees that the rule does not satisfy compliance with federal requirements because the minimum elements listed 40 CFR §122.42(e)(1)(i) - (ix) address the management measures for the proper operation of a CAFO. These minimum elements are contained throughout these rules relating to the requirements for proper design of collection, storage, treatment, and beneficial use of manure, litter, and wastewater. The rules also contain requirements for proper carcass disposal and recordkeeping to document the implementation of management practices. Specifically, §321.46 contains the recordkeeping requirements to meet the elements of 40 CFR §122.42(e)(1)(i) - (ix). Additionally, EPA stated that the amended rules comply with the new federal CAFO rules. The commission declines to make any change to the rule language.

NRCS requested to add "The operator shall employ sampling procedures using accepted techniques of science for obtaining representative samples and analytical results" to §321.36(e)(1).

TCE suggested that the commission require at least quarterly samples for manure and wastewater and that the commission develop sampling guidance with input from TCE.

The commission agrees that the operator shall employ accepted techniques of science for obtaining representative samples and analytical results. The commission agrees to coordinate with TCE and NRCS to develop a regulatory guidance document to clarify the standards and frequency for collection and analysis of representative manure, litter, and wastewater samples. The commission made no change to the rule in response to this comment.

Mayor Ethridge and Waco commented that in §321.36(e)(2) the log of waste or wastewater that goes to third-party fields should include the name of hauler.

The commission responds that this provision is consistent with federal rule which requires the name and address of the recipient, not the hauler. The destination of the manure, litter, and wastewater is more pertinent in evaluating environmental impacts than simply knowing the name of the transporter. The commission declines to make this change.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.36(e)(2)(B) should be revised to clarify the term "recipient" for use in areas outside major sole-source impairment zones. Recipient should be defined as the first person who receives the material for off-site land application. The rule should not extend regulatory oversight to third-party fields not owned or operated by the CAFO. The commenters oppose any additional restrictions or regulations for off-site third-party land application.

The commission responds that this provision is consistent with 40 CFR §122.42(e)(3), which requires the name and address of the recipient. The federal rule does not define recipient as the first person who receives the material for off-site application. The commission does not intend to extend regulatory oversight to third-party fields or any additional restrictions on fields not owned, operated, controlled, rented, or leased by the CAFO. However, §321.42 requires additional restrictions for third-party fields located and operated in the major sole-source impairment zone, but those requirements do not extend statewide. The commission declines to make any change to the rule.

NRCS commented that in §321.36(e)(2)(C) wastewater volume should be expressed as acre- feet or acre-inches rather than cubic yard.

The commission agrees that the volumetric units for wastewater should be added. The commission has made this change in response to this comment.

NRCS commented that §321.36(f) should be moved to §321.40, Land Application Areas.

The commission disagrees because §321.36 includes all requirements associated with federally authorized CAFOs. The commission declines to make this change.

TCE commented that §321.36(g)(1) should list RG-408 here similar to subsection (g)(3)(A).

The commission responds that the methodology for collecting the initial sample references the provision for collecting the annual sample, which includes the requirement to use RG-408 Soil Sampling for Nutrient Utilization Plans. The commission declines to make this change.

Waco commented that §321.36(g)(1) should require soil samples to be collected and analyzed for all LMUs annually regardless of whether waste application occurred the previous year.

The commission disagrees that the CAFO must collect and analyze soil samples in years when the operator does not apply manure, litter, or wastewater to the LMU. The expense for sampling and analysis of soils in the unused LMUs is not justifiable because prior to restarting land application of manure, litter, or wastewater to a field, an initial soil sample must be collected and analyzed to determine nutrient content. The commission declines to make this change.

One individual commented that §321.36(g)(2) should not require more soil testing/analyses than required for a dry litter poultry operation covered by a TSSWCB WQMP.

The commission disagrees that dry litter poultry operations should be allowed to collect soil samples less frequently than other CAFOs. The soil nutrient concentrations can vary from year to year. The operator needs to sample each field annually, to monitor soil nutrient concentrations, and to calculate the agronomic rate. The commission declines to make this change.

CCW commented that in §321.36(g)(3) soil sampling should be limited to the top two inches for irrigated fields or fields where solids are not incorporated. Wallace commented that in §321.36(g)(3) the rules should limit soil testing for nutrients to the top two inches of soil.

The commission disagrees that a zero to two-inch sample should be required for all LMUs. The potential for impact to water quality from LMUs is more pronounced from LMUs that have had manure or litter land applied on the surface. Unincorporated solid material is more prone to stormwater influence than manure, litter, or wastewater that are located in the soil mantle profile at a depth of greater than two inches. Therefore, the rules require a sample of zero to two inches only for fields that have had topically applied manure or litter. In agricultural soils, the infiltration rate normally allows wastewater to migrate to depths greater than two inches. Therefore, as required by the rules, nutrients should be analyzed in Zone 1 from zero to six inches. The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.36(g)(3)(D)(i) wastewater application should not be considered "incorporated" and soil tests should be made in zero to two-inch zone when wastewater is applied.

The commission disagrees because in agricultural soils, the infiltration rate normally allows wastewater to migrate to depths greater than two inches. Therefore, as required by the rules, nutrients should be analyzed in Zone 1 from zero to six inches. The commission declines to make this change.

TCE requested that §321.36(g)(4) list ICP with P and add "ppm" after "soluble salts." TCE stated that ICP will analyze for all forms of P in the extract.

The commission added ICP as the analytical procedure to make a more accurate determination of the P content of the soil. The commission agrees that the ppm unit for P and soluble salts should be listed in the rule and has made this change.

TCE requested to delete "shall must" and use the appropriate term in sentence in §321.36(i)(5). OPIC also commented that §321.36(i)(5) has both "shall" and "must" in the provision. The provision read: "The CAFO operator must comply with the land application area recordkeeping requirements . . .."

The commission agrees that the sentence is grammatically incorrect and has corrected the language.

TPPA and TCFA commented that language should be added to §321.36(j)(8) to recognize that some facilities have LMUs that have never received manure, litter, or wastewater. TPPA and TCFA recommended language to read "a copy of the baseline soil analysis for each LMU. The baseline soil analysis is to be documented prior to the first application of manure, litter or wastewater."

The commission agrees that the initial soil sample analysis for each LMU is more representative of the nutrient concentrations in the soil prior to commencing or restarting land application. The commission agrees to revise the annual report requirement to include the "initial" soil analysis rather than the "original" soil analysis. The term "initial sampling" is used in §321.36(g)(1). It is not necessary to submit this sample annually unless the initial sample is replaced with another initial sample for the baseline measurement for the LMU.

OPIC commented that in §321.36(k) the proposed rules do not include a pond marker indication requirement for minimum treatment volume. OPIC commented that this is an unwarranted substantive change in the requirements of the CAFO air standard permit.

The commission agrees that RCSs designed with a minimum treatment volume to meet the requirements of §321.43(j)(3)(B), should have a permanent pond marker indicating the minimum treatment volume and that the minimum treatment volume must be maintained. These provisions are in the current Chapter 321, Subchapter B, rules but were inadvertently left out of the proposed rule and will be reinstated. The rule was changed to add this pond marker requirement to §321.36(k), and §321.43(j)(3) was revised to require that the wastewater treatment system is operated in accordance with design.

TCE requested to insert "Code" before 360 in §321.36(m).

The commission agrees with this comment because the correct name of this Practice Standard includes the word Code. The commission has made this change in response to this comment.

NRCS requested to delete "be developed using standards contained in the" and replace with "as a minimum meet" from §321.36(m).

The commission agrees that, at a minimum, these standards must be followed during closure of a CAFO. Therefore, the commission has added "at a minimum" to this provision.

Mayor Ethridge and Waco commented that in §321.36(m) specific closure requirements for LMUs with excessive soil P should be included to prevent abandonment and neglect of cover crop. Mayor Ethridge and Waco stated that without proper crop maintenance, soil P levels will go unmanaged and unchanged.

The commission responds that NRCS technical standards for closure, such as those referenced in this subsection, are applicable only to RCSs. NRCS does not have technical standards for closure relating to LMUs. A closure plan is a regulatory tool used by the commission to address potential pollutant impacts from constructed waste management units. Other regulatory tools, such as an NMP, is a more appropriate mechanism for management of agricultural land. The commission did not change the rule in response to this comment.

§321.37. Effluent Limitations for Discharges from Production Areas.

Sierra Club commented that in §321.37 the rules do not have sufficient controls to prevent overflows from RCSs. Sierra Club stated that a 25-year 24-hour design volume is inadequate to protect water quality standards. Sierra Club commented that the proposed rules continue to authorize the discharge of highly concentrated liquid waste from CAFO lagoons that will violate water quality standards.

The commission disagrees that the rule would allow discharges that would violate water quality standards. An authorization issued in accordance with this rule under either an individual or general permit must prohibit a violation of a state water quality standard. Effluent limitations establish the minimum design requirement for CAFO RCSs and are consistent with 40 CFR, Part 412. When implemented, overflows should be minimized by proper operation and maintenance of the RCS, as required by these rules, and should not cause degradation of water quality. The commission continues to require certain CAFOs in certain parts of the state to meet the design standard for a 25-year, 24-hour rainfall event consistent with federal requirements.

In the *Federal Register*, EPA stated that the new rules require CAFOs to properly design, construct, operate, and maintain storage structures to contain all manure, litter, and process wastewater including the runoff from a 25-year, 24-hour rainfall event. EPA noted that USDA and American Society of Agricultural Engineers (ASAE) cite the 25-year, 24-hour rainfall event as part of the standard to which storage structures should be constructed. CAFOs should actively operate and maintain the manure storage structure, including solids removal or dewatering when appropriate, to retain the capacity for the 25-year, 24-hour rainfall event according to EPA. EPA also discussed that recent studies suggest proper operation and maintenance will prevent most, if not all, overflows and discharges from manure storage areas.

With this rulemaking, the commission addressed overflows with more stringent requirements for RCS capacity, operation, and maintenance. The implementation of new federal requirements and the amendment of certain existing state requirements should also reduce the incidence of RCS overflows and reduce impacts of those overflows on instream water quality statewide. These amendments include more stringent provisions for RCS design applicable to poultry, swine, or veal CAFOs, (§321.37(c)), the requirement to document the sufficiency of an RCS design as being consistent with 40 CFR, Part 412 (§321.38(e)(4)), additional clarifications describing when an operator can remove wastewater from the RCS for irrigation (§321.39(b)), and the addition of weekly recordkeeping of wastewater levels observed in the RCS (§321.46(d)(4)). These amendments all should result in of better management of CAFO waste and fewer overflows. The commission also reviewed the design standards against simulations and models that indicate a properly sized and managed RCS and irrigation system can be operated to have no discharges.

One individual commented that in §321.37 authorized discharges of raw, untreated waste from the CAFO holding ponds must be controlled to meet water quality standards and protect human health. The individual quoted an EPA memo with data from ponds and suggested that discharges should be prohibited.

The commission disagrees that all discharges from CAFO RCSs should be prohibited. TWC and the Clean Water Act require the commission to establish water quality standards and implement permitting programs to ensure that those standards are met. The effluent limitation guidelines adopted in §321.37 provide protection based upon the technology-based requirements of the EPA

designed to meet water quality standards. The commission declines to make changes to the rule.

Mayor Ethridge and Waco requested that the commission add a sentence in §321.37(d): "The operators of CAFOs in major sole-source impairment zones must design, construct, operate, and maintain retention control structures that include the margin of safety specified in §321.42(c)." This will be consistent with the "once in 25 years" margin of safety.

The commission responds that the effluent limitations guidelines referenced in this section are derived from the federal rule and apply to CAFOs throughout the state. The margin of safety for a major sole-source impairment zone has been established as a requirement in §321.42(c) of these rules. The commission declines to make this change.

§321.38. Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).

OPIC commented that the existing CAFO rules include a provision that evaporation systems be designed to withstand a ten-year (consecutive) period of maximum recorded monthly rainfall. OPIC noted that this provision had been removed and should not have been.

The commission responds that this provision has not been removed but is addressed in §321.38(e)(7)(C)(i). Any existing evaporation system must meet this requirement. The commission did not make any change to the rule in response to this comment.

OPIC commented that the rules should specify the volumes required to be considered in determining design volume for an RCS. OPIC stated that "white papers" developed by the technical standards committee associated with the coalition of agencies assembled to deal with the North Bosque River Watershed issues recommended that the rules provide clear guidelines for facility management during wet weather. OPIC commented that this is not adequately addressed in the proposed rules and suggested the following sentence be added: "Control facility pumping capacity must be adequate to rapidly pump level down to a safe level."

The commission responds that the volumes required to be considered in determining design volume for an RCS are contained in §321.38(e). Additionally, the commission responds that a CAFO must be able to remove wastewater from the RCS in accordance with its design and consistent with a regular schedule, as required in §321.38(f) and §321.39(b), respectively. These requirements address the issues included in the "white papers." No change was made in response to this comment.

Mayor Ethridge and Waco commented that the last sentence of §321.38(d) should be revised to read: ". . .from inundation and damage that may occur during that flood event." to be consistent with the definition in Chapter 301. OPIC commented that in §321.38(d) the reference to Chapter 301 is inappropriate. Chapter 309 is a more appropriate reference. This subsection should be changed to read: "All control facilities, including holding pens and RCSs, shall be located outside the one- hundred year flood plain unless the facility is protected from inundation and damage that may occur during the flood event."

The commission agrees with the comment and has changed the rule language in §321.38(d) to be consistent with the definition in Chapter 309.

Mayor Ethridge and Waco commented that prior to issuing permits, including renewals, all RCSs should be re-certified based on contemporaneous measurements in §321.38(e).

The commission disagrees that all RCSs require recertification prior to permitting or prior to renewal of a permit. The commission has the authority to require recertification in the individual permitting process; and may also place a special provision in the permit requiring recertification. The commission also has the authority to require the recertification to be performed by a licensed Texas professional engineer when documentation of design rainfall event is unavailable as specified in §321.38(e)(4) and (5). Certifications will not be available for new construction or modifications of RCSs prior to permitting because the permit would authorize such construction. Additionally, §321.46(c) requires a third-party evaluation of an RCS by a licensed Texas professional engineer every five years. The commission did not make any changes to the rule in response to this comment.

OPIC commented that §321.38(e)(4) does not make it clear that the commission will review sizing of volume available in control structures prior to initial authorization. OPIC also requested clarification on the relationship between this subsection and §321.38(e)(5) and asked if the RCS needs to meet both provisions or only one or the other?

The commission responds that it requires all CAFOs to maintain documentation that the RCS design will contain the 25-year, 24-hour rainfall event or other appropriate design standards in the PPP and make it available upon an inspection.

In general, §321.38(e)(4) applies to any existing RCS that has not been modified, has been properly maintained, and has no apparent structural problems or leakage. Additionally, for those facilities designed by the NRCS, the requirements in §321.38(e)(5) would also apply. Such facilities can meet the requirements of §321.38(e)(4) because NRCS standards at the time of construction would meet applicable state and federal design and capacity requirements.

The commission made no changes to the rule in response to this comment. However, the commission made changes to this section to clarify that any modification of RCSs must be documented to meet rules in place at the time of the modification. The commission also made a change that the facilities built under NRCS plans and specifications must be documented.

Mayor Ethridge and Waco commented that water volumes should be included in §321.38(e)(7)(B) as components of the hydrologic needs analysis because they are critical components of a water balance and that these were included in an earlier version.

The commission agrees that one of the critical components of the water balance had been omitted. The commission changed the rule to add a 21-day minimum storage requirement for process wastewater to reflect the previous rule requirements.

NRCS commented that the phrase "that demonstrates the irrigation water requirements for the cropping system maintained on the LMU(s)" should be deleted from §321.38(e)(7)(B)(i).

The commission responds that this provision has been modified to indicate that the irrigation volume from the RCS may not exceed the hydrologic needs of the crop and the RCS must contain adequate storage volume in accordance with the water balance analysis.

TCFA commented that freeboard requirements are not clear.

The commission responds that the term "freeboard" is no longer in the rules. However, §321.38 specifies the requirement for a minimum of two vertical feet of material between the top of the embankment and the spillway. Additionally, this section specifies requirements for RCSs that do not have a spillway. The commission made no changes in response to this comment.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.38(g) should be revised by adding "A RCS that has been properly maintained and shows no sign of structural problems or leakage is considered to be properly designed and constructed, provided that any required documentation was completed in accordance with the requirements at the time of construction."

The commission revised §321.38(g) to delete "new construction and for all structural modifications of" because subsection (g) applies to new and existing RCSs. The commission also revises §321.38(g)(1) and (2) to specifically apply to new construction and structural modifications of RCSs. Section 321.38(e) states that any existing RCS that has been properly maintained and has no apparent structural problems or leakage is considered to be properly designed and constructed provided that any required documentation was completed in accordance with the requirements at the time of construction.

The commission has made a change in response to this comment. Additionally, in order to clarify that these specifications apply to the RCS and not just the RCS embankment, the commission removed the word "embankment" from the end of the first sentence of the text.

OPIC commented that technical standards for embankment construction should be included in §321.38(g)(1).

The commission disagrees with this comment. These provisions require certification for the design and construction of these facilities. As part of professional registration, acceptable practices are required. Therefore, it is not necessary to include the specifications in the rule.

Mayor Ethridge and Waco commented that in §321.38(g)(3)(B) both sentences in the subparagraph are grammatically incorrect and should be reworded.

The commission agrees with this comment and has reworded §321.38(g)(3)(B).

OPIC commented that in §321.38(g)(3)(C) liner design and construction standards should be outlined in the rules.

The commission disagrees with the comment to place the standards for liner design and construction in the rules. The liner design and construction will be certified by a licensed Texas professional engineer in accordance with Texas Administrative Code, Title 22, Examining Boards, Part 6, Texas Board of Professional Engineers, Chapter 131 Practice and Procedures, which requires the use of good engineering practice. No change was made to the rule in response to this comment.

OPIC stated that proposed §321.38(g)(3)(C) is inappropriate because the requirements allow a geoscientist to certify the integrity of an RCS liner. The comment also points out that the Texas Geoscience Practice Act (TGPA) states that the review, analysis, and evaluation of an engineered structure is subject to the Texas Engineering Practice Act (TEPA) which limits the evaluation of such a structure to only a licensed engineer.

The commission agrees with the comment and the importance of ensuring the adopted amendments are consistent with both the TEPA and the newly-enacted TGPA that became law in 2001. In response to the comment, the commission reviewed the subchapter to ensure the amended rules do not conflict with the two laws and adopts revisions to this subparagraph and also revised §§321.34(f)(4), 321.39(b)(5), 321.46(c)(1), and 321.47(e)(7) in response to this comment. The changes to §321.38(g)(3)(C) specify that design and construction of an RCS liner requires certification by a licensed Texas professional engineer. The changes to §321.34(f)(4) ensure only appropriately qualified individuals address recharge features with plans that may include installation of protective measures, conducting groundwater monitoring, or plans describing other approaches to protect a recharge feature. The changes to §321.39(b)(5) and §321.47(e)(7) delete the identification of an NRCS engineer, since the engineering work identified by the requirements must be performed by a licensed Texas professional engineer. It is not relevant and could raise confusion to identify some special class of engineer or agency affiliation of an engineer. Further, the commission received information from the NRCS indication that deletion of the term "NRCS engineer" should not have a negative impact on NRCS operations. The changes to §321.46(c)(1) delete identification of an NRCS engineer and a geoscientist and solely identifies that a licensed Texas professional engineer must conduct the site evaluation of the engineering documentation associated with the RCS. The commission notes that the TGPA identifies mechanisms whereby the Texas Board of Professional Engineers and the Texas Board of Professional Geoscientists may further clarify the roles of qualified professionals when evaluation, design, or construction involve both geoscience and engineering aspects.

OPIC commented that the rules should explicitly set forth that a site-specific assessment must demonstrate equivalent or greater effectiveness of default standards and should clearly state that the site-specific assessment must be completed prior to issuance of the permit.

The commission agrees that the site-specific assessment must demonstrate equivalent protection to the standards set forth in the rule. The commission disagrees that this must be completed prior to issuance of the permit, as an individual permit should be received prior to construction.

OPIC stated that infiltration in the last sentence of §321.38(g)(3)(C) refers to movement of liquid into a container and that the rule requirement is to prevent movement out of the structure and suggested specific language regarding site-specific conditions that may be considered in the design and construction of liners.

The commission agrees with the comment and reworded the language consistent with the comment.

Waco commented that in §321.38(h) manure in roofed storage areas should be protected by berms to prevent run-on.

The commission disagrees that berms are required to prevent run-on. A discharge from manure and litter storage areas is prohibited, regardless of whether the area is roofed or not. The rules provide flexibility for the operator to implement appropriate BMPs to meet the limitations of the rule. BMPs are more appropriately site-specific and should not be dictated by the rule. The commission declines to make this change.

§321.39. Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).

OPIC commented that §321.39(b)(5) should include a provision that requires any mechanical or structural damage to a liner be

inspected within 30 days by a United States Department of Agriculture NRCS engineer or a licensed professional engineer.

The commission agrees that mechanical or structural damage to a liner should be inspected by a qualified person in a timely manner and made this change to the rule language.

NRCS commented that the current wording in §321.39(b)(2) will not require proper waste storage pond management. NCRS commented that the proposed rule should include wording from an earlier draft of the rule "the CAFO operator shall irrigate until the water level is at or below the planned operating level expected during that month."

The commission did not make changes to the rule based on this comment. The adopted rule language requires that the normal operating wastewater level must be maintained within the design parameters. The rule prohibits a discharge except as a result of the design rainfall event provided that the control facility is properly designed, constructed, operated, and maintained. The rule contains operation and management requirements for control facilities, including RCSs, to ensure that the limitations of the rule are met by maintaining the water level below the design rainfall level. The commission declines to make this change.

Regarding §321.39(b)(3), Mayor Ethridge and Waco commented that during conditions for imminent overflow samples of discharge should be collected at an RCS and not from a discharge from a LMU or samples should be collected from both.

The commission disagrees that samples should be taken from an RCS since a sample analysis would not reflect the actual water quality affecting water in the state. The requirement to sample the discharge from the LMU provides a more representative analysis of pollutants in the discharge. However, to clearly state where the sampling point must be located, the commission revised this provision to indicate the sample must be taken from the drainage pathway extending from the LMU which is the source of the discharge.

OPIC commented that §321.39(b)(3) should be clear that a discharge resulting from mismanagement of the CAFO will not be excused because it occurs during a rainfall event.

The commission agrees that mismanagement of the CAFO does not authorize a discharge due to rainfall events. The provision as written requires notification to the regional office. If there is mismanagement, enforcement will be initiated when necessary. Provisions in §321.37 state that a discharge is only allowed as a result of a chronic or catastrophic rainfall event or catastrophic conditions from an RCS that has been properly designed, constructed, operated, and maintained. The commission did not change the rule in response to this comment.

TPPA and TCFA recommended language between §321.39(b)(3) and (4) regarding repairs to embankments and additional discharges from the RCS with the damaged embankment shall be allowed until the CAFO operator has repaired the embankment or has had a reasonable opportunity to make the repair.

The commission acknowledges the potential for damage to embankments that could result in a discharge. However, the CAFO operator is responsible for maintaining compliance with requirements of the rule pertaining to proper design, construction, operation and maintenance of RCSs. In a situation like this, the commission would encourage the permittee to coordinate with the commission's regional staff to minimize impacts. The commission declines to make this change.

OPIC commented on existing §321.38(g) indicating that it is appropriate to allow a geoscientist to carry out certain requirements that are engineering practices.

In response, the commission revised §321.39(b)(5) to remove the identification of an NRCS engineer to evaluate damage to an RCS liner. The engineering work identified by the requirements must be performed by a licensed Texas professional engineer. It is not relevant and could raise confusion to identify some special class of engineer or agency affiliation of an engineer. Further, the commission received information from the NRCS indicating that deletion of the term "NRCS engineer" should not have a negative impact on NRCS operations.

Mayor Ethridge and Waco commented that §321.39(c) should include a specific schedule for checking sludge depth, not less than once per year, and that additional language should be added to ensure that sludge will be properly disposed.

The commission disagrees with a mandatory schedule for checking sludge depth because the rules prohibit sludge accumulation from exceeding the design volume. This is achieved by removing the sludge according to the design schedule for cleanout, which is based on the facility layout, animal type, treatment processes, amount of processed wastewater, and other site-specific information. The schedule for checking sludge depth should be based on the cleanout schedule and the accumulation rate, rather than a fixed schedule, to avoid unnecessary expenses that would not enhance environmental protection. The commission declines to make this change.

Representative McReynolds commented that in §321.39(d) dry litter poultry facilities do not use retention ponds and should also be exempt from spill prevention and recovery provisions. One- hundred and eighty-six individuals commented that in §321.39(d) the preparation of spill prevention and control plans for dry broiler/breeder operations is unnecessary and not affordable. TPF commented that in §321.39(d) the preparation of spill prevention and control plans for dry poultry facilities is an additional cost which is not needed for environmental protection for these operations. If they are required, they should not be held to the EPA Spill Prevention Control and Countermeasures (SPCC) rules and regulations. Provision should be revised to "Spill Prevention and Recovery. *Any*CAFO operator *utilizing a retention control structure and storing significant quantities of toxic pollutants on site* shall develop . . .."

Previously, Subchapter B allowed poultry operations operating under a CWQMP from the TSSWCB to not be treated as a CAFO and to not be covered by the provisions of the subchapter unless referred to the commission for enforcement purposes. In February 2003, EPA included dry litter poultry operations as CAFOs in the new federal regulations. 40 CFR §122.42(e)(1)(v) requires CAFOs to ensure that chemicals and other contaminants handled on site to not be disposed of in any manure, litter, process wastewater, or stormwater storage or treatment system unless specifically designed to treat such chemicals and other contaminants.

The commission agrees that developing written procedures for spill prevention and recovery creates an additional cost. However, the commission determined that it would be appropriate to continue the existing state requirement for spill prevention and recovery. It is necessary because all CAFOs including dry litter poultry operations use toxic chemicals such as herbicides and

pesticides for animal production and crop management. This requirement is not meant to satisfy an EPA SPCC. The federal EPA SPCC requirements are not included in these rules. Therefore, the commission deleted the requirement for development of this plan and revised the rule to reflect previous rule language, which prohibits these chemicals from entering the RCS and establishes that appropriate measures must be taken if spills occur.

TPPA and TCFA requested to delete the first sentence in §321.39(d) which requires written procedures to be developed for spill prevention and recovery. Neither federal rules nor the current Subchapter B rules require this.

The commission acknowledges the concern caused by the provision requiring written procedures to be developed for spill prevention and recovery plans. The commission will replace "written procedures to be developed for spill prevention and recovery" provision with language from the existing Subchapter B rules relating to potential spills. The commission made this change in response to this comment.

Waco commented that in §321.39(e) manure stored in roofed areas should be protected by berms to prevent run-on.

The commission disagrees that berms are required to prevent run-on. A discharge from manure and litter storage areas is prohibited, regardless of whether the area is roofed or not. The rules provide flexibility for the operator to implement appropriate BMPs to meet the limitations of the rule. BMPs are site-specific and should not be dictated by the rule. The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.39(f) composting does not remove P. The proposed rule does not address application restrictions for compost. Mayor Ethridge and Waco commented that it should be restricted in a major sole-source impairment zone.

The commission disagrees that specific provisions are necessary to restrict land application of composted material in the major sole-source impairment zone. Land application rates, regardless of nutrient source, are established by the NMP. Therefore, the nutrient content of the composted material would have to be determined prior to land application in order to comply with the application rate established by the NMP. There are several existing requirements governing composting and compost use. In 30 TAC Chapter 332, the commission established the statewide requirements applicable to composting. A general permit establishes requirements for persons who compost manure. This rulemaking adopts provisions in §321.39(f) that include BMPs when composting areas are located at a CAFO. Additionally, the Texas Department of Transportation (TXDOT) contracts establish restrictions and BMPs when compost is utilized in road construction and maintenance activities. Composting associated with grant funding from a nonpoint source pollution grant includes restrictions. The commission declines to make a change to the rule.

OPIC recommended language to be included in the last sentence of §321.39(f) regarding composting areas.

The commission responds that §321.39(f) requires that if the compost areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the compost areas must be located within the drainage of the RCS and must be shown on the site plan and accounted for in the design calculations of the RCS. The commission disagrees that compost areas located outside of the drainage area of the RCS must be roofed or covered in impermeable material, protected from external rainfall, *and* bermed. The operator can use site-specific information to determine which one of these BMPs to use to prevent a discharge from the compost area. The commission declines to make changes based on this comment.

§321.40. Concentrated Animal Feeding Operation (CAFO) Land Application Requirements.

Mayor Ethridge and Waco commented that §321.40(b) should be revised because the land application of manure, litter, or wastewater at agronomic rates to meet the crop requirements and hydrologic needs shall not be considered surface disposal and is not prohibited.

The commission disagrees that the words "crop requirements" should be added to this provision. Crop requirement is considered in determining agronomic rates; therefore, it would be redundant to state "agronomic rates to meet the crop requirement." The commission declines to make this change.

Mayor Ethridge and Waco commented that §321.40(c) should be revised because manure, litter, or wastewater may be applied to the areas in the 100-year flood plain at agronomic rates not to exceed the crop requirement and hydrologic needs of the crop.

The commission disagrees that the words "crop requirements" should be added to this provision. Crop requirement is considered in determining agronomic rates; therefore, it would be redundant to state "agronomic rates to meet the crop requirement." The commission declines to make this change.

Mayor Ethridge and Waco commented that in §321.40(d) discharge of manure, litter, or wastewater should be prohibited at all application sites (including third-party fields), not just LMUs.

The commission disagrees that third-party fields should be included in this provision. In general, unauthorized discharges from any source are prohibited under TWC, Chapter 26. Specifically for major sole-source impairment zones, §321.42(j) includes prohibitions based on written contracts between the dairy operator and the third-party recipient that establish responsibility for waste management and discharges at a third-party site. The commission declines to make this change.

In §321.40(d), OPIC supports confirmation that the flow of contaminants from an LMU as a result of mismanagement constitutes a prohibited discharge.

The commission acknowledges this comment. Section 321.33(j)(1) requires proper land application of manure, litter, and wastewater to an LMU in order for any runoff to be allowed under the rules.

OPIC noted that a closed parenthesis is missing at end of the first sentence in §321.40(g).

The commission acknowledges that the first sentence is grammatically incorrect by not having the closed parenthesis at the end of the sentence. The commission made this change in response to this comment.

OPIC noted that "CAFOs operator" should be "CAFO operator" in §321.40(h).

The commission acknowledges that this sentence is grammatically incorrect by having the word CAFO plural. The commission made this change in response to this comment.

Mayor Ethridge and Waco commented that §321.40(h) should require a 50-foot buffer between LMUs and adjoining property and public roads.

The commission disagrees that a 50-foot buffer should be required between LMUs and adjoining property and public roads. Land application of manure, litter, or wastewater to adjoining property or public roadways would constitute an unauthorized discharge. The operator is allowed the flexibility to use site-specific information to determine the appropriate BMPs to adhere to the limitations of this rule.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.40(h) should be revised with insertion of the following language from EPA rules: "As a compliance alternative, the CAFO may substitute the 100 foot setback with a 35-foot wide vegetated buffer where applications of manure, litter, or process wastewater are prohibited." Additionally, TCFA commented that the EPA language uses "watercourse" and that the proposed rules need to be consistent with the federal language and not go beyond that requirement.

The commission responds that the agency's existing regulations require CAFOs to maintain a 100-foot vegetative buffer, in accordance with NRCS specifications, between surface water and watercourses and LMUs. This buffer has been effective in Texas to reduce polluted runoff from LMUs. Although the EPA rules allow the buffer to be reduced to 35 feet, based on the potential to have a negative effect on water quality, the commission declines to make this change.

TCFA, TSGRA, TPPA, and TFB commented in §321.39(h) that buffer variances for center pivot sprinkler systems should be granted in all instances which are not precluded by federal rules. They suggested that a sentence be added that where center pivot sprinkler systems are used for wastewater application, neither a setback nor a buffer from the edge-of-field is required, unless a 100- foot (or 35-foot, with a vegetated buffer) setback is required to protect water of the United States.

The commission agrees that the federal CAFO rules include a provision for compliance alternatives to the 100-foot setback. If wastewater is irrigated with a low-pressure, low-profile center pivot system in an area of the state with an annual average rainfall of 25 inches per year, it would satisfy the compliance alternative. The commission agrees to revise §321.40(h) to allow the alternative.

NRCS commented that in §321.40(j) nighttime application should not be allowed unless equipment has automatic shutdown or remote warning systems. TCE commented that in §321.40(j) nighttime application of wastes should be prohibited except under catastrophic conditions and then it should be monitored every two hours.

The commission declines to make changes to the rule based on this comment. Statewide, the agency has not documented substantial problems occurring as a result of nighttime land application. Therefore, this provision would constitute a significant economic burden to the CAFO industry without enhanced environmental benefit. In areas of the state where this problem has caused impacts to water quality, the commission may require that these provisions be implemented for operations that have discharges from the irrigation system.

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.40(k)(3) should be revised by re-inserting language from previous drafts of the rules and in §321.47(g)(1) of the current proposal to establish P thresholds. The commenters suggested language that after a NUP is implemented in a major sole-source impairment zone, the operator shall land apply in accordance with the NUP until soil P is reduced below 200 ppm. The commenters stated that since CAFOs outside a major sole-source impairment zone may apply P according to P index, it may be allowed above 200 ppm.

The commission agrees that the critical P level, recommended by the P index analysis, may deviate from 200 ppm due to site-specific risk factors. For individual permits, the commission will evaluate site-specific information, such as the P index, to determine the appropriate soil P concentration at which a NUP must be developed. To address the comments, the commission agrees to revise §321.40(k)(2) from P limit to critical P level and revise §321.40(k)(3) from 200 ppm to the critical P level.

TCE requested to delete "American Registry of Certified Professionals in Agronomy, Crops and Soils" and replace with "a Certified Professional Agronomist certified through the certification program of the American Society of Agronomy, a Certified Professional Soil Scientist certified through the certification program of the Soil Science Society of America, or a licensed geoscientist-soil scientist in Texas" in §321.40(k)(3) because the American Registry of Certified Professionals in Agronomy, Crops and Soils is no longer a certifying group.

The commission revised the rule to state the proper certifying entity.

Mayor Ethridge and Waco commented that §321.40(k)(3) needs to be revised because after a NUP is implemented, the operator shall land apply in accordance with the NUP until soil P is reduced below 200 ppm. Mayor Ethridge and Waco additionally commented that the word "will" after NUP is grammatically incorrect and stated that there is confusion about NMPs and NUPs. Mayor Ethridge and Waco also commented that there needs to be clarification as to operator obligation under the NUP before soil P is reduced below 200 ppm and their obligation thereafter under the NMP. Additionally, Mayor Ethridge and Waco commented that the purpose of the last sentence is unclear.

The commission agrees that the phrase "in accordance with the NUP will until soil . . ." is grammatically incorrect and the sentence has been revised to strike the word "will." The commenter requested clarification about NMPs and NUPs. The commission responds that an NMP (NRCS Practice Standard Code 590) accounts for all nutrients, generated by the CAFO, and establishes a sustainable application of manure, litter, and wastewater to the LMUs. It also establishes the appropriate application rate based on crop requirements and considers the P index to determine the risk potential for runoff. A NUP is a short-term management tool to address soil P concentrations that exceed the critical P level. This plan is based on crop removal rate to reduce the soil P concentrations. The NUP must be followed until the soil P concentration is reduced to below the critical P level. At that point, the CAFO operator must manage the LMU in accordance with an NMP. Until the NMP is required, CAFOs must follow the land application provisions of this section.

OPIC commented that a new subsection (l) should be added in §321.40 requiring LMUs of adequate size to enable the rapid pumping of RCS levels at a CAFO to safe levels.

The commission disagrees with this comment because the size of the LMU is only one element in managing wastewater levels under imminent overflow conditions. Irrigation equipment and soil permeability rates influence how fast wastewater levels can

be lowered. By designing, constructing, operating, and maintaining the RCS according to the effluent guidelines, conditions that would contribute to the need for rapid reduction of wastewater levels should be minimized. The commission declines to make this change.

§321.42. Requirements Applicable to the Major Sole-Source Impairment Zone.

TAD commented that it appreciated efforts of the commission to incorporate recommendations from "white papers" developed by stakeholder group led by Congressmen Stenholm and Edwards. TAD expressed appreciation for agency efforts to involve stakeholders in the rulemaking process. TAD also recognized the cooperative efforts by the Natural Resource Conservation Commission, the TSSWCB, the Brazos River Authority, the Texas Water Development Board, and the Texas Department of Agriculture.

The commission acknowledges the comment.

Mayor Ethridge and Waco commented that by postponing enforceable regulations on dairies with regard to P, the commission is also delaying any effort to address in any way the concerns about bacteria as noted on page 3 of the TMDL implementation plan.

The commission disagrees that implementation of the TMDL is being postponed. In fact, adoption of this rule is a key step in assisting with the implementation of the TMDL. Additionally, while permit applications are processed for CAFOs in the North Bosque River Watershed, the commission is incorporating the requirements of the TMDL implementation plan at this time as permits are issued. While noted in the TMDL implementation plan as a corollary benefit, the commission continues to list the North Bosque River as impaired due to bacteria concentrations. Instream monitoring data over the next few years may show whether the corollary benefit actually occurs or not.

Mayor Ethridge and Waco commented that the rules continue to authorize discharges from RCSs even though the EPA's approval of the TMDL was based on the assumption that there was no load allocation for RCS discharges.

The commission disagrees with this comment. The TMDL, and more importantly the subsequent implementation plan, allocated an overall "percent reduction" of loading from dairy operations, relative to the loading that occurred during the mid-1990's, and estimated that reduction to be approximately 50% over the entire North Bosque River Watershed. The load reduction target did not distinguish between loading from RCSs and from waste application fields, because data and analyses could not effectively separate them. The adopted rule does contain provisions such as RCS management plans, graduated pond marker, larger margin of safety, and overflow reporting, etc. that will reduce the probability of occurrence of discharges significantly from the RCS. No changes have been made to the rules in response to this comment.

Mayor Ethridge and Waco commented that the rules will not attain objectives of TMDLs for the North Bosque River because they do not include means to achieve BMPs (50% collectible waste haul- out) and assumptions (200 ppm in existing LMUs) upon which the TMDLs were based. Mayor Ethridge and Waco commented that over-application of manure to on-site and third-party LMUs would be allowed despite an assumption in TMDLs of 50% waste removal from the watershed.

The commission disagrees with the comments. Federal regulations do not require a TMDL implementation plan's processes to be included in state regulations. The adopted §321.42 contains special provisions that are more stringent than federal regulations. Section 321.42 is similar to portions of the implementation plan and is predicated on TWC, Chapter 26, Subchapter L, and the Bosque White Papers. Most importantly, adopted §321.42 applies to all dairy CAFOs in a major sole-source impairment zone, not just new or expanding dairy CAFOs as required by TWC, §26.503.

The commission approved the TMDL Implementation Plan for the North Bosque River on December 12, 2002. This plan identifies a goal to seek removal of 50% of the manure from the watershed. However, the commission's plan is clear that it will seek this goal primarily through voluntary means. Further, this goal was never assumed to be the sole and exclusive plan for dairy manure waste management.

In addition, TWC, Chapter 26, Subchapter L, assists with the implementation of the TMDL and implementation plan by identifying several alternatives for waste management, including other beneficial uses approved by the executive director. In view of all ongoing implementation activities, there is no current reason to mandate manure removal by rule, precluding a variety of other alternative waste management methods.

Haul-out of manure was described in the North Bosque Implementation Plan as a voluntary measure that CAFOs can take advantage of the compost project in the watershed. The implementation plan also indicates that if dairies do not choose to use the voluntary measures, or when the compost nonpoint source grant program ends, they will have to achieve the percent reduction target via the regulatory measure, which is comprehensive P-based waste management. The adopted rule requires PPPs and CNMPs for CAFOs in the North Bosque River Watershed, and those plans account for voluntary elements of waste management like haul-out and dietary-P levels. When waste is properly managed and land-applied consistent with P-based plans, there will be little export of P to the stream system will be substantially reduced regardless of the percentage of total waste applied to an LMU.

Section 321.42 requires additional restrictions for third-party fields operated in the major sole-source impairment zone. That section adds a new provision to require permits for existing dairy CAFOs in the major sole-source impairment zone to allow the operator to provide manure, litter, and wastewater to operators of third-party fields that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. Specifically, the amended rule requires: 1) a written contract between the dairy operator and the recipient; 2) dairy CAFO operators may not deliver manure, litter, or wastewater to a third party once the soil test P analysis shows a level equal to or greater than 200; 3) annual samples of third-party fields by a nutrient management specialist; and 4) submittal of records to the appropriate regional office quarterly. This provision was added to allow effective utilization of nutrients on nutrient deficient soils throughout the watershed and will reduce additional land application to existing LMUs at the CAFO. This is intended to reduce the potential for P runoff from the CAFO LMUs. No changes have been made to the rules in response to this comment.

Mayor Ethridge and Waco commented that nothing in the proposed rules will promote attainment of TMDLs other than conversion to a 25-year, ten-day standard for RCSs and this will not promote attainment if the SPAW model is used and management

practices are not strictly enforced. Mayor Ethridge and Waco commented that the proposed rules contain no effective mechanism for assuring that sizing of RCSs to contain the 25-year, ten-day storm will be attained or means to provide enforceable check on SPAW modeling or RCS recertification based on contemporaneous inspections.

The commission responds that the Stephenville field office was created to specifically inspect and enforce permit requirements, including RCS management. The commission is committed to enforcement of proper management practices for all dairies within the major sole-source impairment zone. The TMDL can be attained through the use of the SPAW model. The frequency of the occurrence of any 25-year storm has less than a 4% chance of occurring in any given year. The commission will provide guidance on an as needed basis and will require the use of a data set which includes the severe rainfall that the Bosque River Watershed received during the mid-1990s. The commission made no change to the rule in response to this comment.

Mayor Ethridge and Waco commented that the proposed rules allow application of waste and wastewater to fields with more than 200 ppm even though the waste application field area was modeled at 200 ppm (13% of the area that had had waste applied) and 60 ppm (87% of the area that waste had not been applied).

The commission responds that the model conditions simulate conditions existing or expected in the watershed on a broad scale based on the information available at the time. The model analyses indicated the extent to which stream loading can be reduced, which became the target of the TMDL and implementation plan. Soil P concentrations are addressed by the requirement for PPPs and CNMPs, which are based on site-specific conditions and analyses. Achieving soil conditions identical to the broad-scale watershed model simulation is not a goal for the TMDL or implementation plan, nor appropriate as a requirement within the rule. The rules require dairy CAFOs in the major sole-source impairment zone with LMUs with soil P concentrations above 200 ppm to contract with a nutrient management specialist to develop and implement a NUP to reduce P. The NUP is a site-specific risk evaluation of the potential for runoff from the LMU based on several factors. The commission has not changed the rules in response to this comment.

Mayor Ethridge and Waco commented that waste and wastewater not be applied at a rate greater than the annual crop requirement of P on LMUs.

The commission responds that it is committed to enforcement of the criteria for soil test P and implementation of the more restrictive management practices included in this rule. Available data on soil test P from peer reviewed research and consultation with soil scientists from universities and federal and state agencies have not clearly demonstrated that P levels in excess of the annual crop requirement of P for LMUs with a P content below the established criteria of 200 ppm will run off. This assumption is based on the proper management of land application when manure, litter, and wastewater are applied according to this rule. The commission has not changed the rules based on this comment.

Mayor Ethridge and Waco commented that the number of dairy cows at CAFOs and AFOs in the North Bosque River Watershed should be limited to the number modeled in arriving at the approved TMDL (40,450).

Dairy operators must comply with water quality requirements regardless of the number of head at an individual facility or the total number within a watershed. A TMDL is an evaluation of the loadings of a pollutant of concern and the implementation plan describes how to achieve reductions in loadings. Most importantly, a TMDL contains estimates to reduce loadings of the pollutant of concern to meet water quality standards. Neither federal regulations relating to TMDLs nor the Bosque River TMDL limit the number of animals at a CAFO in an impaired watershed. Water quality regulations limit the amount of pollutant discharged from a CAFO production area. For example, the commission does not limit the amount of waste that can enter a waste management or treatment system, but does regulate the effect discharges from the waste treatment system have on receiving waters. The commission does not limit the production capacity of the dairy industry, by limiting the number of cows allowed in the watershed, but does require proper management of CAFO operations.

The commission did not change the rule in response to this comment. Required elements of a TMDL include a consideration of both point and nonpoint sources of pollution and their relative contribution to the impairment. The modeling procedures used to support the development of the TMDL for the Bosque River Watershed include conservative assumptions to provide some compensation for the inherent variability of the complex interactions of the natural ecosystem. Placing limitations on the production capacity of individual sources of the pollutants raises questions regarding the control of either point sources or nonpoint sources. If reductions in pollutant loading from point sources such as municipal wastewater treatment plants are required to achieve the applicable water quality standards, that reduction is generally accomplished by changes in the wastewater management and treatment process rather than by placing a limit on the individual contributions to the wastewater. Even though portions of most CAFOs and some AFOs are considered to be point sources, the nonpoint source contributions from these facilities had to be considered for development of the TMDL. Changes in BMPs for management and land application to achieve the needed reduction in pollutants from nonpoint sources is preferable to placing production limits on the individual sources.

OPIC supports the addition of management standards applicable to dairy CAFOs within a sole- source impairment zone in §321.42.

The commission acknowledges this comment.

OPIC supports the use of the Mehlich III soil test method, but commented that the rules should also include a requirement that sampling be performed in accordance with TCE soil sampling guidelines.

The commission did not make changes in response to this comment. The commission appreciates the support for the Mehlich III soil test analytical method. The requirement for this procedure is based on continued review of soils related to research reported in referenced journals and consultation with soil scientists from universities and federal and state agencies. The rules require that soil samples be collected in accordance with procedures described in the agency's publication "Soil Sampling for Nutrient Utilization Plans (RG-408)." This document is based on TCE soil sampling guidelines and was subjected to extensive peer review prior to publication.

TCE requested to delete "concentrated animal feeding operations (CAFOS)" and add "CAFOs" in §321.42(a).

The commission declines to make this change. *Texas Register* formatting preferences dictate that the initial use of a word or term in each section that will be referenced to by an abbreviation or acronym be spelled out the first time it is used.

TPF commented that §321.42(a) and (t) should be revised by adding the word *dairy* before "CAFO" in each item.

The commission agrees with this commenter. The commission notes that no change is necessary to subsection (a) since each reference to a CAFO or AFO includes the term "dairy." However, the requested change has been made to subsection (t) to make the intent of the scope of this subsection accurate.

CCW commented that in §321.42(c) RCSs should be designed and operated to contain a 25- year, ten-day rainfall (12 inches).

The commission acknowledges this comment and adopted this as one method to satisfy the margin of safety.

OPIC commented that §321.42(c)(2) should include specific guidelines for SPAW model parameterization and interpretation of outputs.

The commission disagrees that the rule should include specific guidelines. The SPAW model may only be used in applications for individual permits which will undergo a detailed technical review. The assumptions will be documented in the individual permit as special provisions that will be enforceable. If necessary, the commission will provide guidance on the use of SPAW. The commission has not made any changes to the rules in response to this comment.

Mayor Ethridge and Waco commented that in §321.42(c)(2) in the use of a SPAW model no design should be allowed that would be less than required from simply using the 25-year, 24-hour event.

The commission agrees that, at a minimum, the rule requires that the RCS must be able to contain the 25-year, 24-hour event. This will be checked during the review of the individual permit application. The commission did not make any changes in response to this comment.

Mayor Ethridge and Waco commented that in §321.42(d) there are words missing at the end of the sentence after "must be." OPIC proposed a clarifying change in §321.42(d). NRCS requested to delete "that must be" and replace with "required margin of safety" in §321.42(d). TCE commented that §321.42(d) does not make sense and suggested that "that must be" might need to be deleted.

The commission modified this subsection by adding the words "maintained in the RCS." These words were inadvertently left out of the sentence.

Mayor Ethridge and Waco commented that the SPAW model is a design tool, not an enforcement tool. Additionally, Mayor Ethridge and Waco commented that dairies should be made aware that RCSs must be managed in accordance with assumptions that go into the model. Mayor Ethridge and Waco also commented that margin of safety is one discharge in 25 years and that any discharge that occurs as a result of any event smaller that the 25-year, ten-day event will be occurring more than once in 25 years, and would thus be an unauthorized discharge. One individual commented that in §321.42(c) the use of SPAW model in rule is vague, complex, and difficult to enforce.

The commission acknowledges that SPAW is a design tool. However, the design assumptions used in the SPAW model will be documented in the individual permit as special conditions. These are expected to include the level at which the irrigation pumps will be operated, the minimum capacities of the irrigation pumps, the crop systems and size of irrigation area, the size of the area which will be contained by the RCS, and the expected operating parameters. During the review, additional requirements may be added, including the expected volume added to the pond after a certain amount of rainfall. These special provisions will be enforceable and provide the tools for the commission to determine whether the operation is in compliance with their permit and representations in the SPAW model.

One individual commented that §321.42(d) should not allow overflow of raw, untreated waste from CAFO holding ponds in the Bosque River Watershed.

The commission did not make any changes in response to this comment. The additional margin of safety greatly decreases the occurrence of an overflow. A prohibition on discharges from an RCS is unnecessary for water quality protection, nor is a prohibition economically achievable.

Mayor Ethridge and Waco commented that in §321.42(e) the compliance schedule for construction of a new or modified RCS should not be more than one year.

The commission disagrees with a limitation of one year for a compliance schedule to construct adequate facilities to comply with subsections (c) and (d). The existing requirements of the TPDES program, including the requirements of 30 TAC §307.2(f) adequately address time limits for compliance schedules. In this provision, a compliance schedule may be granted in a permit for up to three years. A shorter compliance schedule could be required depending on site-specific conditions.

Mayor Ethridge and Waco commented that §321.42(h) does not have adequate requirements to determine that ponds designed with SPAW are managed properly. Mayor Ethridge and Waco added that if the water level in the RCS exceeds the projected monthly level more than three months in a row or four times in a given year, the operator should enlarge the RCS.

The commission responds that exceedance of the projected monthly level does not always constitute an encroachment into the margin of safety. The commission disagrees that just because the water level exceeds that expected level in a given number of months, the RCS must be enlarged. The commission cannot predict when the amount of rainfall at the CAFO will exceed those used in the SPAW model or when circumstances exist that the water level is not maintained. The field staff will review the documentation by the CAFO operator to determine if the justification for exceeding the projected water level for a given month is reasonable. The commission made no changes to the rule in response to the comment.

Mayor Ethridge and Waco commented that an annual certification by a professional should be required which certifies that each RCS has been continuously operated in accordance with its design.

The commission disagrees that another certification should be required. The commission is currently conducting annual inspections for CAFOs in the North Bosque River Watershed which verifies compliance with the commission's rules and permit requirements. The commission made no changes to the rule in response to the comment.

Mayor Ethridge and Waco indicated that the commission told the court in litigation that often RCS levels cannot be lowered because the liner must remain wet so that it does not crack. Mayor Ethridge and Waco asserted that this must not be used as an excuse for not meeting projected monthly depths, and this provision should provide so. Mayor Ethridge and Waco stated that if a cracking liner is an issue in that area of a lagoon designed for fluctuating water levels, then some other liner design should be used.

The commission responds that the rules require a CAFO operator to manage the level in the RCS in order to provide sufficient capacity for a chronic or catastrophic rainfall event. The commission requires CAFO operators to maintain the RCS wastewater levels and the required margin of safety. This does not authorize the operator to exceed sludge design and maintenance requirements by claiming that the RCS level could not be changed in order to protect the liner.

One individual commented that §321.42(i) should require removal of manure from the Bosque River Watershed. Mayor Ethridge and Waco commented that over-application of manure to on-site and third-party LMUs would be allowed despite an assumption in TMDLs of 50% waste removal from the watershed. Sierra Club commented that in §321.42(i) provisions for the Bosque River Watershed do not require haul-out or composting of solid waste produced, but allows other options as well and is contrary to the TMDL implementation plan. EPA suggested that the rules should include provisions which address recommendation in the TMDL implementation plan for removal of about half of the collectable dairy-generated manure from the North Bosque Watershed.

The commission disagrees with the comments. The commission approved the TMDL implementation plan for the North Bosque River on December 12, 2002. This plan identifies a goal to seek removal of 50% of the manure from the watershed. However, the commission's plan is clear that it will seek this goal primarily through voluntary means. Further, this goal was never assumed by the commission to be the sole and exclusive plan for dairy manure waste management.

In addition, TWC, Chapter 26, Subchapter L, assists with the implementation of the TMDL and implementation plan by identifying several alternatives for waste management, including other beneficial use approved by the executive director. In view of all ongoing implementation activities, there is no current reason to mandate manure removal by rule, precluding a variety of other alternative waste management methods.

Haul-out of manure was described in the North Bosque River Implementation Plan as a voluntary measure that CAFOs can take to take advantage of the compost project in the watershed. The implementation plan also indicates that if dairies do not choose to use the voluntary measures, (or if the compost program ends) they will have to achieve the percent reduction target via the regulatory measure, which is comprehensive P-based waste management. The adopted rule requires PPPs and CNMPs for CAFOs in the North Bosque River Watershed, and those plans account for voluntary elements of waste management like haul-out and dietary-P levels. When waste is properly managed and land-applied consistent with P-based plans, there will be little export of P to the stream system regardless of the percentage of total waste applied.

Section 321.42 requires additional restrictions for third-party fields operated in the major sole-source impairment zone. That section adds a new provision to require permits for existing dairy CAFOs in the major sole-source impairment zone to allow the operator to provide manure, litter, and wastewater to operators of third-party fields that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. Specifically, the amended rule requires: 1) a written contract between the dairy operator and the recipient; 2) dairy operators to not deliver manure, litter, or wastewater to a third party once the soil test P analysis shows a level equal to or greater than 200 ppm, or the operator is not in compliance with this subchapter or the contract; 3) annual samples of third-party fields by a nutrient management specialist; and 4) submittal of records to the appropriate regional office quarterly. This provision was added to allow effective utilization of nutrients on nutrient deficient soils throughout the watershed and will reduce additional land application to LMUs at the CAFO. This is intended to reduce the potential for P runoff from the CAFO LMUs. No changes have been made to the rules in response to this comment.

EPA commented that in §321.42(i) permits issued for new or expanding dairy CAFOs in a major sole-source impairment zone should require disposal of waste outside the watershed or delivery to a compost facility. EPA stated that the proposed regulation and P index appear to be inconsistent. EPA stated that the P index provides that once a field reaches the critical soil test P no further application is recommended, but the proposed rules say that when soil test P reaches 500 ppm a NUP with a P reduction component must be developed. EPA recommends that regulation prohibit or strongly restrict further land application of manure or wastewater if the soil P is greater than the critical soil test P level as listed in the Texas Phosphorus Index (PI). EPA stated that this should apply to all CAFOs covered by the proposed regulation.

The commission responds that the provision in the rule that requires the operator to have a NUP developed with a P reduction component if soil test P levels exceed 500 ppm is consistent with state statute (See TWC, §26.504.).

The 500 ppm is statutory language which required soil testing for P in the fall of 2001. If the P rating was 500 ppm or greater, the operator would be required to develop a NUP or revise the existing NUP to show a crop removal application rate. Prior to 2001, the rule contained a 200 ppm limit statewide that required a NUP for continued land application but also provided the CAFO an option to cease land application on that field. Once the NUP has been implemented, the P level historically has not increased, but stabilized or started to decrease. The NUP will use the PI to establish site-specific levels of P to determine risk potential for runoff and establish the land application practices at the site which may contribute to water quality concerns. In these cases the operator will be required to follow the recommendations of the NUP for management of P and could be subject to enforcement action if the recommended practices are not implemented.

Water quality protection is enhanced by better management of the site, minimizing potential for runoff and continuing to maintain vegetation production to harvest excess P. The commission encourages operators to continue production of vegetation on high P fields to facilitate P removal. This requires fertilizer (nitrogen and potassium) to be added even if the soil laboratory analysis does not recommend adding P to achieve optimum production. The operator can utilize manure as the nutrient source in these

cases but must limit the manure application rate to the risk potential identified by the PI. The commission did not make any changes to the rule in response to these comments.

CCW commented that in §321.42(i) application of collectable manures and liquids in the Bosque River and Leon River Watersheds should be allowed, including third-party fields, if a valid CNMP is developed for each land application unit. CCW commented that solids and portable liquids applications should be allowed to 2.5 times the relevant crop agronomic rate or 150 ppm every other year, if soil test P is below 200 ppm. No application should be allow if soil test P exceeds 500 ppm. CCW also commented that on fields with soil test P of 200 and 500 ppm application of effluent de- watering should be restricted to relevant crop agronomic rate or 80 ppm, whichever is greater. CCW added that waste application fields should not be grazed.

The commission supports the development and implementation of CMPs for all agricultural operations that involve crop production or that add supplemental nutrients and soil amendments to improve soil productivity. Further, the CNMP includes a NMP which is required for appropriate land application. The NMP must be developed by a certified nutrient management specialist and must consider nutrient requirement of the crop and water quality. There are provisions in this rule which will allow dairy operators in the North Bosque River Watershed to include third-party land application areas if the dairy operator follows specified practices and recordkeeping requirements outlined in the rule. This rule does not place any additional restrictions on use of manure, litter, or wastewater on third-party land application areas in the Leon River Basin or other areas of the state.

The current numerical criteria of 200 ppm of soil test P allows for the inherent spatial variability of P levels as well as other variables such as soil types, soil depths, and sampling/analytical procedures. The commission recognizes that this level does not reflect estimated crop requirement levels, but is based on research related to risk levels for leaching and movement from soil to water. This level is also based on the recognition of not only the variables listed above, but other factors such as plant availability of the various ionic and molecular complexes that may exist and not distinguished by the lack of specificity of functional and affordable analytical procedures.

The rules provide for a range of management practices that are triggered by soil test P levels. In all cases the rules require the CAFO operator to have a NUP developed and implemented if soil test P levels exceed 200 ppm for land application areas owned by the CAFO, no matter where the facility is located in the state. In the major sole-source impairment zone, the operator is required to develop a NUP which includes a P reduction component if soil test P levels exceed 200 ppm. If the levels are between 200 and 500 ppm, the operator may be able to demonstrate through a site-specific NUP that P can be applied without risk of having runoff contribute to the impairment. However, if the level exceeds 500 ppm the only option is to have a P reduction component. The operator must also implement a monthly soil testing protocol consistent with soil sampling guidelines. If soil test P levels do not decrease within a year, the operator may be subject to enforcement action from the agency. The requirements for the major sole-source impairment zone are consistent with state statutory requirements found in TWC, §26.504.

Mayor Ethridge and Waco commented that §321.42(i) should also apply to wastewater, and specify how wastewater may be managed and disposed.

The commission disagrees with the comment. A substantial part of the rule already describes the appropriate management methods for wastewater, including effluent limitations, control facility design and operational requirements, as well as land application requirements. The commission declines to make this change.

Sierra Club commented that in §321.42(i) the compost program does not remove enough manure from the watershed, indicating that 28% of waste that had been going to historical fields was either being removed from the watershed or to composting facilities. The commenter was concerned that the program will not be self-sustaining after the conclusion of grant funding, and recommended that the rule should require participation by dairies and funding by the dairies.

The commission made no change to the rule in response to this comment. The commission, other state and federal agencies, and other parties have placed a high priority on the manure composting effort and substantial benefit has been achieved to date. It is the intention of the grant program to demonstrate a cost effective, market-based approach to manure waste management. After the conclusion of the grant, the commission expects these successful efforts to continue without state and federal funding. There are at least seven composting facilities processing manure from the Bosque River and Leon River Watersheds, who have invested in composting both to receive the grant-based incentives and for the time beyond. The TXDOT has allowed broad use of compost in road construction and maintenance projects signifying a viable and continuing market. As stated in response to other comments, the TMDL implementation plan is clear that it will seek the goal of 50% removal from the watershed primarily through voluntary means. The commission disagrees with the commenter that there is a need to mandate composting of manure.

Mayor Ethridge and Waco commented that the rule allow application of waste to fields that have P levels beyond the crop requirement; therefore, this is waste disposal. Sierra Club commented that in §321.42(i) the Bosque River Watershed provisions allow application of waste to fields with greater than 200 ppm soil test P. Sierra Club commented that applications on fields which exceed this level ceases to be beneficial use, but becomes disposal. EPA commented that §321.42(i)(5) of the rules should include a discussion of how the land application requirements will comply with any applicable TMDLs in a major sole-source impairment zone. Senator Averitt commented that the proposed rule would allow CAFOs to apply manure and wastewater to fields with P concentrations in excess of 200 ppm. Senator Averitt also stated that fields with P levels in excess of 200 ppm have no need for additional nutrients as that level exceeds vegetation's ability to uptake.

The commission responds that the numerical criteria for soil test P in the LMUs are based on consultation with soil specialists from universities, state and federal agriculture agencies, and research published in peer reviewed journals related to soil science and agronomy. The requirement for CNMPs developed in accordance with NRCS guidelines and by specialists that have completed NRCS training is consistent with the federal regulation for CAFOs developed by the EPA. The background and justification for this approach is discussed in detail in the "Strategy for Addressing Environmental and Public Health Impacts from Animal Feeding Operations" developed jointly by EPA and USDA,

in "Concentrated Animal Feeding Operations: Final Rule" developed by EPA and in "Concentrated Animal Feeding Operation Supplemental Documents: Development Documents" developed by EPA. The site-specific plans utilize the P index analysis to determine risk potential for P movement from the LMU and acknowledge the inherent variability that prevails in agricultural areas of the state.

They also rely on the expertise of agricultural specialists with access to scientifically based data and methods which are applicable to understanding and controlling the complex interactions between soil and water. Based on the review of available research data and continued consultation with soils specialists, the agency has not found sufficient data to demonstrate that soil test P levels below the existing criteria, but above the crop requirement levels will result in the excess P being transported from the land application unit to a receiving stream.

The commission disagrees that application of waste in accordance with the requirements of this rule is a disposal activity. Section 321.32 defines beneficial use as application of manure, litter, or wastewater at or below an agronomic rate. Agronomic rate is also defined in §321.32 as land application done in accordance with a plan for nutrient management. Section 321.40(k) establishes necessary controls that are implemented in permits to ensure excessive P is used and removed from the soil. A NUP is necessary in the instance where excessive P is found in soil of an application field. Land application must cease until the NUP is developed and implemented.

The commission also responds that the adopted rules restrict nutrient concentration in third-party fields to 200 ppm because the scientific analysis associated with an NMP/NUP is not performed by a certified nutrient management specialist. For LMUs, a certified nutrient management specialist must prepare an NMP which evaluates risk potential for runoff and recommends appropriate BMPs to control the runoff.

Mayor Ethridge and Waco commented that in §321.42(i)(3) compost should be required to be used outside of the watershed or specific guidelines established for its use in the watershed.

The commission disagrees that additional requirements are necessary. There are several existing requirements governing composting and compost use. In Chapter 332, the commission established the statewide requirements applicable to composting. The commission does not intend to regulate the end use of compost. The composting general permit establishes requirements for persons who compost manure. This rulemaking adopts provisions in §321.39(f) that include BMPs when composting areas occur at a CAFO. Additionally, TXDOT contracts establish restrictions and BMPs when compost is utilized in road construction and maintenance activities. Composting associated with grant funding from a nonpoint source pollution grant includes restrictions.

TCE requested to delete "nutrient management plan (NMP)" and add "NMP" and requested to delete "Natural Resources Conservation Service (NRCS) 590" and add "NRCS Code 590" in §321.42(i)(5)(A).

The commission declines to make this change. *Texas Register* formatting preferences dictate that the initial use of a word or term in each section that will be referenced to by an abbreviation or acronym be spelled out the first time it is used.

TCE requested to add "Code" before "590" §321.42(i)(5)(B).

The commission agrees with the comments to add the word "Code" to the title of the NRCS guidance.

TCE requested to delete "nutrient utilization plan (NUP)" and add "NUP" in §321.42(i)(5)(C).

The commission agrees to use the acronym NUP in subparagraph (C), since it was previously identified in the rule section.

TCE supports provisions for third-party waste application fields.

The commission acknowledges this comment.

Mayor Ethridge and Waco commented that the rules would allow waste application to third-party fields without any effective means of enforcement. Additionally, Mayor Ethridge and Waco commented that all third-party fields should be part of the permit.

The commission disagrees with the comment. The requirements for third-party land application included in these rules are adequate controls, including third-party contracts, that will be readily enforceable. This activity is optional and there is not a need to include it in a permit. The CAFO permit establishes all necessary land application capacity consistent with the production of the CAFO, including a specific description of the LMUs in the permit. Any additional third-party land application will represent excess capacity to provide for more sound waste management by existing dairy CAFOs. The commission made no change to the rule in response to this comment.

Regarding §321.42(j), (n), and (o), Mayor Ethridge and Waco commented that the requirements of subsection (j) seem initially to apply only to third-party fields, but LMUs are also mentioned in subsection (j)(3). Since subsections (n) and (o) both refer to subsection (j)(3), it is not clear whether they apply to LMUs only or to both third-party fields and LMUs. Since both subsections (n) and (o) discuss P levels in excess of 200 ppm, it is not clear that third-party fields will be limited to 200 ppm as seemingly required by §321.42(j)(2).

The commission agrees with the commenters that the wording proposed for subsections (j), (n), and (o) may conflict with each other. Therefore, the commission adopts revisions to these subsections to make the commission's intent more accurate. Adopted subsection (j)(2) specifies a prohibition on land application at a third-party field once the operator determines soil P exceeds either 200 ppm P or the P crop requirement. To accomplish this, subsection (j)(3) has been revised to delete a reference to LMUs. Adopted subsections (n) and (o) reference sample results from the requirements of subsection (m). Subsections (o) and (p) were revised to include "based on crop removal" to clarify the requirements of a P reduction plan.

Regarding §321.42(k), TCE commented that an NRCS employee cannot be under contract and the NRCS commented that NRCS employees cannot work under contract to private citizens.

The commission deleted "an employee of" from this subsection to address this comment.

Mayor Ethridge and Waco commented that in §321.42(m) CAFOs in a major sole-source impairment zone should also be required to collect and analyze samples taken in the zero- to two-inch soil zone regardless of method of application. Mayor Ethridge and Waco stated that it is the top two inches that impact water quality of runoff.

The commission did not change the rule as a result of this comment. There is disagreement among soil specialists as to the efficacy of this requirement. Some contend that analysis of soil test P from this soil zone does not accurately reflect P levels available to the plants. The commission included this requirement as a means of assuring better management of manure, litter, or wastewater on land application units which are not conducive to injection or incorporation into deeper soil layers. Collection of soil samples from soil zones other than the top two inches is necessary to assist the operator with proper management of waste application and crop production in the LMU.

Mayor Ethridge and Waco commented that the existence of §321.42(n) implies that despite recommendations in NRCS guides there could be fields in excess of 500 ppm P. Mayor Ethridge and Waco commented that this emphasizes the need to set the recommended levels as required levels in the rules.

The commission did not make changes to the rule in response to this comment. This subsection is taken directly from TWC, §26.504. This subsection was added to the rule in response to legislation adopted by the 77th Legislature, 2001. This provision requires an amendment to a NUP to specifically address actions needed to reduce the soil P level. It also requires the operator to implement a monthly soil testing protocol and if, after a year, there is no demonstration of P reduction, the operator may be subject to enforcement action by the agency.

OPIC requested clarification of the term "documented" in §321.42(q). OPIC commented that an unauthorized discharge should be considered documented if a notice of violation is issued. Additionally, OPIC commented that the requirement for installation of shutdown or an alarm system should be mandatory and not subject to waiver by the executive director. It should require both shutdown and an alarm system.

The commission agrees in part with the comment. If an activity is unauthorized, it is a violation. Therefore, the adopted subsection (q) deletes the word "unauthorized." The commission disagrees that the rule should mandate the installation of an automatic shutdown or alarm system. These needs will be reviewed in consideration of site-specific factors and the nature or gravity of an unauthorized discharge.

Mayor Ethridge and Waco commented that in §321.42(s) CNMPs should be required to be developed and implemented by September 1, 2005 for facilities with existing permits. Mayor Ethridge and Waco commented that new individual permits should be required to operate under a CNMP at the time of permit issuance. CCW commented that in §321.42(s) that CNMPs should be required to be developed by January 1, 2005 and implemented by January 1, 2006. One individual commented that CNMPs and other actions that are voluntary now should not become mandatory in the future.

The commission disagrees with the comments. A CNMP is mandatory for dairy CAFOs in a major sole-source impairment zone to better ensure adverse impacts from P and other nutrients do not occur. The proposed deadline of December 31, 2006 will allow time for the operator to obtain assistance to develop and implement the CNMP. Although the rule deadline is more than a year following the effective date of these rule amendments, the requirement is consistently being implemented in advance of the date, by establishing the requirement in all dairy CAFO permits being processed by the executive director. The commission made no change to the rule in response to this comment.

Mayor Ethridge commented that the reduction of P in a dairy cow's diet, which was part of the TMDL implementation plan, is not included in the rule. EPA commented that §321.42(s) of the rules should include provisions which address the recommendation in the TMDL implementation plan for dietary reduction of P.

The commission agrees the implementation plan identifies the reduction of P in diet as a strategy. However, the requirement in §321.42(s) for a CNMP, applicable to all dairy CAFOs in the major sole-source impairment zone, adequately addresses the concern of the commenter. A CNMP requires a holistic consideration of nutrient sources at the CAFO and the development of a plan to manage all nutrient sources. The dairy operators will consider a P- reduced diet as one of many options in the operation-wide analysis during the plan's development.

OPIC commented that in §321.42(s) certification of CNMPs by the TSSWCB should not preclude independent review of the plan by the commission. OPIC commented that the commission should retain oversight to ensure that CAFO program requirements are met because the commission has legal responsibility to administer the rules.

No changes were made to the rule in response to this comment. The commission recognizes the TSSWCB policy, supported by Texas Agriculture Code, §201.006, that any conservation plan developed through a soil and water conservation district and certified by the TSSWCB is a confidential agreement with a landowner.However, the recordkeeping and monitoring requirements of this rule that exist between any CAFO permit and the commission provide sufficient information to determine if program requirements are being achieved. Additionally, compliance monitoring activities by the commission to inspect CAFOs and to respond to notices of noncompliance provide adequate oversight of facilities using CNMPs.

NRCS commented that in §321.42(u) 90 days is not enough time to accomplish requirements of this subsection.

The commission agrees that a modification of the RCS requires substantial planning, design, and construction activities by the operator. Therefore, the rule incorporates a variance procedure afforded to the operator. The commission did not make a change to the rule in response to this comment.

OPIC commented that in §321.42(u) it supports application of a 25-year, ten-day standard to unauthorized discharges from any RCS sized using the SPAW model. OPIC also suggested a requirement of automated monitoring and notification equipment upon the occurrence of an unauthorized discharge from an RCS located in a major sole-source impairment zone. OPIC added that this proposal is similar to the requirement for an automated system on irrigation equipment after an unauthorized discharge from an LMU.

The commission acknowledges the comment. The commission disagrees that the rule should mandate the installation of an automatic monitoring or notification system. These needs will be reviewed in consideration of site-specific factors and the nature or gravity of an unauthorized discharge. The commission made no change to the rule in response to this comment.

TAD commented that the requirement in the proposed rule for RCSs to be designed to hold a 25 year, ten-day rainfall event of 11.9 inches would require a 65% increase in design capacity. TAD and other dairy operators did not agree to this requirement. TAD stated that even though EQIP funds have been promised to pay up to 75% of the costs for the increased size, the 25%

still represents a significant economic burden on the operator. TAD commented that a cost-benefit analysis of the requirement for additional capacity has not been done. One individual also made similar comments regarding these rule changes.

The commission agrees with the comment that the increase in capacity may require an increase in existing design capacity for some dairy CAFO operators and the rule amendment may be an economic burden. However, it is the commission's understanding that some existing CAFOs have surplus capacity that will ease the implementation of the requirements. The site- specific conditions will be a major factor in determining costs and which are not easily estimated. Also, the rules provide flexibility for attaining the margin of safety. One method includes the SPAW model which uses management practices to continue using their existing RCS. Another method could be reducing the size of the drainage area into the RCS. The commission is confident that fewer overflows from an RCS will facilitate water quality improvements and provide substantial, long-term benefits to the North Bosque River.

§321.43. Air Standard Permit for Animal Feeding Operations (AFOs).

OPIC commented that in §321.43 the air standard permit does not require the BACT which includes airtight lagoon covers and disposal using subsurface injection. OPIC stated that these technologies are available at a reasonable cost for the control of emissions on large facilities.

The commission disagrees with this comment. Based on §116.602(c), the air standard permit must contain the requirements to meet BACT. Chapter 116 for individual air quality permits defines BACT as ". . .best available control technology, with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility." The commission does not specify control technologies or emission limits in Chapter 116 because the extensive diversity of facility types and emission reduction options makes specification an impractical task. In considering BACT for this standard permit, the commission considered the types of equipment that are approved as BACT for individual permits. For individual permits, a case-by-case review is performed in which an applicant presents an analysis in support of the applicant's BACT proposal. The permit reviewer evaluates the analysis and makes a case-by-case determination as to whether the facility satisfies Chapter 116 BACT requirements. To determine the technical practicability and economic reasonableness of a BACT proposal, the proposal has to demonstrate that the control has worked based on actual operation, that the control can be expected to work based on technical analysis, and that the cost of the control is acceptable to achieve the emission reduction or elimination. The executive director's BACT evaluation is conducted using a "tiered" approach. The evaluation begins at the first tier and continues sequentially through subsequent tiers only if necessary as determined by the evaluation process. In each tier, BACT is evaluated on a case-by-case basis for technical practicability and economic reasonableness.

Tier I of the BACT evaluation involves a comparison of the applicant's BACT proposal to emission reduction performance levels accepted as BACT in recent permit reviews. In some cases, evaluation of new technical developments may also be necessary; however, the lagoon covers and subsurface injection mentioned in the comment have not been proposed by an AFO (with a typical lagoon system) authorized through an individual Chapter 116 air quality permit. The lagoon covers and subsurface injection have also not been evaluated by the commission's Air Permits Division to determine the technical practicability and economic reasonableness. In addition, one use of a new technology does not mandate that it will become BACT for the industry. Significant evaluation and management approval must occur to change BACT. The air standard permit under this chapter does allow for innovative technology and would not preclude an AFO from using a covered lagoon system provided it is equivalent to the current waste treatment methods that are considered BACT for controlling odors from AFOs.

Current BACT for AFOs consists of the following: 1) wastewater systems which satisfy all commission rules and regulations and are designed for proper treatment of waste to minimize odors; 2) when applicable, the use of multiple-stage lagoon systems, where the primary lagoon can be operated at a constant level, with a secondary lagoon used for irrigation; 3) lagoon design consistent with current ASAE and/or NRCS standards, if applicable; 4) proper land application of manure and lagoon effluent; 5) scraping and removal of manure from all pens, cow traffic alleys, under-cage pits, etc. to minimize odors and nuisance conditions; 6) proper pen drainage; 7) proper stockpiling of manure; 8) control of dust from any on-site feedmilling and/or feed handling sources; and 9) as necessary, treatment of road surfaces to minimize dust and nuisance conditions.

Section 321.43 contains all of the previously mentioned requirements; therefore, it is representative of current BACT.

NRCS commented that in §321.43(a) non-CAFOs should be exempted from the requirements of this section.

The commission disagrees with this comment. Based on the definition of "facility" in 30 TAC Chapter 116, §116.10(6), all AFOs (regardless of size) require air quality authorization. This authorization can be achieved by meeting all of the applicable requirements in §106.161, obtaining an individual permit under Chapter 116, or meeting all of the applicable requirements in §321.43. Those operations with less than 1,000 cattle, horses, mules, swine, sheep, and goats as well as the caged poultry operations with less than 30,000 birds and all dry litter poultry operations meet §106.161 with no required registration and no specific operational requirements. It is expected that these operations will continue to be authorized under the permit by rule; however, the commission did not want to preclude an AFO from using the air standard permit under Chapter 321 if it provided a better option for authorization.

TPF commented that in §321.43(b) the air standard permit should include provisions for incinerators and emergency generators that are a part of the CAFO facility. This item needs to be reworded to remove the apparent inconsistency. CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.43(b) should include provisions required in other commission permits by rule for generators and incinerators.

The commission disagrees that authorization for emergency generators and incinerators should be included in this section. Incinerators and emergency generators are currently authorized through Chapter 106, Permits by Rule. Air quality authorization for these units is complete if the specific design parameters and operational requirements in §106.494 for pathological waste incinerators and §106.511 for portable and emergency engines and turbines can be met. Registration inconsistencies would exist with the incorporation of these and potentially other permit by rule requirements into the air standard permit. For example, the air standard permit does not require registration while

§106.494 does require registration and review by someone familiar with the technical requirements of the permit by rule. In addition, any changes to Chapter 106 would require changes to be made to Chapter 321. The tracking of the changes can become overwhelming and may result in some changes not being made and the requirements in Chapter 321 being out-of-date. Incorporation of the permit by rule language would also create ambiguity as to which authorization actually applies to the other activity. Further, requirements related to other authorizations would remain unchanged whether those requirements were incorporated into the air standard permit. Therefore, because few net benefits would result, and for clarity, incinerators and emergency generators will not be included in the operations authorized by §321.43. These units will retain the option to obtain air quality authorization under permit by rule §106.494 and §106.511, as well as the option to obtain an individual Chapter 116 air quality permit should the PBR requirements not be met. Section 106.494 requires registration and review by the Air Permits Division. Section 106.511 does not require registration; therefore, authorization for emergency generators under the permit by rule does not require any additional pre-construction administrative effort on behalf of the operator that exceeds requirements already in place. The commission did not make any changes to the rule in response to this comment.

OPIC commented that in §321.43(j)(3) does not explicitly require that the primary lagoon be operated to maintain the minimum treatment volume for air quality purposes.

The commission agrees that this requirement was inadvertently omitted in this section and did not intend to remove the requirement. The commission revised the rule to require that wastewater treatment systems must be operated in accordance with the design in §321.43(j)(3).

CCC commented that §321.43(j)(2)(A) should include an exemption for requirements from odor control plans or air quality buffers for CAFOs in operation prior to August 19, 1998, and which are not expanding. TCFA, TSGRA, TPPA, and TFB commented that §321.43(j)(2)(A) should include an exemption from requirements for odor control plans or air quality buffers for CAFOs in operation prior to August 19, 1998, and which have not expanded.

The commission disagrees with this comment. The intent of the Chapter 321 air standard permit has always been that the facility have either the 1/4 mile-buffer distance or an odor control plan which incorporates BMPs to minimize odors, dust, and other contaminants. There was not an exemption in the prior rules, and all AFOs in existence prior to the adoption of the air standard permit were required to either meet a permit by rule (or former standard exemption) or obtain a Chapter 116 individual air quality permit. In the past, the primary need for the air standard permit was for a new or expanding CAFO to obtain authorization for construction without the need to apply for a Chapter 116 individual permit or apply for an amendment to an existing Chapter 116 individual permit. Smaller operations should be able to meet §106.161 or former Standard Exemption 62. The commission made no change in response to this comment.

NRCS requested that the reference to the figure published as 30 TAC §321.43(j)(2)(A)(iii) be corrected to apply to all of subsection (j)(2)(A).

The commission agrees with this comment and moved the figure indicator and graphic to clarify that the buffer requirements apply to all of paragraph (2).

CCC, TCFA, TSGRA, TPPA, and TFB commented that §321.43(j)(2)(C) should be revised to replace "place of worship" with "church."

The commission responds that "place of worship" may be open to wider interpretation than the word "church." However, written consent from the owner of the land containing any permanent structure housing a religious institution or holding religious services is the focus of this provision. The rules have been modified to replace the term "place of worship" with "permanent structure containing a place of worship."

NRCS commented that §321.43(j)(3)(B) needs to be modified to allow flexibility because some facilities will not be able to exclude all contaminated lot runoff from the lagoon.

The commission revised the rule in response to this comment. The majority of runoff should be routed around the primary lagoon and into a secondary structure as good engineering practice. The rule has been revised to indicate that the amount of contaminated runoff into the primary lagoon shall be minimized.

OPIC commented that in §321.43(j)(3)(B) the design specifications for control facilities should be included in the same manner as under the previous rules. OPIC requests clarification regarding the reasons for these changes.

The commission responds that these design specification references were updated to reflect current engineering practices and the current standards available. The ASAE Standard D384.1 for Manure Production and Characteristics (which is referenced in the existing rules and omitted in the proposed rule language) states that whenever site-specific data are available or actual sample analyses can be performed, such information should be considered in lieu of the mean values presented in ASAE D384.1. ASAE D384.1 may still be used to calculate manure production. The commission added the reference to ASAE EP403.3 for the design of treatment lagoons, which reflects good engineering practices. The NRCS, Field Office Technical Guidance, Practice Standard 359, Waste Treatment Lagoon is also considered a good engineering practice, uses updated values, and goes through a public review prior to being modified. The standards referenced in the rule language represent the most current information and good engineering practices. The commission made no changes to the rule in response to this comment.

TCFA and TPPA commented that in §321.43(j)(4)(A) choke feeding is not always feasible and can cause significant damage to augers and elevator legs when started under loaded conditions. This provision should be deleted or qualified with the phrase "when feasible."

The commission disagrees with this comment. The language in the proposed rule requires choke feeding or an equivalent method of control. If a facility cannot implement choke feeding procedures, another method of controlling approximately 90% of the particulate emissions from the receiving pits must be implemented. This is necessary to reduce the nuisance potential from grain dust. In addition, the grain handling portions of AFOs must also maintain compliance with the process weight allowables in Chapter 111. These process weight allowables are based on emission rates from all on-site grain handling sources. If the 90% control efficiency cannot be applied to the emission rates from receiving pits, the resulting emissions increase has the potential to exceed the calculated process weight allowable. In addition, choke feeding (or equivalent) represents current BACT for grain handling operations, and based on §116.602(c), the air standard

permit must contain the requirements to meet BACT. Therefore, the requirement cannot be deleted. Based on the information provided by applicants for Chapter 116 air quality permits for AFOs, CAFOs, grain elevators, and feedmills, the argument that choke feeding can cause significant damage to augers and elevator legs has not been demonstrated. Operators may need to evaluate the age and integrity of any augers and elevator legs that may not be able to accommodate choke feeding and consider replacement of these pieces of equipment. The commission made no changes in response to this comment.

TCFA and TPPA commented that in §321.43(j)(4)(E) the proposed language ". . .shall implement any necessary additional abatement measures to control and minimize . . ." does not apply to practical or economical considerations for potential dust control practices that may be required by the executive director. The paragraph should be amended to read "shall implement effective and economically feasible additional abatement measures . . .."

The commission disagrees with this comment. Based on §116.602(c), the air standard permit must contain the requirements to meet BACT; therefore, consideration must be given to technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility. Any requirement for additional abatement measures must still meet commission rules and regulations, so there is no need to amend the rule language. The commission made no change to the rule in response to this comment.

§321.44. Concentrated Animal Feeding Operation (CAFO) Notification Requirements.

Mayor Ethridge and Waco supported the addition of P to the list of analyses in §321.44(b)(1).

The commission acknowledges this comment.

§321.45. Concentrated Animal Feeding Operation (CAFO) Training Requirements.

TPF commented that §321.45(b) should be revised to "Dairy Outreach Program Area Operator Training. The operator of a *dairy* CAFO located within an area specified in the definition of Dairy Outreach Program areas . . . ".

The commission agrees that the curriculum for dairy outreach program area operator training was developed to educate operator's on the proper operation and management of waste management systems of dairy CAFOs and this provision should apply only to dairy CAFOs. The commission made this change in response to this comment.

§321.46. Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting.

OPIC commented that in §321.46(a)(1) it is inappropriate to specify that a permit or authorization will establish the requirements for the development of a PPP. OPIC commented that this should be done in the rules. OPIC also suggested that the first sentence of this subsection should be deleted.

The commission disagrees that the rule should establish the requirements of the PPP. This provision allows the executive director the flexibility to determine the appropriate PPP requirements and incorporate those requirements into individual or general permits. The commission declines to make this change to the rule.

Mayor Ethridge and Waco commented that clarification should be added to §321.46(a)(4) that an amendment to the PPP does not substitute for changes that require permit amendment.

The commission agrees that revising the PPP does not substitute for an amendment to the permit in accordance with §321.33(h); therefore, the commission replaced the term "amend" with the term "revised." A CAFO operator cannot circumvent §305.62, Permit Amendments, by revising its PPP. An increase in the number of animals, construction of new buildings or structures, or adding LMUs cannot be accomplished with a simple change to a PPP. Rather, §305.62 would require a permit amendment for such activities at a CAFO.

Four hundred and sixty-six individuals commented that in §321.46(a)(5) PPPs should not be required for dry litter poultry operations. The technical requirements of the TSSWCB WQMP should meet requirements for these operations.

The commission disagrees that a PPP should not be required for dry litter poultry operations. The PPP is a management tool that is an essential element for demonstrating environmental compliance. Therefore, the requirements in a PPP should apply to all CAFOs, including dry litter poultry operations. However, §321.46(a)(5) allows for equivalent provisions of a TSSWCB certified WQMP to substitute for applicable provisions or portions of the PPP. The commission declines to make this change to the rule.

OPIC commented that the information required in §321.46(a)(7) should be *produced* at the time of application rather than *developed.*

The PPP is an operational document that records ongoing management practices, such as rainfall logs, RCS wastewater levels, land application records, etc. This document contains information that is useful for compliance verification but not needed for permitting staff to determine if the application is sufficient. However, the executive director may request additional information from the PPP, as necessary for the permitting process. The commission declines to make this change.

TPF commented that §321.46(b)(4) should be reworded to include "where applicable:" at the end of the statement.

The commission agrees that a change is necessary in this subsection to offer the flexibility allowed in §321.34(f)(3). The commission agrees that a copy of the approved recharge feature certification must be maintained in the PPP, if applicable.

TPF commented that the requirement in §321.46(c)(1) for an engineering evaluation and recertification of structural controls and liner requirements every five years should not apply to poultry operations.

The commission agrees that an engineering evaluation and recertification of structural controls and liner requirements every five years should not apply to dry litter poultry operations. These requirements apply to facilities that have RCSs, and therefore would not apply to dry litter poultry operations because of their waste management practices. The commission revised the rule to exclude operations that do not use an RCS from this requirement.

OPIC commented that it is inappropriate to allow a geoscientist to carry out certain requirements that are engineering practices.

The commission responds that it revised §321.46(c)(1) to specify that only a licensed professional engineer can perform the site

evaluation because it is an evaluation of the engineering of an RCS and the review of the sufficiency of the RCS design.

One individual commented that in §321.46(d) recordkeeping requirements for RCSs should not apply to dry poultry operations.

The commission agrees that the recordkeeping requirements in this provision which are associated with RCSs do not apply to dry litter poultry operations because of their waste management practices. The commission revised the rule to exclude dry litter poultry operations from §321.46(d)(3) - (5) and (7).

TPPA and TCFA commented that in §321.46, subsection (d)(2) seems to duplicate requirements of subsection (d)(8) and should be deleted or modified to read "(2) a log of wastewater, manure, litter, and sludge removal that shows the dates, times and recipient." Without this change it appears that the operator must maintain logs on land that is not owned, operated, controlled, leased, or rented by the CAFO.

The commission agrees that portions of the requirements of §321.46(d)(2) and (8) are duplicative. The commission revised §321.46(d)(2) so that it only applies to removal of manure, litter, or wastewater from the CAFO for off-site application or disposal. Section 321.46(d)(8) has been revised to only apply to land application by the CAFO operator.

TPF commented that §321.46(d)(3) should be reworded to "*for facilities with retention control structure*, a log of daily measurable rainfall events . . .."

The commission agrees that the recordkeeping requirements in this provision only apply to facilities that use an RCS. The commission revised the rule to specify provisions applicable to different types of facilities based on waste management practices.

Mayor Ethridge and Waco commented that the requirement in §321.46(d)(8) should also include third-party fields in major sole-source impairment zones.

The commission disagrees that recordkeeping should extend to third-party fields. Third- party field operators are not CAFOs, nor are these fields owned, operated, controlled, rented, or leased by a CAFO operator; therefore, this provision should not apply to non-CAFOs. However, to ensure implementation of P reduction strategies in the major sole-source impairment zone in accordance with §321.42(j), a CAFO operator must have a contract with the third-party field landowner which requires proper land application of manure. The dairy operator shall submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of manure, litter, and wastewater transferred to operators of third-party fields. The commission declines to make this change.

CCC, TCFA, TPPA, TSGRA, and TFB commented that §321.46(d)(11) should be deleted because current commission rules and EPA rules do not have this recordkeeping requirement.

The commission agrees that recordkeeping for pesticide container storage and disposal should be deleted from the rule. Records of storage and disposal of chemical containers are required under Texas Department of Agriculture regulations. The commission agrees to make this change .

TPF commented that §321.46(e) may conflict with the requirement for an annual report. TPF commented that the rules should not require duplication of reporting requirements and should be revised so that it is clear that soil test data need to be submitted with an annual report and may be more than 60 days after samples were collected.

The commission agrees that submittal of the soil sample laboratory analyses and the soil monitoring report form are duplicative. The commission revised the rule to require laboratory analyses of soil samples to be submitted to the agency with the annual report due February 15 of each year. This will provide timely notification to the agency of soil nutrient levels of LMUs. The annual report requires the operator to submit a soil monitoring report form which summarizes the laboratory results. However, the commission kept the requirement to submit sample results within 60 days to the commission for dairy CAFOs in a major sole-source impairment zone as stated in revised §321.42(m).

Mayor Ethridge and Waco commented that in §321.46(e) CAFOs should be required to report recordkeeping of manure and wastewater nutrient analyses required by §321.46(d)(9) and volume of manure, litter, and wastewater applied to LMUs (including third-party fields in a major sole- source impairment zone) as required by §321.46(d)(8)(B) and all information should be available to public.

The commission disagrees that the operator should be required to report information on nutrient analyses. Certified nutrient management specialists use these analyses in determining the land application rates for the NMP. On the other hand, the CAFO operator is required to submit an annual report to the commission. It contains a summary of all land application activities and records of off site removal of manure, litter, and wastewater from TPDES CAFOs. The annual report and any information submitted to the agency is public record. The commission declines to make this change.

CCC, TCFA, TFB, TPPA, and TSCRA commented that §321.46(e)(1) should be modified to read ". . .Office of Compliance and Enforcement, Enforcement Division, soil testing analysis for all soil samples with the Annual Report due February 15 of each year" to consolidate reporting requirements. TCFA also recommend the first report be due February 15, 2006 to allow time for development of the forms and revision of recordkeeping systems by commission.

The commission agrees with this comment and changed the date that laboratory analyses of the soil samples must be submitted to the agency to coincide with the annual report due February 15 of each year. The annual report as described in §321.36(j) requires the operator to submit a soil monitoring report form which summarizes the laboratory results. The annual report is required for all large, medium and small TPDES CAFOs. The commission is currently in the process of developing the necessary forms to implement this federal requirement.

§321.47. Requirements for Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs).

TFB commented that the proposed rules should retain language from former §321.33(d) that any facility, including all poultry operations as described in TWC, §26.302, which qualifies for, obtains, and is operating under a CWQMP from the TSSWCB is not a CAFO for purposes of this subchapter and is not covered by the provisions of this subchapter, unless referred to the commission in accordance with Texas Agriculture Code, §201.026. TFB stated that this should remain applicable to smaller AFOs.

The commission retained the authorization by rule provisions of the rule in §321.47 for an AFO that is not a CAFO. The authorization does not require registration. A WQMP certified by the TSSWCB is identified in §321.47(c)(7) as a plan that can satisfy requirements of this subchapter. The existing memorandum of

understanding between the commission and the TSSWCB identify procedures for compliance evaluation and response by the agencies for these AFOs. Additionally, a dry litter poultry operation, now defined as a point source, is under the commission's jurisdiction.

CCC, TFB, TCFA, TPPA, TSCRA, TSGRA, and USDA/NRCS commented that requirements of this section were overly prescriptive and burdensome for most smaller AFO operations. NRCS recommended that all non-CAFO operations be excluded from the detailed requirements. The other commenterss recommended that the more restrictive requirements be applicable only to AFOs with animal numbers which exceed those defined as medium CAFOs. The commenters further noted that AFOs are nonpoint sources not subject to regulation under federal CAFO rules and recommended that this section recognize that the preferred method of managing AFO nonpoint source pollution is by use of WQMPs developed by the TSSWCB as addressed in Texas Agriculture Code, Chapter 201.

The commission responds that §321.47 is necessary as a method of authorization for AFOs because TWC, §26.121, does not allow a discharge of agricultural waste without authorization. Thus, the commission declines to limit the applicability of §321.47 based on the size of the facility since it would exclude small feeding operations below such a number threshold that may require coverage. Exemption from the requirements of this section should be based on the method of operation rather than upon size or number of animals involved. EPA relied on data from a number of sources to justify the threshold values for CAFOs. Even though the federal regulations are primarily aimed at the establishment of operational requirements for larger facilities, there are provisions which recognize that medium and small AFOs can have a significant environmental impact if not operated and managed appropriately.

The EPA, in its preamble to the new federal CAFO rules, explained the scope of the AFO definition. Specifically, EPA stated that true pasture and rangeland operations are not considered AFOs, because animals are in areas such as pastures, croplands, or rangelands, that sustain crops or forage growth during the normal growing season. Additionally, EPA stated that in some pasture-based operations animals may freely wander in and out of particular areas for food or shelter, so this is not considered as confinement. EPA noted that pasture and grazing operations may also have confinement areas that may qualify as an AFO. Second, EPA stated that incidental vegetation in a clear area confinement, such as a feedlot or pen, would not exclude an operation from meeting the definition of an AFO. Third, in the case of a winter feedlot, the "no vegetation" criterion in the AFO definition is meant to be evaluated during the winter when the animals are confined. Therefore, use of a winter feedlot to grow crops or other vegetation during periods of the year when animals are not confined would not exclude the feedlot from meeting the definition of an AFO. Most importantly, EPA noted that animals must be stabled or confined for at least 45 days out of any 12-month period to qualify the operation as an AFO. Lastly, EPA assumes that AFOs and permitting authorities will use common sense and sound judgment in applying the definition.

The commission recognizes that the suggested threshold similar to that defined as a medium CAFO in this rule consistent with the federal regulation has some justification. However, the commission has sufficient documentation of negative impact from facilities in this size range and does not agree to provide an exemption from the requirements of this section. The existing language related to applicability along with the additional provision that recognizes the role of the TSSWCB WQMPs is adequate to insulate the small AFOs from unnecessarily prescriptive and burdensome regulations.

The commission considers the economic impact of the implementation and enforcement of environmental regulations to small businesses in general, and small AFOs in particular. The commission also recognizes that the extent of environmental controls necessary to protect resources of the state will vary depending on size and complexity of the operation. The recognition of this variability and the economic burden of implementing this regulation is reflected in §321.47(b) by including general requirements for AFOs which do not require control facilities to manage manure, litter, and wastewater generated on site. First, the rule states that an AFO not defined or designated as a CAFO that uses a control facility must comply with the requirements in §321.47.

Second, the commission recognizes the key role and statutory responsibility that the TSSWCB has been given with regard to control of nonpoint source pollution in the state. New §321.47(b)(2) provides that a TSSWCB's certified water quality management plan, along with compliance of subsection (c)(1) - (3) will meet all the technical requirements of this section. If the owner of an AFO does have a control facility, §321.47(c)(7) indicates that equivalent measures contained in a plan developed by the TSSWCB and other plans required by other agencies can satisfy the technical requirements in this subchapter.

Third, the commission modified §321.47(b) to more clearly specify the type of AFO that is not subject to the detailed technical requirements of this section. The adopted changes include specifying that an owner of an AFO who does not use a control facility is only subject to general requirements in adopted §321.47(b)(3). In addition, the facility may be subject to other requirements in §321.47 if the owner changes the operation and needs to use a control facility. For example, a rancher who has a pasture-based livestock operation would not be subject to this subchapter when the number of days in confinement do not exceed the numerical threshold identified in the definition of an AFO in §321.32(3). As another example, an owner of a horse stable confining the animals is an AFO; however, the owner would only be subject to the general requirements of §321.47(b)(2) to protect water quality and prevent the occurrence of a nuisance.

Mayor Ethridge and Waco commented that §321.47(c)(3) does not specify the design rainfall event for retention structures for AFOs, but seems to allow the 25-year, 24-hour design standard applicable to most CAFOs. The commenters recommended that the same margin of safety applied to CAFOs in a major sole-source impairment zone be applied to AFOs in a major sole-source impairment zone.

The commission responds that AFOs that use a control facility must design and maintain an RCS to contain the 25-year, 24-hour storm event. The commission does not have data available which demonstrates that RCSs for AFO facilities in a major sole-source impairment zone that are designed and are properly managed contribute to impaired water quality. However, the commission does share the concern about the potential for unauthorized discharges to contribute to the impairment of surface

water. The commission notes that §321.33(b)(5) allows the executive director to designate an AFO as a CAFO and therefore require a permit and any applicable requirements associated with the major sole-source impairment zone.

Mayor Ethridge and Waco commented that the last sentence in §321.47(c)(6) should be revised to read: ". . . from inundation and damage that may occur during that flood event." OPIC commented in §321.47(c)(6) that any control facility located within the 100-year flood plain should be protected against the highest level of the 100-year flood, regardless of rainfall event duration.

The commission agrees with this recommendation and changed this subsection to be consistent with other rules of the commission.

NRCS commented that §321.47(c)(7)(D) could be confusing because the term "comprehensive nutrient management plan" is represented in parentheses as "NMP."

The commission has changed the acronym "NMP" to "CNMP" in response to this comment.

Mayor Ethridge and Waco commented that §321.47(e)(6) should be changed so that AFOs in a major sole-source impairment area with RCSs with permanent pond markers should be marked in one-foot intervals.

The requirement for the one-foot increments is associated with an RCS management plan which only CAFOs in the major sole-source impairment zone must implement. The commission made no change in response to this comment.

OPIC commented on existing §321.38(g) indicating that it is in appropriate to allow a geoscientist to carry out certain requirements that are engineering practices.

In response, the commission revised §321.39(b)(5) to remove the identification of an NRCS engineer to evaluate damage to an RCS liner. The engineering work identified by the requirements must be performed by a licensed Texas professional engineer. It is not relevant and could raise confusion to identify some special class of engineer or agency affiliation of an engineer. Further, the commission received information from the NRCS indicating that deletion of the term "NRCS engineer" should not have a negative impact on NRCS operations.

TPF commented that dry broiler/breeder operations do not utilize RCSs; therefore, the requirement in §321.47(i)(1)(D) for a daily rainfall record is not necessary for these facilities.

The commission did not revise this subsection in response to this comment. While it is understood that dry litter broiler/breeder poultry operations do not usually require a RCS in their operations, this provision can provide critical records for AFOs other than dry litter poultry facilities. Daily records are not required in this provision, but the required records of measurable rainfall can be important for AFOs that rely on this information for management of land application areas as well as RCSs. Additionally, if the AFO does not have control facilities these recordkeeping requirements do not apply at all.

30 TAC §§321.31 - 321.47

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.102, which provides the commission with the general authority necessary to carry out its duties and general powers under its jurisdiction; TWC, §5.103, which provides the commission with the general authority to adopt rules; TWC, §5.105, which is the commission's authority to set policy by rule; and TWC, §5.013, which states the commission's authority over various statutory programs.

These amendments are also adopted under TWC, §26.011, regarding the commission's authority over water quality in the state; TWC, §26.028, which provides the commission's authority to approve certain applications for wastewater discharge; and TWC, §26.0286, which requires the commission to process an application for authorization to construct or operate a CAFO located in the protection zone of a sole-source surface drinking water supply as an application for an individual permit.

These amendments are also adopted under TWC, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment by House Bill 1542 in 1997, in order to continue to regulate small AFOs under a permit by rule. In addition, §26.040 authorizes the commission to approve a general permit to authorize the discharge of waste into or adjacent to water in the state by a category of dischargers that engage in the same or substantially similar types of operations.

These amendments are also adopted under TWC, §26.041, which allows the commission to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health; and §26.048, which allows the commission to propose rules to prohibit the discharge into a playa or use of it as a wastewater retention facility. In addition, these amendments are adopted under TWC, §26.121, which prohibits the discharge of waste into or adjacent to any water in the state except as authorized with a commission permit or other authorization.

These amendments are also adopted under TWC, Chapter 26, Subchapter L, which requires the commission to authorize the construction or operation of a new or expanded dairy CAFO located in a major sole-source impairment zone through an individual permit, which must contain specific requirements for the management and beneficial use of animal waste, and sets forth waste application field soil sampling and testing requirements that apply to all dairy CAFOs within a major sole-source impairment zone.

These amendments are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

Finally, these amendments are also adopted under Texas Health and Safety Code, §382.011, which provides the commission the authority to control the quality of the state's air; §382.017, which authorizes the commission to propose rules consistent with the policy and purposes of the Texas Clean Air Act and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and §382.051, which provides the commission the authority to issue air standard permits. These amendments are also adopted under Texas Health and Safety Code, §382.05195, which authorizes the commission to issue and amend air standard permits for new or existing similar facilities, and to propose rules to implement and administer the issuance, amendment, renewal, and revocation of authorizations to use standard permits.

§321.31. Manure, Litter, and Wastewater Discharge and Air Emission Limitations.

(a) There shall be no discharge or disposal of manure, litter, or wastewater from an animal feeding operation (AFO) into or adjacent to waters in the state, except in accordance with an individual water quality permit issued by the commission, or a concentrated animal feeding operation (CAFO) general permit or other authorization issued or adopted by the commission. Manure, litter, and wastewater generated by an AFO under this subchapter shall be retained and utilized in an appropriate and beneficial manner as provided by commission rules, orders, authorizations, CAFO general permits, or individual water quality permits.

(b) AFOs shall be operated in such a manner as to prevent the creation of a nuisance or a condition of air pollution as mandated by Texas Health and Safety Code, Chapter 341 and Chapter 382.

§321.32. Definitions.

All definitions in Texas Water Code (TWC), Chapter 26 and Chapter 3 and Chapter 305 of this title (relating to Definitions and Consolidated Permits) shall apply to this subchapter and are incorporated by reference. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agronomic rates--The land application of manure, litter, or wastewater at rates of application in accordance with a plan for nutrient management designed to enhance soil productivity and provide the crop or forage growth with needed nutrients for optimum health and growth.

(2) Air contaminant--Particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor or any combination thereof produced by processes other than natural. Water vapor is not an air contaminant.

(3) Animal feeding operation (AFO)--A lot or facility (other than an aquatic animal production facility) where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season over any portion of the lot or facility. Two or more AFOs under common ownership are a single AFO if they adjoin each other, or if they use a common area or system for beneficial use of wastes. A land management unit is not part of an AFO.

(4) Aquifer--A saturated permeable geologic unit that can transmit, store, and yield to a well, the quality and quantities of groundwater sufficient to provide for a beneficial use. An aquifer can be composed of unconsolidated sands and gravels, permeable sedimentary rocks such as sandstones and limestones, and/or heavily fractured volcanic and crystalline rocks. Groundwater within an aquifer can be confined, unconfined, or perched.

(5) Area land use map--A map that identifies property lines, permanent odor sources, and distances and direction to any occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park within a one-mile radius of the permanent odor sources at the AFO. The map shall include the north arrow, scale of map, buffer distances, and date that the map was generated and the date that the distances were verified.

(6) Beneficial use--Application of manure, litter, or wastewater to land in a manner that does not exceed the agronomic need or rate for a cover crop. Application of manure or wastewater on the land at a rate below or equal to the optimal agronomic rate is considered a beneficial use.

(7) Best management practices (BMPs)--The schedule of activities, prohibitions of practices, maintenance procedures, and other management and conservation practices to prevent or reduce the pollution of water in the state. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, land application, or drainage from raw material storage.

(8) Catastrophic conditions--Conditions that cause structural or mechanical damage to the AFO from natural events including high winds, tornados, hurricanes, or other natural disasters, other than rainfall events.

(9) Certified nutrient management specialist--An organization in Texas or an individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service recognized certification program .

(10) Chronic or catastrophic rainfall event--A series of rainfall events that do not provide opportunity for dewatering a retention control structure and that are equivalent to or greater than the design rainfall event or any single rainfall event that is equivalent to or greater than the design rainfall event.

(11) Certified water quality management plan--A site-specific plan for agricultural or silvicultural lands that includes appropriate land treatment practices, production practices, management measures, technologies, or combinations thereof that when implemented, will achieve a level of pollution prevention or abatement determined by the Texas State Soil and Water Conservation Board, in consultation with the local Soil and Water Conservation District, to be consistent with state water quality standards.

(12) Comprehensive Nutrient Management Plan (CNMP)--A resource management plan containing a grouping of conservation practices and management activities that, when implemented in a conservation system, will help ensure that both agricultural production goals are achieved, and natural resource concerns dealing with nutrient and organic by-products and their adverse impacts on water quality are minimized.

(13) Concentrated animal feeding operation (CAFO)--Any animal feeding operation (AFO) defined as follows:

(A) Large CAFO--Any AFO that stables or confines and feeds or maintains for a total of 45 days or more in any 12-month period equal to or more than the numbers of animals specified in any of the following categories:

(i) 1,000 cattle other than mature dairy cattle or veal calves. Cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(ii) 1,000 veal calves;

(iii) 700 mature dairy cattle (whether milkers or dry cows);

(iv) 2,500 swine weighing more than 55 pounds or 10,000 swine weighing less than 55 pounds;

(v) 500 horses;

(vi) 10,000 sheep or lambs;

(vii) 55,000 turkeys;

(viii) 125,000 chickens (other than laying hens, if the operation does not use a liquid waste handling system);

(ix) 30,000 laying hens or broilers (if a liquid manure handling system), or 82,000 laying hens (if the operation does not use a liquid manure handling system); or

(x) 5,000 ducks (a liquid manure handling system), or 30,000 ducks (if the operation does not use a liquid manure handling system);

(B) Medium CAFO--Any AFO with the following number of animals that discharges pollutants into water in the state either through a man-made ditch, flushing system, or other similar man-made device, or directly into water in the state that originates outside of and passes over, across, or through the facility or otherwise comes into direct contact with animals confined in the operation:

(i) 300 to 999 cattle other than mature dairy cattle or veal calves. Cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

(ii) 200 to 699 mature dairy cattle (whether milking or dry cows);

(iii) 300 to 999 veal calves;

(iv) 750 to 2,499 swine each weighing 55 pounds or more, or 3,000 to 9,999 swine each weighing less than 55 pounds;

(v) 150 to 499 horses;

(vi) 3,000 to 9,999 sheep or lambs;

(vii) 16,500 to 54,999 turkeys;

(viii) 37,500 to 124,999 chickens (other than laying hens and other than a liquid manure handling system);

(ix) 9,000 to 29,999 laying hens or broilers (if a liquid manure handling system), or 25,000 to 81,999 laying hens (if other than a liquid manure handling system); or

(x) 1,500 to 4,999 ducks (if a liquid manure handling system), or 10,000 to 29,999 ducks (if other than a liquid manure handling system).

(C) Small CAFO--An AFO that is designated by the executive director as a CAFO because it is a significant contributor of pollutants into or adjacent to water in the state and is not a large or medium CAFO.

(D) State-only CAFO--An AFO that falls within the range of animals in subparagraph (B) of this paragraph and that is either located in the dairy outreach program areas or designated by the executive director as a CAFO because it is a significant contributor of pollutants into water in the state. A state- only CAFO is authorized under state law.

(14) Control facility--Any system used for the collection and retention of manure, litter, or wastewater on the premises until their ultimate use or disposal. This includes all collection ditches, conduits, and swales for the collection of runoff and wastewater, and all retention control structures.

(15) Crop removal--The amount of nutrients contained in and removed by harvest of the proposed crop.

(16) Crop requirement--The amount of nutrients that must be present in the soil in order to ensure that the crop nutrient needs are met, while accounting for nutrients that may become unavailable to the crop due to adsorption to soil particles or other natural causes.

(17) Dairy outreach program areas--The area including all of the following counties: Erath, Bosque, Hamilton, Comanche, Johnson, Hopkins, Wood, and Rains.

(18) Edwards Aquifer--As defined in §213.3 of this title (relating to Definitions).

(19) Edwards Aquifer recharge zone--As defined in §213.3 of this title (relating to Definitions).

(20) Groundwater--Subsurface water that occurs below the water table in saturated soils and geologic formations, and is other than underflow of a stream or an underground stream.

(21) Historical waste application field--An area of land located in a major sole-source impairment zone that at any time since January 1, 1995, has been owned or controlled by an operator of a concentrated animal feeding operation (CAFO), and on which agricultural waste or wastewater from a CAFO has been applied.

(22) Hydrologic connection--The connection and exchange between surface water and groundwater.

(23) Lagoon--A retention control structure used for the biological treatment of liquid organic wastes. Lagoons can be aerobic, anaerobic, or facultative depending on their design and can be used in a series to produce a higher quality effluent. Treatment volume must be included in the lagoon design.

(24) Land application--The act of applying manure, litter, or wastewater associated with the animal feeding operation including distribution to, or incorporation into, the soil mantle primarily for beneficial use purposes.

(25) Land management unit (LMU)--An area of land owned, operated, controlled, rented, or leased by an animal feeding operation (AFO) owner or operator to which manure, litter, or wastewater from the AFO is or may be applied. This includes land associated with a single center pivot system or a tract of land on which similar soil characteristics exist and similar management practices are being used. LMUs include historical waste application fields. The term "land management unit" does not apply to any lands not owned, operated, controlled, rented, or leased by the AFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for land application.

(26) Letter of consent--A document signed by the owner or the authorized legal representative of the owner(s) of an occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park, or a document signed by the governmental entity or the authorized legal representative of the entity responsible for the operation of a school or public park. The document specifically consents to location and operation of permanent odor sources of an animal feeding operation within the minimum buffer distance required under §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFO)).

(27) Liner--Any barrier in the form of a layer; membrane; or blanket; naturally existing, constructed, or installed, to prevent a significant hydrologic connection between liquids contained in retention control structures and water in the state.

(28) Liquid waste handling system--A system in which freshwater or wastewater is used for transporting and land applying waste.

(29) Major sole-source impairment zone--A watershed that contains a reservoir:

(A) that is used by a municipality as a sole source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and

(B) which at least half of the water flowing into is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended:

(i) at least in part because of concerns regarding pathogens and phosphorus; and

(ii) for which the commission, at some time, prepared and submitted a total maximum daily load standard.

(30) Manure--Feces and/or urine excreted by animals. Manure includes manure, bedding, compost, feed, and other raw materials commingled with feces and/or urine.

(31) New source--As defined in §305.2 of this title (relating to Definitions). The criteria for new source determination are located in §305.534(b) of this title (relating to New Sources and Dischargers).

(32) Nuisance--Any discharge of air contaminant(s) including, but not limited to, odors of sufficient concentration and duration that are or may tend to be injurious to or that adversely affects human health or welfare, animal life, vegetation, or property, or that interferes with the normal use and enjoyment of animal life, vegetation, or property.

(33) Nutrient management plan (NMP)--The Natural Resources Conservation Service Practice Standard Code 590 plan. A plan to address the amount, source, placement, form, and timing of the application of all nutrients and soil amendments.

(34) Nutrient utilization plan (NUP)--A plan developed to evaluate and address site- specific characteristics of a land management unit to ensure that the beneficial use of manure, litter, or wastewater is conducted in a manner to prevent adverse impacts on water quality.

(35) One-hundred-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 100 years, with a duration of 24 hours, as defined by the National Weather Service in Technical Paper Number 40, "Rainfall Frequency Atlas of the United States," May 1961, and subsequent amendments; or equivalent regional or state rainfall information.

(36) One-hundred-year flood plain--Any land area that is subject to a 1.0% or greater chance of flooding in any given year from any source.

(37) Open lot--Pens or similar confinement areas with dirt, concrete, or other paved or hard surfaces wherein livestock or poultry are substantially or entirely exposed to the outside environment except for small portions of the total confinement area affording protection by windbreaks or small shed-type shade areas and that do not sustain crops, vegetation, forage growth, or postharvest residues in the normal growing season. For the purposes of this subchapter, the term "open lot" is synonymous with the terms "dirt lot" or "dry lot," for livestock or poultry, as these terms are commonly used in the agricultural industry.

(38) Operator--The owner or person responsible for the overall operation of a facility or part of a facility, subject to the provisions of this subchapter.

(39) Permanent odor sources--Those odor sources that may emit odors 24 hours per day. For the purposes of this subchapter, permanent odor sources include, but are not limited to, pens, confinement buildings, lagoons, retention control structures, manure stockpile areas, and solid separators. For the purposes of this subchapter, permanent odor sources shall not include any feed handling facilities, land application equipment, or land management units.

(40) Permittee--Any person issued an individual permit or order or authorized under a general permit.

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

(42) Playa--A flat-floored, clayey bottom of an undrained basin that is located in an arid or semi-arid part of the state, that is naturally dry most of the year, and that collects runoff from rain, but is subject to rapid evaporation.

(43) Process-generated wastewater--Any water directly or indirectly used or generated by the operation of an animal feeding operation, including spillage or overflow from animal or poultry watering systems that comes in contact with waste; water used or generated by washing, cleaning, or flushing pens, barns, and manure pits; direct contact swimming, washing, or spray cooling of animals; dust control; and water used in or resulting from the production of animals or poultry or direct products (e.g., milk, meat, or eggs).

(44) Production area--That part of an animal feeding operation that includes, but is not limited to, the animal confinement area, manure storage area, raw materials storage area, and control facilities.

(45) Protection zone--The area within the watershed of a sole-source surface drinking water supply that is:

(A) within two miles of the normal pool elevation, as shown on a United States Geological Survey (USGS) 7 1/2-minute quadrangle topographic map, of a sole-source drinking water supply reservoir;

(B) within two miles of that part of a perennial stream that is:

(i) a tributary of a sole-source drinking water supply; and

(ii) within three linear miles upstream of the normal pool elevation, as shown on a USGS 7 1/2-minute quadrangle topographic map, of a sole-source drinking water supply reservoir; or

(C) within two miles of a sole-source surface drinking water supply river, extending three linear miles upstream from the sole-source water supply intake point.

(46) Recharge feature--Those natural or artificial features either on or beneath the ground surface at the site under evaluation that provide or create a significant hydrologic connection between the ground surface and the underlying groundwater within an aquifer. Significant artificial features include, but are not limited to, wells and excavation or material pits. Significant natural hydrologic connections include, but are not limited to: faults, fractures, sinkholes, or other macro pores that allow direct surface infiltration; a permeable or shallow soil material that overlies an aquifer; exposed geologic formations that are identified as an aquifer; or a water course bisecting an aquifer.

(47) Retention control structure (RCS)--Any basins, ponds, pits, tanks, conveyances, and lagoons used to store and/or treat manure, litter, wastewater, and sludge. This RCS does not include conveyance systems such as irrigation piping or ditches that are designed and maintained to convey but not store any manure, litter, or water.

(48) Significant concentrated animal feeding operation (CAFO) expansion--Any change to a CAFO that increases the waste production at the CAFO by more than 50%, above the maximum operating capacity stated in the notice of intent, during the term of the general permit%.

(49) Sludge--Solid, semi-solid, or slurry waste generated during the treatment of and/or storage of any wastewater. The term includes material resulting from treatment, coagulation, or sedimentation of waste in a retention control structure.

(50) Soil Plant Air and Water (SPAW) Field Pond Hydrology--SPAW is a Natural Resources Conservation Service (NRCS) water budgeting tool for farm fields, ponds, and inundated wetlands. The SPAW model may be used to perform daily hydrologic water budgeting using the NRCS Runoff Curve Number method.

(51) Sole-source surface drinking water supply--A body of surface water that is identified as a public water supply in §307.10 of this title (relating to Appendices A - E) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(52) Technical service provider--An individual, entity, or public agency certified and placed on an approved list by the Natural Resources Conservation Service (NRCS) to provide technical services to program participants or the NRCS.

(53) Twenty-five-year, ten-day rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of ten days, as defined by the National Weather Service in Technical Paper Number 49 U.S. Weather Bureau and USDA, Two-to-Ten Day Precipitation for Return Periods of 2 to 100 Years in the Contiguous United States (1964)" , and subsequent amendments; or equivalent regional or state rainfall information.

(54) Twenty-five-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of 24 hours, as defined by the National Weather Service in Technical Paper Number 40, "Rainfall Frequency Atlas of the United States," May 1961, and subsequent amendments; or equivalent regional or state rainfall information.

(55) United States Department of Agriculture (USDA) - Natural Resources Conservation Service (NRCS)--An agency of the United States Department of Agriculture that provides assistance to agricultural producers for planning and installation of conservation practices through conservation and technical programs.

(56) Waste--Manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations.

(57) Wastewater--Any water, including process-generated wastewater and precipitation, that comes into contact with any manure, litter, bedding, or any raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk, meat, or eggs).

(58) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(59) Well--Any artificial excavation into and/or below the surface of the earth whether in use, unused, abandoned, capped, or plugged that may be further described as one or more of the following:

(A) an excavation designed to explore for, produce, capture, recharge, or recover water, any mineral, compound, gas, or oil from beneath the land surface;

(B) an excavation designed for the purpose of monitoring any of the physical or chemical properties of water, minerals, geology, or geothermal properties that exist or may exist below the land surface;

(C) an excavation designed for the injection or placement of any liquid, solid, gas, vapor, or any combination of liquid, solid, gas, or vapor into any soil or geologic formation below the land surface; or

(D) an excavation designed to lower a water or liquid surface below the land surface either temporarily or permanently for any reason.

§321.33. Applicability and Required Authorizations.

(a) Permit required. All concentrated animal feeding operations (CAFOs) are point sources that require owners and operators to seek and obtain authorization under a water quality general permit or individual permit. CAFO owners and operators have a duty to seek coverage as described in this section.

(b) Individual permit required. A discharge from the following CAFOs may be authorized only under an individual water quality permit in accordance with §321.34 of this title (relating to Permit Applications). Except as provided by subsections (e) and (f) of this section, any operator who is required to obtain an individual water quality permit under this subsection may not commence physical construction and/or operation of any new control facilities until an individual water quality permit is issued for that CAFO, or unless otherwise authorized by the commission in accordance with Texas Water Code (TWC), §26.027(c)).

(1) Any CAFO located within one mile of coastal natural resource areas as defined by Texas Natural Resources Code, §33.203, unless the CAFO was authorized by the commission prior to January 10, 1997.

(2) Any dairy CAFO located in a major sole-source impairment zone.

(3) Any CAFO where, on the date the executive director determines that the application is administratively complete, any part of the production area of the CAFO is located or proposed to be located within the protection zone of a sole-source surface drinking water supply, in accordance with TWC, §26.0286.

(4) Any CAFO where any part of the production area or land management units is located in a watershed of a segment listed on the current United States Environmental Protection Agency-approved 303(d) list of impaired water bodies, as required by 33 United States Code (USC), §1313(d), and where a total maximum daily load implementation plan has been adopted by the commission that established additional water quality protection measures for CAFOs that are not required by the CAFO general permit.

(5) Any animal feeding operation (AFO) that the executive director designates and requires to be authorized by an individual water quality permit to achieve the policies and purposes enumerated in TWC, §5.120 and §26.003; Texas Health and Safety Code, Chapters 341, 361, or 382; or §321.31 of this title (relating to Manure, Litter, and Wastewater Discharge and Air Emission Limitations). Cases for which the executive director may require an AFO to obtain an individual water quality permit include, but are not limited to, the following:

(A) the operation is located near surface or groundwater resources;

(B) compliance with standards in addition to those listed in this subchapter is necessary in order to protect water in the state from pollution;

(C) the operation is not or has not been in substantial compliance with the standards of this subchapter;

(D) the operation is under a formal commission enforcement order or has been referred to the commission for enforcement action by the Texas State Soil and Water Conservation Board;

(E) the operation does not qualify for a CAFO general permit under §205.4 of this title (relating to Authorizations and Notices of Intent); or

(F) the production area or land management unit of any new CAFO is located in a watershed of a segment listed on the current 303(d) list of impaired water bodies for bacteria, nutrients, and/or pathogens as required by 33 USC, §1313(d).

(G) the executive director determines that an individual water quality permit is appropriate considering other pertinent factors.

(c) Individual permit or general permit required. A discharge from any other CAFO shall be authorized either by an individual water quality permit or an applicable CAFO general permit. Except as provided by either subsection (e) or (f) of this section, any operator required to obtain an individual water quality permit or authorization under a CAFO general permit according to this subsection may not begin physical construction or operation of any new control facility until the CAFO operator receives an individual water quality permit or authorization under a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(d) New or expanding AFO. After the effective date of this subchapter, no person may commence construction or operation of a new CAFO or alter any existing AFO such that it becomes defined as a CAFO without prior authorization through an individual water quality permit or a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(e) Newly defined CAFO. An AFO that becomes classified as a CAFO after the effective date of this subchapter may not begin physical construction or operation of any new control facility until the CAFO operator receives authorization through an individual water quality permit or a CAFO general permit, unless otherwise authorized by the commission under TWC, §26.027(c).

(f) Dry litter poultry operations. Existing dry litter poultry operations must obtain authorization by an individual water quality permit or a CAFO general permit in accordance with subsection (a), (b), or (c) of this section not later than April 13, 2006.

(g) Facilities operating under an existing authorization. A CAFO currently authorized by registration must apply for an individual water quality permit before July 27, 2004 in order to continue to operate. An application for renewal of a registration will be considered an application for an individual permit, so long as the application fee for an individual permit is paid. If such an application is timely filed, operation of the CAFO under the terms and conditions of the existing permit by rule will continue to be authorized, and authorization under the existing permit by rule does not expire, until final commission action on the permit application or until the CAFO qualifies for coverage under a general permit.

(h) Expansion or modification requirements. A CAFO operator authorized under an individual water quality permit shall comply with §305.62 of this title (relating to Amendment). Before the permittee begins physical construction or operation of any new control facility, the operator must obtain commission authorization. Changes for which a permit amendment is required include, but are not limited to:

(1) increasing the maximum number of animals authorized for confinement;

(2) increasing the wastewater storage volume; and

(3) adding land management units.

(i) AFOs that are not defined or designated as CAFOs. Discharges of manure, litter, or wastewater from an AFO that is not a CAFO as defined in this subchapter are authorized under this subchapter. Requirements applicable to these AFOs are described in §321.47 of this title (relating to Requirements for Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs)).

(j) Runoff from a land management unit.

(1) The runoff of manure, litter, or wastewater to water in the state from a CAFO as the result of the proper land application of that manure, litter, or wastewater to land management units under the operator's control is subject to the requirements of this subchapter in accordance with paragraph (2) of this subsection.

(2) Where manure, litter, or wastewater is applied in accordance with a site-specific nutrient management plan that complies with §321.36(d) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)) or when the land application conforms to §321.40 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements), precipitation-related runoff from land management units under the control of a CAFO operator is authorized as:

(A) a pollutant discharge if the source is land associated with a CAFO in a major sole-source impairment zone; or

(B) an agricultural storm water discharge for all other sources.

(k) Edwards Aquifer. New CAFOs are prohibited on the Edwards Aquifer recharge zone.

(l) Permit term. Individual and general permits issued under this subchapter shall be effective for a term not to exceed five years from the date the permit is issued. Any previously issued individual water quality permit or authorization by rule that did not include an expiration date shall expire 180 days after the effective date of this subchapter. The permittee shall comply with the requirements of subsection (g) of this section.

(m) Dual authorization. No person may concurrently hold both an individual water quality permit and authorization under a CAFO general permit for the same CAFO.

(n) Additional requirements. Authorization under this subchapter, a general permit, or an individual permit does not release the operator from any responsibilities or requirements under other federal, state, or local statutes or regulations.

(o) State-only authorizations. Any AFO that is a state-only CAFO, as defined by §321.32(13)(D) of this title (relating to Definitions) shall be authorized in accordance with subsection (a) or (b) of this section.

§321.34. Permit Applications.

(a) Any operator of an animal feeding operation (AFO) who is required to operate under an individual water quality permit by the Texas Water Code, the executive director, or this subchapter shall submit an application in accordance with Chapter 281 of this title (relating to Applications Processing) and Chapter 305 of this title (relating to Consolidated Permits). The applicant shall provide such additional information in support of the application as may be necessary for the executive director to carry out an adequate administrative and technical review of the application.

(b) Applicants shall comply with §§305.41, 305.43, 305.44, and 305.47 of this title (relating to Applicability; Who Applies; Signatories to Applications; and Retention of Application Data) and §1.5(d) of this title (relating to Records of the Agency). Except as provided in subsection (c) of this section, §§305.61 - 305.68 of this title (relating to Applicability; Amendment; Renewal; Transfer of Permits; Permit Denial, Suspension, and Revocation; Revocation and Suspension upon Request or Consent; and Action and Notice on Petition for Revocation or Suspension) apply to applications for water quality permits. Notice, public comment, and contested case hearings on applications shall be conducted in accordance with commission rules governing applicable individual water quality permit applications.

(1) Any permittee with an issued and effective individual water quality permit shall submit an application for renewal of the permit in accordance with the requirements of Chapter 281 and Chapter 305 of this title, or shall submit a notice of intent (NOI) for a concentrated animal feeding operation (CAFO) general permit in accordance with the requirements of the CAFO general permit.

(2) If an individual water quality permit application or an NOI for a CAFO general permit has been submitted before the expiration date of the existing authorization, the terms and conditions of the existing permit continues in effect until final commission action on the permit application or until the CAFO qualifies for authorization under a CAFO general permit.

(3) A CAFO owner or operator who submits an NOI for a CAFO general permit for a new operation or significant CAFO expansion as defined by §321.32(48) of this title (relating to Definitions) shall comply with the public participation process detailed in the CAFO general permit. Expansions which are not considered significant only require the CAFO owner or operator to amend the pollution prevention plan and meet all the technical requirements of this subchapter and the permit or authorization.

(4) The executive director may renew an application for an individual water quality permit for a state- only CAFO without contested case hearing if the application does not propose any change that constitutes a major amendment as defined in Chapter 305 of this title (relating to Consolidated Permits) or if the operation is not a major source as defined under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification). Renewal under this paragraph is allowed only if there has been no related formal enforcement action against the facility during the last 36 months of the term of the individual water quality permit in which the commission determined that:

(A) a violation occurred that contributed to pollution of surface or groundwater, or an unauthorized discharge occurred, or a violation of §101.4 of this title (relating to Nuisance) occurred, or any violation of an applicable state or federal air quality control requirement occurred;

(B) such discharge or air emission was within the reasonable control of the permittee; and

(C) such discharge or air emission could have been reasonably foreseen by the permittee.

(5) For any application for renewal within an area specified in §321.32(17) of this title (relating to Definitions), the executive director will conduct an annual compliance inspection within 12 months of the date the executive director declares the application administratively complete.

(c) An operator shall submit a complete application within 90 days of notification from the executive director that an individual water quality permit is required under §321.33(b)(5) of this title (relating to Applicability and Required Authorizations).

(d) Permittees may amend their individual water quality permits in accordance with §305.62 of this title and §321.33(h) of this title (relating to Applicability and Required Authorizations), and must include all requested changes to the individual water quality permit application. The executive director will process a permit amendment application in accordance with all applicable requirements in Chapter 281 and Chapter 305 of this title.

(e) Any operator of an AFO who files an application for an individual water quality permit under this subchapter, or an amendment in accordance with §321.33(h) of this title, shall submit a complete application to the executive director, according to the provisions of this section including any other information as the executive director or the commission may require.

(f) Applications for an individual water quality permit under this section shall be made on forms prescribed by the executive director. The applicant shall submit an original completed application with attachments to the executive director at the commission headquarters in Austin, and one additional copy of the application with attachments to the appropriate commission regional office. At a minimum, the executive director will require the following information to be submitted, as it is applicable to the facility:

(1) information specified in §305.45 of this title (relating to Contents of Application for Permit);

(2) information specified in 40 Code of Federal Regulations (CFR) §122.21(i)(1), relating to application for a permit for a CAFO;

(3) a recharge feature certification, signed and sealed by a licensed Texas professional engineer, or a licensed Texas professional geoscientist, documenting the absence or presence of any natural or artificial recharge features identified on any tracts of land owned, operated, controlled, rented, or leased by the applicant and to be used as a part of a CAFO or land management unit. A certified water quality management plan prepared by the Texas State Soil and Water Conservation Board that is developed for a dry litter poultry facility that evaluates site-specific recharge characteristics and management practices of the operation will meet the recharge feature requirement of this paragraph.

(A) Documentation by the certifying party shall identify:

(i) the sources and methods used to identify the presence or absence of recharge features; and

(ii) the method or approach to be used to identify previously unidentified and undocumented recharge features that may be discovered during the time of construction;

(B) In preparing the recharge feature certification, the licensed Texas professional engineer or Texas professional geoscientist must conduct an on-site inspection and must review all pertinent records and maps maintained by the following entities or persons to locate any artificial recharge feature:

(i) Railroad Commission of Texas;

(ii) a Groundwater Conservation District, if applicable;

(iii) Texas Water Development Board;

(iv) the commission;

(v) Natural Resources Conservation Service (NRCS); and

(vi) previous owner of site, if available.

(4) where the applicant documents the presence of recharge features on the tracts for which an application is being filed, the applicant shall submit a plan. The plan must be signed and sealed by a licensed Texas professional engineer or licensed Texas professional geoscientist, as appropriate and in conformance with the Texas Engineering Practices Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts. The plan must prevent impacts to an aquifer from any recharge features present. The plan must include at least one of the following:

(A) provisions for the installation of the necessary and appropriate protective measures for each located recharge feature, including impervious cover, berms, buffer zones, or other equivalent protective measures, on the production area and land management units; or

(B) except as specified in §321.41 of this title (relating to Special Requirements for Discharges to a Playa), submission of a detailed groundwater monitoring plan covering all affected facilities and land application areas. At a minimum, the groundwater monitoring plan shall specify procedures to annually collect a groundwater sample from representative wells, have each sample analyzed for chlorides, nitrates, and total dissolved solids, and compare those values with background values for each well; or

(C) provisions for any other similar method or approach demonstrated by the applicant to be protective of any associated recharge feature and approved by the commission; and

(5) any information required by §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)) to document compliance with the air standard permit.

§321.36. Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs).

(a) Applicability. These requirements apply to a concentrated animal feeding operation (CAFO) general permit, individual water quality permit, or other authorization issued by the commission for a large CAFO, medium CAFO, and small CAFO subject to the requirements of the Texas Pollutant Discharge Elimination System.

(b) Permits. A CAFO shall comply with §305.125 of this title (relating to Standard Permit Conditions) and all applicable permit conditions contained in commission rules. Requirements to provide for and ensure compliance with standards set by the rules of the commission and the laws of Texas shall be determined and included in an individual water quality permit on a case-by-case basis to reflect the best method for attaining such compliance. Each permit shall contain terms and conditions as the commission determines necessary to protect human health and safety, and the environment.

(c) Control facility. A CAFO shall ensure that the control facility is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from the design rainfall event as described in §321.37 of this title (relating to Effluent Limitations for Discharges from Production Areas).

(d) Nutrient management plan (NMP).

(1) On or before December 31, 2006, the operator of a CAFO shall develop and implement an NMP certified in accordance with the Natural Resources Conservation Service Code 590 Practice Standard. The plan shall include site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients in the manure, litter, or wastewater.

(2) The CAFO operator shall create, maintain for five years, and make available to the executive director, upon request, a copy of the site-specific NMP and documentation of the implementation.

(3) Compliance with the requirements of this section and applicable requirements for the design and operation of a control facility, as described in §321.38 and §321.39 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs) and Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)) constitute compliance with the provisions of 40 Code of Federal Regulations (CFR) §122.42(e)(1)(i) - (ix).

(e) Manure, litter, and wastewater management.

(1) At least one representative sample of wastewater, if applicable, and one representative sample of manure/litter shall be collected and analyzed each year for total nitrogen, total phosphorus, and total potassium. The results of these analyses shall be used in determining application rates for manure in conjunction with analysis of wastewater.

(2) If manure, litter, or wastewater is sold or given to other persons for off-site land application or disposal, the CAFO operator shall maintain a log of:

(A) the date of removal from the CAFO;

(B) the name and address of the recipient; and

(C) the amount, in wet tons, dry tons, cubic yards, acre-inches, acre-feet, or gallons of manure, litter, or wastewater.

(3) A single pickup truck load need not be recorded.

(4) The operator shall make the most recent nutrient analysis available to any recipient of manure, litter, or wastewater.

(f) Buffers for land management units (LMUs). A sinkhole shall be protected with a 100-foot buffer from manure, litter, and wastewater application. Alternatively, the CAFO may substitute a 35-foot wide vegetative buffer around a sinkhole where alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent to or better than the reductions that would be achieved by the 100-foot buffer.

(g) Soil sampling and testing.

(1) Initial sampling. Before commencing wastewater irrigation or manure/litter application on land owned, operated, controlled, rented, or leased by the CAFO operator, the operator shall collect and analyze at least one representative soil sample from each of the LMUs according to the following procedures. The CAFO operator is not required to collect soil samples or report on LMUs where manure, litter, or wastewater has not been applied during the preceding year. The CAFO operator must comply with the initial sampling requirement before resuming land application to such LMUs.

(2) Annual sampling. The CAFO operator shall annually collect soil samples for each LMU owned, operated, controlled, rented, or leased by the CAFO operator where manure, litter, or wastewater was applied during the preceding year.

(3) Sampling procedures. The operator shall employ sampling procedures using accepted techniques of soil science for obtaining representative samples and analytical results.

(A) Samples shall be collected using approved procedures described in the agency's publication "Soil Sampling for Nutrient Utilization Plans (RG-408)."

(B) Samples shall be collected by the operator or its designee and analyzed by a soil testing laboratory within the same 45-day time frame each year, except when crop rotations or inclement weather require a change in the sampling time frame.

(C) One composite sample shall be obtained for each soil depth zone per uniform soil type (soils with the same characteristics and texture) within each LMU.

(D) Composite samples shall be comprised of 10 - 15 randomly sampled cores obtained from each of the following soil depth zones:

(i) Zone 1: zero to six inches (for an LMU where the manure is incorporated directly into the soil) or zero to two inches (for an LMU where the manure is not incorporated into the soil). Wastewater is considered to be incorporated. If a zero to two-inch sample is required under this subsection, then an additional sample from the two to six-inch soil depth zone shall be obtained in accordance with the provisions of this section; and

(ii) Zone 2: six to 24 inches.

(4) Laboratory analysis. The CAFO operator shall have a laboratory analysis of the soil samples performed for physical and chemical parameters to include: nitrate as nitrogen in parts per million (ppm), extractable phosphorus (ppm, using Mehlich III with Inductively Coupled Plasma (ICP)), potassium (extractable, ppm); sodium (extractable, ppm); magnesium (extractable, ppm); calcium (extractable, ppm); soluble salts (ppm) or electrical conductivity (deciSiemens/meter (dS/m) - determined from extract of 2:1 volume to volume (v/v) water/soil mixture); and soil water pH.

(h) Required inspections. The CAFO operator shall perform the routine inspections described in paragraphs (1) and (2) of this subsection to determine preventive maintenance and repair needs. Inspections shall include visual inspections and equipment testing to determine conditions that could cause breakdowns or failures resulting in discharge of pollutants to water in the state or the creation of a nuisance condition.

(1) CAFO operators shall conduct a daily inspection of all water lines, including drinking water and cooling water lines, located within the drainage area of the retention control structure (RCS).

(2) CAFO operators shall conduct a weekly inspection of all control facilities and equipment used during that week for land application of manure, litter, or wastewater. An inspection must include all storm water diversion devices, runoff diversion structures, and devices channeling contaminated storm water to each RCS. The weekly inspection will note the level of liquid in each RCS as indicated by the pond marker required by subsection (k) of this section.

(i) Recordkeeping.

(1) The CAFO operator shall draft and maintain a report for five years in the pollution prevention plan to document the inspections and to report that appropriate action has been taken in response to deficiencies identified during any inspection required by subsection (h) of this section. A CAFO operator shall correct all the deficiencies within 30 days or shall document the factors preventing immediate correction.

(2) The CAFO operator shall maintain records describing mortality management practices implemented in accordance with subsection (l) of this section.

(3) The CAFO operator shall maintain documentation describing the sources of information, assumptions, and calculations used in determining the appropriate volume capacity and structural features of each RCS, including embankments and liners.

(4) The CAFO operator shall maintain documentation describing a discharge into water in the state including the date, time, volume of overflow, a copy of the notification(s) provided to the regional office, and sample analysis results associated with an RCS discharge.

(5) The CAFO operator shall comply with the land application area recordkeeping requirements identified in 40 CFR §412.37 and §412.47. Compliance with §321.46 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting) constitutes compliance with this requirement.

(j) Annual report required. An annual report shall be submitted to the executive director's Office of Compliance and Enforcement, Enforcement Division, by February 15 of each year (for the reporting period of January 1 to December 31 of the previous year) from each CAFO authorized under a CAFO general permit or through an individual water quality permit in accordance with this subchapter. The report shall be submitted on forms prescribed by the executive director and shall include, but is not limited to, the following information:

(1) number and type of animals, whether in open confinement or housed under roof;

(2) estimated total manure, litter, and wastewater generated during the reporting period;

(3) total manure, litter, and wastewater land applied during the reporting period;

(4) total manure, litter, and wastewater transferred to other persons during the reporting period;

(5) total number of acres for land application under the control of the CAFO operator, including both the acres included in the NMP for the CAFO and the total number of acres used during the reporting period for land application;

(6) summary of discharges of manure, litter, or wastewater from the production area that occurred during the reporting period including dates, times, and approximate volume;

(7) a statement indicating that the NMP under which the CAFO is operating was developed and approved by a certified nutrient management specialist;

(8) a copy of the initial soil analysis for each LMU, regardless of whether manure, litter, or wastewater has been applied;

(9) soil monitoring reports of all soil samples collected in accordance with the requirements of this subchapter;

(10) groundwater monitoring reports; and

(11) any other information requested by the executive director.

(k) Pond marker. A permanent pond marker that identifies the level of the design rainfall event shall be installed and maintained in the RCS. In addition, if the operator must maintain a minimum treatment volume in accordance with §321.43(j)(3)(B) of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)), the pond marker must identify this level. The pond marker shall be visible from the top of the levee.

(l) Carcass disposal. Carcasses shall be collected within 24 hours of death and properly disposed of within three days of death in accordance with Texas Water Code, Chapter 26; Texas Health and Safety Code, Chapter 361; and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste) unless otherwise provided for by the commission. Animals must not be disposed of in any liquid manure or process wastewater system. Disposal of diseased animals shall also be conducted in a manner that prevents a public health hazard in accordance with Texas Agriculture Code, §161.004, and 4 TAC §31.3 and §58.31(b).

(m) Closure required. A closure plan must be developed by a CAFO operator when an RCS will no longer be used and when the CAFO ceases or plans to cease operation. For closure of a CAFO, a closure plan must be developed and submitted to the executive director when operation of the CAFO or an individual RCS terminates. The closure plan for the RCS must, at a minimum, be developed using standards contained in the NRCS Practice Standard Code 360 (Closures of Waste Impoundments), as amended, and using the guidelines contained in the Texas Cooperative Extension/ NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures), as amended. A CAFO shall maintain or renew its existing authorization and maintain compliance with the requirements of this subchapter until the facility has been closed.

§321.38. Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).

(a) Purpose. The purpose of this section is to describe the control facility design requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations under this subchapter.

(b) Well buffers. Except as provided by subsection (c) of this section, the control facility of an animal feeding operation (AFO) shall be separated from a well by ensuring a minimum buffer zone, as described in this subsection. An AFO shall not locate a new retention control structure (RCS) or holding pen within the required well buffer zones:

(1) public drinking water supply wells - 500 feet;

(2) drinking water wells used for private water supply - 150 feet; or

(3) water wells used exclusively for agriculture irrigation - 100 feet.

(c) Buffer variance. A CAFO operating under an existing authorization may continue the operation and use of any existing holding pens and RCSs located within the required well buffer zones provided they are in accordance with the recharge feature evaluation and certification required under §321.34(f)(3) of this title (relating to Permit Applications). Documentation supporting variances of the buffer zones that were previously authorized shall be kept on site and made available to agency personnel upon request.

(d) 100-year flood plain. All control facilities, including holding pens and RCSs, shall be located outside of the 100-year flood plain unless the facility is protected from inundation and damage that may occur during the flood event.

(e) RCS design capacity. The following design requirements apply to any AFO, including any CAFO.

(1) The design of a control facility shall include measures that will be used to minimize entry of uncontaminated runoff into RCSs.

(2) Any AFO constructing a new, or modifying an existing, RCS shall ensure that the design specifications and completed construction specifications are certified by a licensed Texas professional engineer. The failure to obtain the certifications or to maintain records verifying the certifications is a violation of this subchapter.

(3) Except as provided in this subsection, each RCS, at a minimum, shall be designed and constructed in accordance with the technical standards developed by the Natural Resources Conservation Service (NRCS), American Society of Agricultural Engineers, American Society of Civil Engineers, or American Society of Testing Materials that are in effect at the time of construction. Where site- specific variations are warranted, a licensed Texas professional engineer shall document these variations and their appropriateness to the design.

(4) Any existing RCS that has been properly maintained without any modifications and has no apparent structural problems or leakage is considered to be properly designed and constructed to meet the capacity requirements, provided that any required documentation was completed in accordance with the requirements at the time of construction. If no documentation exists, the ability of the RCS to meet the capacity for the design rainfall event must be certified by a licensed Texas professional engineer.

(5) Any RCS documented to have been built in accordance with site-specific NRCS plans and specifications is considered to be in compliance with the design and capacity requirements of this subchapter provided that:

(A) the site-specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.); and

(B) the RCS is operated and maintained in accordance with NRCS requirements.

(6) The production area of a new or expanding AFO shall not be constructed in any stream, river, lake, wetland, or playa, except as provided in §321.41 of this title (relating to Special Requirements for Discharges to a Playa).

(7) The design plan must include documentation of the sources of information, assumptions, and calculations used in determining the appropriate volume capacity of the retention control structures (RCSs). The volume must include design rainfall event runoff and normal operating capacity requirements in accordance with subparagraphs (A) and (B) of this paragraph or design rainfall event runoff and evaporation systems in accordance with subparagraphs (A) and (C) of this paragraph.

(A) Design rainfall event runoff.

(i) New source swine, veal, or poultry (chickens and turkeys) CAFOs. Any swine, veal, or poultry (chickens and turkeys) CAFO subject to the new source performance standards in 40 Code of Federal Regulations §412.46 shall have an RCS designed and constructed to meet or exceed the capacity required to contain the runoff and direct precipitation from the 100-year, 24-hour rainfall event.

(ii) All other AFOs. All other AFOs shall have an RCS designed and constructed to meet or exceed the capacity required to contain the runoff and direct precipitation from the 25-year, 24-hour rainfall event, except as required by §321.42(c) of this title (relating to Requirements Applicable to the Major Sole-Source Impairment Zone).

(B) Design capacity requirements for systems using irrigation.

(i) The RCS shall be designed for the authorized number of animals to include any storage volume required by a

hydrologic needs analysis (water balance) that documents that the typical irrigation demands of the proposed crop and irrigated land area will not be exceeded.

(ii) Precipitation inputs to the water balance shall be the average monthly precipitation reported in a National Weather Service current publication.

(iii) The consumptive use requirements of the cropping system shall be developed on a monthly basis, and shall be calculated as a part of the water balance.

(iv) The maximum required storage value calculated by the water balance shall not encroach on the storage volume required under subparagraph (A) of this paragraph.

(v) Wastewater application rates used in the water balance shall not induce uncontrolled runoff or create tailwater that causes a discharge.

(vi) All waste and process-generated wastewater produced during a 21-day or greater period.

(vii) Any other relevant volume needed in the water balance, including any required under the air standard permit in §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)).

(C) Design requirements for evaporation systems. Evaporation systems shall be designed:

(i) to withstand a ten-year (consecutive) period of maximum recorded monthly rainfall (other than catastrophic). In any month in which a catastrophic rainfall event occurs, the water balance shall replace such an event with not less than the long-term average rainfall for that month as determined by a water balance; and

(ii) to maintain sufficient volume to contain rainfall and rainfall runoff from the rainfall event as required by subparagraph (A) of this paragraph without overflow. The depth for this volume must be at least one vertical foot allocated within the RCS above the volume required in clause (i) of this subparagraph.

(f) Dewatering system. An irrigation system or other liquid removal system used by an AFO must be designed to ensure that the system is capable of dewatering the RCSs on a regular schedule.

(g) RCS embankment and liner design. A permit or authorization shall identify required design specifications for all RCS.

(1) The design specifications for all new construction and for all structural modifications of existing RCSs must describe standards for the quality of soils used, lift thickness and density at optimum moisture content, procedures and minimum requirements for liner and embankment compaction testing, and spillway construction.

(2) For all new construction and for all structural modifications of existing RCSs, each RCS must have a minimum of two vertical feet of materials equivalent to those used at the time of design and construction between the top of the embankment and the structure's spillway. RCSs without spillways must have a minimum of two vertical feet between the top of the embankment and the required storage capacity, including any additional storage required by an alternative standard.

(3) The operator shall ensure site-specific documentation is prepared that shows that no significant hydrologic connection exists between the contained wastewater and water in the state. Where the operator cannot document that no significant hydrologic connection exists, RCSs must have a liner consistent with the requirements of this subsection.

(A) Documentation must show that there will be no significant leakage from the RCS; or that any leakage from the RCS will not migrate to water in the state. A permit or authorization will require documentation of the lack of hydrologic connection certified by a licensed Texas professional engineer or licensed Texas professional geoscientist and must include information on the hydraulic conductivity tested at the optimum moisture content and thickness of the natural materials underlying and forming the walls of the containment structure up to the wetted perimeter.

(B) If it is claimed that no significant leakage would result from the use of in-situ materials, documentation must be provided that leakage will not migrate to waters in the state. The operator must at a minimum include maps showing groundwater flow paths, or that the leakage enters a confined environment. A permit or authorization will require a written determination by an NRCS engineer, or a licensed Texas professional engineer or a licensed Texas professional geoscientist that a liner is not needed to prevent a significant hydrologic connection between the contained wastewater and waters in the state. This information will be considered documentation that no significant hydrologic connection exists.

(C) Site-specific conditions may be considered in the design and construction of liners. Where no site- specific assessment has been performed demonstrating that there will be no significant leakage from the RCS or that any leakage from the RCS will not migrate to water in the state, a liner must be designed by a licensed Texas professional engineer and documented to have hydraulic conductivities no greater than 1×10^{-7} centimeters per second (cm/sec), with a thickness of 1.5 feet or greater or its equivalency in other materials. The liner must be constructed in accordance with the design and certified as such by a licensed Texas professional engineer. The operator shall maintain the liner to minimize the percolation of wastewater through the liner.

(D) A permit or authorization shall include provisions whereby the executive director may, upon written notice, require the operator to install a leak detection system or monitoring well(s), based upon a determination that significant potential exists for the contamination of water in the state or drinking water.

(E) Documentation of lack of hydrologic connection, liner, and capacity certifications by a licensed Texas professional engineer or licensed Texas professional geoscientist must be completed for each RCS and kept on site.

(h) Manure storage. The AFO operator shall provide manure storage capacity based upon manure and waste production, land availability, and the NRCS Field Office Technical Guide or equivalent standards. When manure is stockpiled, it shall be stored in a well-drained area with no ponding of water, and the top and sides of stockpiles shall be adequately sloped to ensure proper drainage. Runoff from manure storage piles must be retained on site. If the manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the manure areas must be located within the drainage area of the RCS and accounted for in the design calculations of the RCS.

§321.39. Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).

(a) Purpose. The purpose of this section is to describe the control facility operational requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter.

(b) Retention control structure (RCS) operation and maintenance. A CAFO using an RCS for storage and treatment of storm water, sludge, or process-generated wastewater, including liquid manure handling systems, shall ensure that the required capacity in the RCS is

available to contain rainfall and rainfall runoff from the required rainfall event.

(1) The operator shall restore such capacity after each rainfall event or accumulation of manure, sludge, or process-generated wastewater that reduces such capacity, when conditions are favorable for irrigation. Favorable conditions shall be when the soil moisture level decreases so that irrigation will not cause runoff.

(2) The normal operating wastewater level in the RCS shall be maintained within the design of the RCS. If the water level in the RCS encroaches into the storage volume reserved for the design rainfall event (25-year or 100-year), the operator must document the conditions that resulted in this occurrence. As soon as irrigation is not prohibited, the CAFO operator shall irrigate until the water level is at or below the design rainfall level.

(3) If an RCS is in danger of imminent overflow from chronic or catastrophic rainfall or catastrophic conditions, then the CAFO operator shall take reasonable steps to irrigate wastewater to land management units (LMUs) only to the extent necessary to prevent overflow from the RCS. If irrigation results in a discharge from an LMU, the CAFO operator shall collect samples from the drainage pathway at the point of discharge from the edge of the LMU where the discharge occurs for the parameters identified in §321.44(b)(1) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Notification Requirements). The operator shall orally notify the appropriate regional office within 24 hours of beginning irrigation under this provision and in writing within 14 working days.

(4) A rain gauge capable of measuring the required rainfall event shall be installed and properly maintained.

(5) The CAFO operator shall ensure liners and embankments are protected from animals by fences or other protective devices. No tree shall be allowed to grow such that the root zone would intrude or compromise the structure of the liner. Any mechanical or structural damage to the liner shall be evaluated by a licensed Texas professional engineer within 30 days of the damage.

(c) Sludge. The CAFO operator shall monitor sludge accumulation and depth in an RCS, as necessary, based upon the design sludge storage volume in the RCS.

(1) Sludge shall be removed from RCSs in accordance with the design schedule for cleanout to prevent the accumulation of sludge from exceeding the designed sludge volume of the structure.

(2) The operator shall provide written notice to the appropriate regional office of the commission as soon as the RCS cleaning is scheduled, but not less than ten days before cleaning. The operator shall also provide written verification of completion to the same regional office within five days after the cleaning has been completed. This paragraph does not apply to cleaning of solid separators or settling basins. Removal of sludge shall be conducted during favorable wind conditions that carry odors away from nearby receptors. Any increase in odors associated with a properly managed cleanout under this subsection will be taken into consideration by the executive director when determining compliance with the provisions of this subchapter.

(d) Spill prevention and recovery. The CAFO operator shall take appropriate measures necessary to prevent spills and to clean up spills of any toxic pollutant. Where potential spills can occur, material, handling procedures, and storage shall be specified. The CAFO operator shall identify the procedures for cleaning up spills and shall make available the necessary equipment to personnel to implement a cleanup. The CAFO operator shall store, use, and dispose of all herbicides and pesticides in accordance with label instructions. There shall be no disposal of herbicides, pesticides, solvents or heavy metals, or of spills or residues from storage or application equipment or containers, into RCSs. Incidental amounts of such substances entering an RCS as a result of storm water transport of properly applied chemicals is not a violation of this section.

(e) Storage of waste. A permit or authorization will establish requirements for the temporary storage of manure, litter, or sludge not to exceed 30 days, and requirements for permanent storage for more than 30 days. If the manure areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the manure areas must be located within the drainage area of the RCS and accounted for in the design calculations of the RCS.

(f) Composting. Composting on site at a CAFO shall be performed in accordance with Chapter 332 of this title (relating to Composting). CAFOs may compost waste generated on site, including manure, litter, bedding, feed, and dead animals. In accordance with Chapter 332 of this title, a CAFO operator may add agricultural products to provide an additional carbon source or bulking agent to aid in the composting process. If the compost areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the compost areas must be located within the drainage of the RCS and must be shown on the site plan and accounted for in the design calculations of the RCS.

(g) Maintenance of animals.

(1) Animals confined at the CAFO shall be restricted from coming into direct contact with surface water in the state through the use of fences or other controls.

(2) A CAFO that maintains animals in pastures must maintain crops, vegetation, forage growth, or postharvest residues in the normal growing season, excluding the feed and water trough areas and open lots designated on the site map.

§321.40. Concentrated Animal Feeding Operation (CAFO) Land Application Requirements.

(a) The purpose of this section is to describe the land application requirements that apply to concentrated animal feeding operation (CAFO) general or individual water quality permits or other authorizations allowed by this subchapter.

(b) The land application of manure, litter, or wastewater at agronomic rates and hydrologic needs shall not be considered surface disposal and is not prohibited.

(c) Manure, litter, or wastewater may be applied to the areas in the 100-year flood plain at agronomic rates not to exceed the hydrologic needs of the crop.

(d) Discharge of manure, litter, or wastewater from the land management unit (LMU) is prohibited and shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition.

(e) Irrigation practices shall be managed so as to minimize ponding or puddling of wastewater on the site, prevent tailwater discharges to waters in the state, and prevent the occurrence of nuisance conditions.

(f) Land application shall not occur when the ground is frozen or saturated or during rainfall events unless in accordance with §321.39(b)(3) of this title (relating to Control Facility Operational Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)) or as approved by the commission.

(g) The CAFO operator shall not locate a new LMU within the required well buffer zones identified in §321.38(b) of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)). An exception to the full well buffer zone for a private drinking water well or a water well used exclusively for agricultural irrigation may be approved by the executive director if a licensed Texas professional engineer or licensed Texas professional geoscientist provides accurate documentation showing that additional wellhead protective measures will be or have been implemented that will prevent pollutants from entering the well and contaminating groundwater. Additional protective measures may include a sanitary seal, annular seal, a steel sleeve, or surface slab.

(h) Vegetative buffer strips shall be no less than 100 feet of vegetation to be maintained between manure, litter, or wastewater application areas and water in the state. A buffer is not required for wastewater irrigation when applied by low-pressure, low-profile center pivot irrigation systems in areas of the state where the annual average rainfall is less than 25 inches per year. The CAFO operator shall maintain the buffer strips in accordance with Natural Resources Conservation Service (NRCS) guidelines.

(i) CAFOs introducing wastewater or chemicals to water wellheads for the purpose of irrigation shall install backflow prevention devices in accordance with requirements contained in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers).

(j) Nighttime application of manure, litter, or wastewater by a CAFO shall be allowed only in areas with no occupied residence(s) within 1/4 mile from the outer boundary of the LMU receiving manure, litter, or wastewater. In areas with an occupied residence within 1/4 mile from the outer boundary of the LMU receiving manure, litter, or wastewater shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have, in writing, agreed to such nighttime applications.

(k) Any CAFO operator who owns, operates, controls, rents, or leases land where manure, litter, or wastewater from the CAFO is land applied must be in compliance with the deadline and requirements specified in §321.36(d) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)). Before this deadline, the operator of any existing CAFO must manage nutrients on LMUs according to all other applicable requirements of this subchapter.

(1) Nutrient requirement. Any land application of manure, litter, and wastewater shall not exceed the nutrients necessary to meet the planned crop requirements. Land application rates of manure, litter, and wastewater shall be based on the total nutrient concentration on a dry weight basis.

(2) Critical phosphorus level. A permit or other authorization shall establish the appropriate threshold for phosphorus in the soil and the requirements to develop the nutrient utilization plan (NUP). If an operator is required to develop a NUP, the operator shall cease land application of manure, litter, or wastewater to the affected area and may resume only after a detailed NUP has been implemented.

(3) NUP. An NMP (Practice Standard 590) certified as meeting the NRCS standard is equivalent to the requirements for a NUP. The NUP, based on crop removal, must be developed and certified by an employee of the NRCS, a nutrient management specialist certified by the NRCS, the Texas State Soil and Water Conservation Board, Texas Cooperative Extension, an agronomist or soil scientist on full- time staff at an accredited university located in the State of Texas, or a professional agronomist or soil scientist certified by the Certified Professional Agronomist certified through the certification program of the American Society of Agronomy, a Certified Professional Soil Scientist certified through the certification program of the Soil Science Society of America, or a licensed geoscientist-soil scientist in Texas after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner. After a NUP is implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below the critical phosphorus level. Thereafter, the operator of a CAFO shall implement the requirements of the nutrient management plan certified in accordance with §321.36(d) of this title. All other CAFOs must follow the requirements in this section.

(4) For a CAFO, land application under the terms of the NUP may begin 30 days after the plan is filed with the executive director, unless before that time the executive director has returned the plan for failure to comply with all the requirements of this subsection.

§321.41. Special Requirements for Discharges to a Playa.

(a) This section applies to any animal feeding operation (AFO) operator authorized by the commission before July 13, 1995 to discharge manure, litter, or wastewater into a playa or to use a playa as a retention control structure for manure, litter or wastewater in accordance with Texas Water Code, §26.048.

(b) A playa that is in use as a retention control structure, as allowed by Texas Water Code (TWC), §26.048, and that shows no signs of leakage, is considered to satisfy all applicable design and construction requirements specified in §321.38 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)).

(c) A groundwater plan for use of a playa shall be implemented in accordance with TWC, §26.048.

(d) If the executive director determines that contamination of groundwater is occurring as a result of use of the playa as a retention facility for manure, litter, or wastewater from the AFO, the executive director shall require action to correct the problem or revoke the AFOs authority to discharge into the playa.

§321.42. Requirements Applicable to the Major Sole-Source Impairment Zone.

(a) The purpose of this section is to describe certain requirements for individual water quality permits for dairy concentrated animal feeding operations (CAFOs) or other authorizations allowed by this subchapter when an operation is located in a major sole-source impairment zone. Additionally, subsection (i) of this section applies to any dairy animal feeding operation (AFO), including any dairy CAFO, which is located in a major sole-source impairment zone.

(b) The dairy CAFO operator must adhere to provisions of this section and the other requirements contained in this subchapter. When a requirement of this section conflicts with another requirement of this subchapter, the requirement of this section shall supercede the other requirement.

(c) The dairy CAFO operator must operate and maintain a margin of safety in the retention control structure (RCS) to contain the volume:

(1) of runoff and direct precipitation from the 25-year, ten-day rainfall event; or

(2) necessary to prevent overflow resulting from a statistically determined probability of overflow resulting in a discharge frequency of no more than once in 25 years. The margin of safety using this method must be evaluated using the Soil Plant Air and Water (SPAW) Field and Pond Hydrology Tool and be certified by a Texas licensed professional engineer.

(d) The dairy CAFO is only authorized to discharge from a properly operated and maintained RCS when the volume of the rainfall runoff and direct precipitation exceed the volume for the margin of safety that must be maintained in the RCS.

(e) If construction of new or modified RCSs is necessary to comply with subsections (c) and (d) of this section, a permit or other authorization will specify a schedule for compliance.

(f) The dairy operator shall install and maintain a permanent pond marker (measuring device) in the RCS visible from the top of the levee to show the following:

(1) the volume for the margin of safety; and

(2) one-foot increments beginning from the predetermined minimum treatment volume of the RCS to the top of the embankment or spillway.

(g) The dairy operator shall implement an RCS management plan incorporating the margin of safety developed by a licensed Texas professional engineer. The management plan shall become a component of the pollution prevention plan (PPP), shall be developed for the RCS system, and must describe or include:

(1) RCS management controls appropriate for the CAFO and the methods and procedures for implementing such controls;

(2) the methods and procedures for proper operation and maintenance of the RCS consistent with the system design;

(3) the appropriateness and priorities of any controls reflecting the identified sources of pollutants at the facility;

(4) a stage/storage table for each RCS with minimum depth increments of one-foot, including the storage volume provided at each depth;

(5) a second table or sketch that includes increments of water level ranges for volumes of total design storage, including the storage volume provided at each specified depth (or water level) and the type of storage designated by that depth; and

(6) the planned end of month storage volume anticipated for each RCS for each month of the year and the corresponding operating depth expected at the end of each month of the year, based on the design assumptions.

(h) The dairy operator shall monitor and record wastewater levels daily in the RCS. A log shall be kept in the PPP to document the level of wastewater observed each day. In circumstances where the RCS has a water level exceeding the expected end of the month depth, the operator shall document in the PPP why the level of water in the structure is not at or below the expected depth.

(i) The dairy operator shall provide for management and disposal of waste as specified in Texas Water Code, §26.503, in accordance with the following:

(1) beneficially used outside of the watershed;

(2) disposed in landfills outside of the watershed, subject to the requirements of commission rules relating to industrial solid waste;

(3) delivered to a composting facility approved by the executive director;

(4) put to another beneficial use approved by the executive director; or

(5) applied in any of the following ways:

(A) in accordance with a nutrient management plan (NMP) certified in accordance with Natural Resources Conservation Service (NRCS) Code 590 Practice Standard to a waste application field that is owned, operated, controlled, rented, or leased by the owner of the CAFO, if the field is not a historical waste application field, as defined in §321.32 of this title (relating to Definitions);

(B) in accordance with an NMP certified in accordance with NRCS Code 590 Practice standard to a historical waste application field that is owned, operated, controlled, rented, or leased by the owner or operator of the CAFO, if results of representative composite soil sampling conducted at the waste application field and submitted to the executive director show that the waste application field contains 200 or fewer parts per million (ppm) of extractable phosphorus (reported as P) in the Zone 1 (zero to six inches) depth; or

(C) in accordance with a detailed nutrient utilization plan (NUP) approved by the executive director which, at a minimum, meets the requirements of §321.40(k)(3) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Land Application Requirements), to a historical waste application field that is owned, operated, controlled, rented, or leased by the owner or operator of the CAFO, if results of representative composite soil sampling conducted at the waste application field and submitted to the executive director show that the waste application field contains greater than 200 ppm of extractable phosphorus (reported as P) in the Zone 1 (zero to six inches) depth.

(j) Permits for existing dairy CAFOs in the major sole-source impairment zone in accordance with subsection (i) of this section may allow the operator to provide manure, litter, and wastewater to operators of third-party fields, i.e., areas of land not owned, operated, controlled, rented, or leased by an AFO owner or operator, that have been identified in the PPP. The dairy operator will be subject to enforcement action for violations of the land application requirements on any third-party field under contract. The permit provision must, at a minimum, include the following requirements:

(1) there must be a written contract between the dairy operator and the recipient that requires all transferred manure, litter, and wastewater to be beneficially applied to third-party fields identified in the PPP in accordance with the applicable requirements in §321.36 of this title (relating to Texas Pollutant Discharge Elimination System Requirements for Concentrated Animal Feeding Operations (CAFOs) and §321.40 of this title at an agronomic rate based on soil test phosphorus;

(2) the permit must prohibit the dairy operator from delivering manure, litter, or wastewater to an operator of a third-party field once the soil test phosphorus analysis shows a level equal to or greater than 200 ppm or after becoming aware that the third-party operator is not following §321.36 of this title and §321.40 of this title and the contract;

(3) third-party fields identified in the PPP on which manure, litter, or wastewater have been applied during the preceding year must be sampled annually by a nutrient management specialist and the samples analyzed in accordance with §321.36(g) of this title; and

(4) the dairy operator shall submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of manure, litter, or wastewater transferred to operators of third-party fields.

(k) The dairy operator must contract with the NRCS, a certified nutrient management specialist, the Texas State Soil and Water Conservation Board, the Texas Cooperative Extension, or an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas to collect one or more representative composite soil samples from each LMU including any historical waste application fields, not less than once every 12 months.

(l) The dairy operator shall notify the appropriate regional office in writing or by electronic mail with the date, time, and location at least ten working days before collecting soil samples.

(m) The dairy operator shall ensure that soil samples are analyzed in accordance with the procedures and laboratory analysis requirements in §321.36(g) of this title (relating to Texas Pollutant Discharge Elimination System General Requirements for Concentrated Animal Feeding Operations (CAFOs)). The dairy CAFO operator shall furnish to the appropriate regional office and the commission's Office of Compliance and Enforcement, Enforcement Division, soil testing analysis of all soil samples within 60 days of the date the samples were taken in accordance with the requirements of this subchapter.

(n) If the samples tested under subsection (m) of this section show a phosphorus level in the soil of more than 500 ppm in Zone 1 (zero to six inches) depth, the operator shall file with the executive director a new or amended NUP with a phosphorus reduction component based on crop removal that is certified as acceptable by a person described in §321.40(k)(3) of this title.

(o) If the samples tested under subsection (m) of this section show a phosphorus level in the soil of more than 200 ppm but not more than 500 ppm in Zone 1 (zero to six inches) depth, the operator shall:

(1) file with the executive director a new or amended NUP with a phosphorus reduction component based on crop removal that is certified as acceptable by a person described in §321.40(k)(3) of this title; or

(2) show that the level is supported by a NUP that is certified as acceptable by a person described under §321.40(k)(3) of this title.

(p) If the owner or operator of a waste application field is required by this section to have a NUP with a phosphorus reduction component based on crop removal, and if the results of tests performed on composite soil samples collected 12 months or more after the plan is filed do not show a reduction in phosphorus concentration in Zone 1 (zero to six inches) depth, then the owner or operator is subject to enforcement action at the discretion of the executive director. The executive director, in determining whether to take an enforcement action, shall consider any explanation presented by the owner or operator regarding the reasons for the lack of phosphorus reduction, including, but not limited to, an act of God, meteorologic conditions, diseases, vermin, crop conditions, or variability of soil testing results.

(q) The dairy operator shall inspect the irrigation system to prevent discharges. If a discharge from an irrigation system within the major sole-source impairment zone is documented as a violation, then the CAFO operator shall, if required by the executive director, install an automatic emergency shutdown or alarm system to notify the operator of system problems.

(r) The dairy operators are prohibited from land application of manure, litter, or wastewater in a major sole-source impairment zone between midnight and 4 a.m.

(s) All dairy CAFOs in a major sole-source impairment zone shall develop and operate under a comprehensive nutrient management plan (CNMP) certified by the Texas State Soil and Water Conservation Board. This CNMP shall be implemented not later than December 31, 2006.

(t) In addition to the requirements of §321.44 of this title (relating to Concentrated Animal Feeding Operation (CAFO) Notification Requirements), a dairy CAFO operator in a major sole-source impairment zone must comply with this subsection. In the event of a discharge from the RCS or LMU during a chronic or catastrophic rainfall event or resulting from catastrophic conditions, the dairy CAFO operator shall orally notify the appropriate regional office within one hour of the discovery of the discharge. The operator shall send written notification to the appropriate regional office within 14 working days.

(u) Any dairy CAFO operator to whom this section applies who has an unauthorized discharge from the RCS and who used the SPAW certification method for the margin of safety shall, within 90 days of written notification by the executive director, develop and implement the capacity for a 25-year, ten- day margin of safety. Upon written request, the executive director may grant a variance from the 90- day time requirement.

(v) Any dairy CAFO operator to whom this section applies shall, in the event of a discharge from an RCS or LMU, submit a report to the appropriate regional office showing the facility records that substantiates that the overflow was a result of cumulative rainfall that exceeded the volume of storage capacity and margin of safety without the opportunity for dewatering, and was beyond the control of the operator. After review of the report, if required by the executive director, the operator shall have an engineering evaluation by a licensed Texas professional engineer developed and submitted to the executive director. This requirement is in addition to the discharge notification requirement in this subchapter.

(w) For additional protection in the major sole-source impairment zone, dairy CAFO operators who utilize LMUs must:

(1) adhere to the vegetative buffer required by §321.40(h) of this title;

(2) install and maintain a filter strip or vegetative barrier, according to NRCS Codes 393 or 601, between the vegetative buffer and land application area; and

(3) install and maintain contour buffer strips, according to NRCS Code 332, in the land application area nearest to the vegetative barrier or filter strip.

§321.43. Air Standard Permit for Animal Feeding Operations (AFOs).

(a) Air quality authorization required. All animal feeding operations (AFOs), regardless of size, are required to obtain air quality authorization under the Texas Clean Air Act, Texas Health and Safety Code, Chapter 382, Subchapter C. AFOs may obtain air quality authorization in one of the following ways:

(1) by meeting the requirements of a permit by rule under Chapter 106, Subchapter F of this title (relating to Animal Confinement);

(2) by obtaining an individual permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(3) by meeting the requirements in this section and the general conditions for air standard permits in §116.615 of this title (relating to General Conditions).

(b) Applicability. The air standard permit requirements in this section and in §116.615 of this title are applicable to all portions of AFOs including permanent odor sources, land management units, and associated operations. The air standard permit requirements are also applicable to associated feed handling or feed milling operations (including, but not limited to, natural gas-fired boilers, milling equipment, and grain cleaners) located on the same site. This air standard permit may not be used to authorize the construction or operation of unassociated operations or equipment, including incinerators or emergency generators, located at the AFO.

(c) Water quality authorization. Authorization under this air standard permit may be obtained by AFOs with water quality authorization under:

(1) a Texas Pollutant Discharge Elimination System permit;

(2) a state-only water quality general permit;

(3) a state only individual water quality permit; or

(4) a permit by rule under this subchapter.

(d) Air standard permit in lieu of individual permit. A concentrated animal feeding operation (CAFO) or other AFO that obtains water quality authorization as provided in subsection (c) of this section, and also satisfies the air quality requirements contained in this section qualifies for an air standard permit in lieu of an individual air quality permit under Chapter 116 of this title.

(e) Obtaining the air standard permit for AFOs. The air standard permit may be obtained in conjunction with a water quality application for an individual or CAFO general permit. If no water quality application is pending, a separate written request for authorization under the AFO air standard permit may be submitted that must indicate that the AFO will comply with all the requirements in this section. Registration for authorization to operate under the air standard permit is not required.

(f) Fee. There is no fee for the air standard permit for AFOs.

(g) Facilities not eligible. A CAFO or other AFO does not qualify for authorization under the air standard permit if:

(1) the CAFO or other AFO does not have water quality authorization; or

(2) the CAFO or other AFO constitutes a new major source or is located at a site that constitutes a major source as defined by Chapter 116 of this title.

(h) Dual authorization. No person may concurrently hold both an individual permit under Chapter 116 and authorization under this air standard permit for the same AFO and associated facilities. This does not preclude the operator from holding individual permits or other applicable authorizations for facilities not authorized by this air standard permit.

(i) Restriction on use of permit by rule. An AFO authorized under this air standard permit may not claim authorization under §106.532 of this title (relating to Water and Wastewater Treatment) to construct a new retention control structure (RCS).

(j) Requirements for air standard permit authorization. AFOs shall meet the following requirements.

(1) Air emission limitations.

(A) Facilities shall be operated in such a manner as to prevent the creation of a nuisance as defined by Texas Health and Safety Code, §341.011 and §321.32(32) of this title (relating to Definitions), and as prohibited by §101.4 of this title (relating to Nuisance). Facilities shall be operated in such a manner as to prevent a condition of air pollution as defined by Texas Health and Safety Code, §382.003(3).

(B) The AFO operator shall take necessary action to identify any nuisance condition that occurs. The AFO operator shall take action to abate any nuisance condition as soon as practicable or as specified by the executive director.

(2) Buffer requirements. The buffer requirements in the following table apply to all of the requirements in subparagraphs (A) - (F) of this paragraph.

Figure: 30 TAC §321.43(j)(2)

(A) The buffer requirements shall be satisfied at the time that the AFO operator does any of the following:

(i) claims authorization under the air standard permit for an AFO already in operation;

(ii) begins construction of a new AFO; or

(iii) begins construction for expansion or modification of an AFO already in operation by performing activities including, but not limited to, increasing the maximum number of animals confined under the water quality authorization, constructing new pens, or constructing or modifying RCSs.

(B) The operator of an AFO shall document that the applicable buffer requirement is satisfied in accordance with this paragraph. The operator of an AFO shall maintain such documentation on site and make it available upon request by any representative of the commission.

(C) The buffer distance shall be measured from the nearest edge of the permanent odor sources to the nearest edge of any occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park.

(D) Written consent, including a letter as defined by §321.32(26) of this title (relating to Definitions), easement, or lease agreement specifically consenting to location and operation of permanent odor sources at an AFO within the required minimum buffer distance in this paragraph from the owner of the land containing each occupied residence or business structure, school (including associated recreational areas), permanent structure containing a place of worship, or public park located within the buffer distance may be obtained in lieu of satisfying the buffer distance requirements in this paragraph. Written consent from the governmental entity responsible for operating a school or public park, if the governmental entity is not the owner of the land containing the receptor, is required in addition to the consent of the owner of the land containing the receptor. An easement must be recorded with the county. The written consent must include the following information at the time the actions specified in this paragraph occur:

(i) the name, physical address, mailing address, and phone number of the owner(s) of the land containing the receptor and of the governmental entity responsible for the operation of the receptor, if applicable;

(ii) the types of animals and maximum number of animals to be confined under the AFO operator's current and/or anticipated authorization;

(iii) a description of the activity within the buffer distance for which the owner of the land containing the receptor and the governmental entity responsible for the operation of the receptor, if applicable, is giving consent;

(iv) the description and location of permanent odor sources located or proposed to be located within the buffer distance;

(v) an acknowledgment by the owner of the land containing the receptor located within the buffer distance, and by the governmental entity responsible for the operation of the receptor, if applicable, that the consent for the owner of the land containing the AFO to locate and operate permanent odor sources within the buffer distance excuses the operator of the AFO from otherwise applicable legal requirements; and

(vi) the verified signature of the owner(s) of the land containing the receptor, and of the governmental entity responsible for the operation of the receptor, if applicable, who is consenting to the location or operation of the AFO within the buffer distance.

(E) An area land use map as defined by §321.32(5) of this title, an odor control plan, if required by this paragraph, and documentation and copies of the written consent required in subparagraph (D) of this paragraph shall be kept on site and made available upon request by the executive director.

(F) The odor control plan, if required by this paragraph, shall be developed and implemented to control and reduce odors, dust, and other air contaminants, as defined by §321.32(2) of this title, from the AFO. The plan shall identify all structural and management practices that the operator will employ to minimize odor and control air contaminants at the AFO. At a minimum, the plan shall include, where applicable, procedures for manure/litter collection, manure, litter, and wastewater storage and treatment, land application, dead animal handling, and dust control. If the executive director determines that the implementation and employment of these practices is not effective in controlling dust, odors, and other air contaminants, the operator shall include any necessary additional abatement measures in the odor control plan and implement those measures to control and reduce these contaminants within the time period specified by the executive director.

(3) Wastewater treatment. Operators of AFOs that produce process-generated wastewater (excluding water trough overflow in open lots and wastewater from boiler operations) shall design and operate RCSs to minimize odors in accordance with accepted engineering practices. Each system shall be operated in accordance with the design and an operation and maintenance plan that minimizes odors.

(A) Accepted engineering practices to minimize odors include anaerobic treatment lagoons, aerobic treatment lagoons, or other equivalent technology. The retention control structures shall also meet the design criteria specified for water quality in this subchapter.

(B) Accepted design standards and requirements for each of these methods of treatment are:

(i) an anaerobic treatment lagoon shall be designed in accordance with American National Standards Institute/American Society of Agricultural Engineers EP403.3 July 1999 (or subsequent updates); Natural Resources Conservation Service (NRCS), Field Office Technical Guidance, Practice Standard 359, Waste Treatment Lagoon, or the equivalent for the control of odors. The primary lagoon in a multi-stage lagoon system shall be designed with a minimum treatment volume so that the lagoon maintains a constant level at all times unless prohibited by climatic conditions. A multi-stage lagoon system shall be designed to minimize the amount of contaminated storm water runoff entering the primary lagoon by routing the contaminated storm water runoff into a secondary RCS;

(ii) aerobic treatment lagoons shall be designed in accordance with NRCS, Field Office Technical Guidance, Practice Standard 359, Waste Treatment Lagoon; or technical requirements for sizing the aeration portion of the system located in Chapter 317 of this title (relating to Design Criteria for Sewerage Systems); and

(iii) equivalent technology or design standards shall indicate how the design of the AFO minimizes odors equivalent to an aerobic or anaerobic lagoon. These designs shall be developed and certified by a licensed Texas professional engineer. An "as-built" certification in letter form shall be completed by a licensed Texas professional engineer before operation of the AFO. These documents shall be maintained on site and made available within the time period specified by the executive director.

(4) Dust control. To minimize dust emissions, the AFO shall be operated and maintained as follows.

(A) Fugitive emissions from all grain receiving pits, where a pit is used, shall be minimized through the use of "choke feeding" or through an equivalent method of control. If choke feeding is used, operation of conveyors associated with receiving shall not commence until the receiving pits are full.

(B) As necessary, emissions from all in-plant roads, truck loading and unloading areas, parking areas, and other traffic areas shall be controlled with one or more of the following methods to minimize nuisance conditions and maintain compliance with all applicable commission requirements:

(i) sprinkled with water;

(ii) treated with effective dust suppressant(s); or

(iii) paved with a cohesive hard surface and cleaned.

(C) All non-vehicular external conveyors or other external conveying systems associated with the feedmill shall be enclosed.

(D) On-site feed milling operations with processing equipment using a pneumatic conveying system (which may include, but are not limited to, pellet mill/pellet cooler systems, flaker systems, grinders, and roller-mills) shall vent the exhaust air through a properly-sized high efficiency cyclone collector or an equivalent control device before releasing the exhaust air to the atmosphere. This requirement does not include cyclones used as product separators.

(E) If the executive director determines that the implementation and employment of these practices is not effective in controlling dust, the operator shall implement any necessary additional abatement measures to control and minimize this contaminant within the time period specified by the executive director.

(5) Maintenance and housekeeping. The AFO operator shall comply with the following to help prevent nuisance conditions.

(A) The premises shall be maintained to prevent the occurrence of nuisance conditions from odors and dust. Spillage of any raw products or waste products causing a nuisance condition shall be picked up and properly disposed of daily.

(B) Proper pen drainage shall be maintained at all times. Earthen pen areas shall be maintained by scraping uncompacted manure and shaping pen surfaces as necessary to minimize odors and ponding.

§321.44. Concentrated Animal Feeding Operation (CAFO) Notification Requirements.

(a) Discharge notification. If for any reason there is a discharge to water in the state, the concentrated animal feeding operation (CAFO) operator shall notify the appropriate regional office orally within 24 hours or upon discovery of the discharge, whichever occurs first. The CAFO operator shall also submit written notice, within 14 working days of the discharge from the retention control structure or any component of the waste handling or land application system to the Office of Compliance and Enforcement, Enforcement Division. In addition, the operator shall document the following information, keep the information on site, and submit the information to the appropriate regional office within 14 working days of becoming aware of such discharge. The notification must include:

(1) a description and cause of the discharge, including a description of the flow path to the receiving water body;

(2) an estimation of the volume discharged;

(3) the period of discharge, including exact dates and times, and, if not corrected, the anticipated time the discharge is expected to continue, and steps being taken to reduce, eliminate, and prevent recurrence of the discharge;

(4) if caused by a precipitation event(s), the date(s) of the event(s) and the rainfall amount(s) recorded from the on-site rain gauge; and

(5) results of analysis as required by subsection (b) of this section.

(b) Discharge monitoring. A permit or authorization will establish requirements for sample collection and analysis, sample type and frequency, and the parameters to be monitored.

(1) Sample analysis of the discharge must, at a minimum, include the following:

(A) fecal coliform bacteria;

(B) total coliform;

(C) five-day biochemical oxygen demand (BOD_5);

(D) total suspended solids (TSS);

(E) Ammonia Nitrogen (as N);

(F) Nitrate (as N);

(G) total dissolved solids (TDS);

(H) total phosphorus (as P); and

(I) any pesticide which the operator has reason to believe could be in the discharge.

(2) If the operator is unable to collect samples due to climatic conditions that create dangerous conditions for personnel (such as local flooding, high winds, hurricane, tornadoes, electrical storms, etc.), the operator shall document why discharge samples could not be collected. Once dangerous conditions have passed, the operator shall conduct the required sampling.

(c) Construction notification. After all initial construction activity has been completed, and before beginning operations, an operator of a new CAFO must notify the appropriate regional office orally that the facility is commencing operations.

§321.45. Concentrated Animal Feeding Operation (CAFO) Training Requirements.

(a) Employee training. A permit or authorization will establish requirements for training of employees who are responsible for work activities relating to compliance with provisions of this subchapter that address all levels of job responsibility associated with compliance with this subchapter.

(b) Dairy outreach program area operator training. The operator of a dairy concentrated animal feeding operation (CAFO) located in §321.32(17) of this title (relating to Definitions) shall attend and complete training developed by the executive director and the Texas Cooperative Extension as follows:

(1) an eight-hour course or its equivalent on animal waste management within 12 months of receiving initial authorization under this subchapter; and

(2) at least eight additional hours of continuing education on animal waste management or its equivalent for each two-year period after completing the requirements of paragraph (1) of this subsection.

§321.46. Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting.

(a) Pollution prevention plan (PPP).

(1) A permit or authorization will establish requirements for the development of a PPP. PPPs shall be prepared in accordance with good engineering practices and shall include measures necessary to limit the discharge of pollutants to or adjacent to water in the state. The plan shall describe and ensure the implementation of practices which are to be used to assure compliance with the limitations and conditions of this subchapter. The plan shall identify a specific individual(s) at the facility who is responsible for development, implementation, operation, maintenance, inspections, recordkeeping, and revision of the PPP. The activities and responsibilities of the pollution prevention personnel shall address all aspects of the facility's PPP.

(2) The plan shall be signed by the operator or other signatory authority in accordance with §305.44 of this title (relating to Signatories to Applications), and the plan shall be retained on site.

(3) Upon completion of a PPP review, the executive director may notify the operator of a concentrated animal feeding operation (CAFO) at any time that the plan does not meet one or more of the minimum requirements of this subchapter. After such notification from the executive director, the operator shall make changes to the plan within 90 days after such notification, unless otherwise provided by the executive director.

(4) The operator of the CAFO shall revise the plan:

(A) before any change in the number or configuration of land management units (LMUs);

(B) before any increase in the maximum number of animals;

(C) before operation of any new control facilities;

(D) before any change that has a significant effect on the potential for the discharge of pollutants to water in the state;

(E) if the PPP is not effective in achieving the general objectives of controlling discharges of pollutants from the CAFO or LMU(s); or

(F) within 90 days following written notification from the executive director that the plan does not meet one or more of the minimum requirements of this section.

(5) Where design, planning, construction, operation and maintenance, or other documentation equivalent to PPP requirements are contained in site specific-plans prepared and certified by the Natural Resources Conservation Service (NRCS), Texas State Soil and Water Conservation Board, or their designee, information in the plans are sufficient to document best management practices (BMPs) or applicable portions of the technical requirements in this subchapter. Where provisions in the certified plan are substituted for applicable BMPs or portions of the PPP, the PPP must refer to the appropriate section of the certified plan. If the PPP contains a reference to a certified plan, a copy of the certified plan must be kept in the PPP.

(6) The PPP shall provide a description of potential pollutant sources. Potential pollutant sources include any activity or material that may reasonably be expected to contain pollutants at the facility, including the CAFO, the associated control facilities, and LMUs. An evaluation of potential pollutant sources shall identify the types of potential pollutant sources, provide a description of the potential pollutant

sources, and indicate all measures that will be used to prevent contamination from the potential pollutant sources.

(7) A permit or authorization will establish requirements for the development and retention by the operator of:

(A) a site map, including a depiction of buffer zones and setbacks;

(B) soil, crop, and crop nutrient information;

(C) a description of land application procedures and equipment used; and

(D) a description of BMPs utilized to minimize the entry of uncontaminated runoff into the control facility and retention control structure (RCS).

(b) Management documentation. A permit or authorization will establish additional requirements for recordkeeping and documentation. At a minimum, these records must include:

(1) a copy of the administratively complete and technically complete individual water quality permit application, notice of intent seeking authorization under a CAFO general permit, and the written authorization issued by the commission or executive director, for any facility required to obtain written authorization;

(2) the RCS management plan, if applicable;

(3) procedures for spill prevention and recovery;

(4) a copy of the approved recharge feature certification, if applicable;

(5) the groundwater monitoring plan associated with the use of a playa;

(6) a copy of the comprehensive nutrient management plan, nutrient management plan or nutrient utilization plan, if required;

(7) site-specific documentation that no significant hydrologic connection exists between the contained wastewater and water in the state;

(8) any written agreement with a landowner which documents the allowance of nighttime application of manure, litter, or wastewater;

(9) the odor control plan requirements established in §321.43 of this title (relating to Air Standard Permit for Animal Feeding Operations (AFOs)); and

(10) documentation of employee training, including dates when training occurred and, for dairy outreach program area (DOPA)-required training, verification of the date, time of attendance, and completion of training.

(c) Site evaluation.

(1) Once every five years, any CAFO operator who uses an RCS shall have a licensed Texas professional engineer review the existing engineering documentation, complete a site evaluation of the structural controls, review existing liner documentation, and complete and certify a report of their findings.

(2) A complete inspection of the facility, including the CAFO, the associated control facilities, and LMUs shall be completed by the CAFO operator and a report documenting the findings of the inspection made at least once per year. The inspection shall verify that:

(A) the description of potential pollutant sources is accurate;

(B) the site plan/map has been updated or otherwise modified to reflect current conditions;

(C) the controls outlined in the PPP to reduce pollutants and avoid nuisance conditions are being implemented and are adequate; and

(D) records documenting significant observations made during the site inspection.

(d) Recordkeeping requirements. The CAFO operator shall keep records on site for a minimum of five years from the date the record was created and shall submit them within five days of a written request by the executive director. Any CAFO operator that does not use an RCS is not subject to paragraphs (3) - (5) and (7) of this subsection. The following records must be included unless otherwise specified:

(1) a list of any significant spills of potential pollutants at the CAFO that have a significant potential to reach water in the state;

(2) a log of wastewater, manure, litter, and sludge removed from the CAFO that shows the dates, times, and recipient;

(3) a log of all daily measurable rainfall events, including the measured rainfall;

(4) a log of all weekly wastewater levels observed in the RCS, or daily wastewater levels in a major sole-source impairment zone;

(5) documentation of liner maintenance by an NRCS engineer, licensed Texas professional engineer, or qualified groundwater scientist;

(6) groundwater monitoring records, if required by §321.41 of this title (relating to Special Requirements for Discharges to a Playa);

(7) records that show the control facilities have been inspected for structural integrity and maintenance, the date of each inspection, and a description of the findings;

(8) a log of all manure, litter, and wastewater used at the CAFO updated at least monthly. For CAFOs where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the CAFO owner or operator, such records must include the following information:

(A) date of manure, litter, or wastewater application to each LMU;

(B) location of the specific LMU and the volume applied during each application event;

(C) acreage of each individual crop on which manure, litter, or wastewater is applied;

(D) basis for and the total amount of nitrogen and phosphorus applied per acre to each LMU, including sources of nutrients other than manure, litter, or wastewater on a dry basis;

(E) the percentage of moisture content of the manure;

(F) actual annual yield of each harvested crop; and

(G) weather conditions (such as the temperature, precipitation, and cloud cover) during the land application and 24 hours before and after the land application;

(9) annual nutrient analysis for at least one representative sample of irrigation wastewater, if applicable, and one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium;

(10) the results of initial and annual soil analysis reports as required by this subchapter; and

(11) copies of all notifications to the executive director, including any made to a regional office, as required by this subchapter, a permit, or authorization.

(e) Reporting requirements.

(1) The CAFO operator shall furnish to the appropriate regional office and the commission's Office of Compliance and Enforcement, Enforcement Division in Austin, soil testing analysis of all soil samples with the annual report due February 15 of each year.

(2) CAFO operators shall provide all other reports required by this subchapter to the Office of Compliance and Enforcement, Enforcement Division.

§321.47. Requirements for Animal Feeding Operations (AFOs) Not Defined or Designated As Concentrated Animal Feeding Operations (CAFOs).

(a) Purpose. This section provides an animal feeding operation (AFO) that is not defined or designated as a concentrated animal feeding operation (CAFO) authorization to operate, and identifies the operational requirements necessary to achieve the purposes of this subchapter.

(b) Applicability.

(1) Except as identified in paragraph (2) of this subsection, the owner or operator of an AFO not defined or designated as a CAFO who uses acontrol facility to manage manure, litter, or wastewater generated on site shall comply with all the requirements of this section.

(2) The owner or operator of an AFO not defined or designated as a CAFO who qualifies for, obtains, and is operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board (TSSWCB) and subsection (c)(1) - (3) of this section are considered to meet all technical requirements of this section.

(3) The owner of an AFO not defined or designated as a CAFO who does not use a control facility to manage manure, litter, or wastewater generated on site shall adhere to the following general requirements.

(A) The owner shall ensure that manure, litter, or wastewater generated at an AFO is stored, beneficially used, or disposed of in a manner that will protect surface and groundwater quality.

(B) The owner shall prevent nuisance conditions and minimize odor conditions.

(c) General requirements.

(1) An AFO operator must locate, construct, and manage the control facility and land management unit (LMU) in a manner that will protect surface and groundwater quality.

(2) An AFO operator must prevent nuisance conditions and minimize odor conditions in accordance with the requirements of §321.31(b) of this title (relating to Manure, Litter, and Wastewater Discharge and Air Emission Limitations).

(3) The AFO may discharge from the production area, if the discharge is the result of a chronic or catastrophic rainfall event, or catastrophic condition which exceeds the design capacity of a retention control structure (RCS) that has been properly designed, constructed, operated, and maintained. RCSs shall be designed in accordance with §321.38 of this title (relating to Control Facility Design Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs)).

(4) An AFO shall not expand operations, either in size or numbers of animals, before amending or enlarging the waste handling procedures and structures to accommodate all additional wastes that will be generated by the expanded operations.

(5) As applicable to the operation, the production area of a new or expanding AFO must comply with the requirements of §321.41 of this title (relating to Special Requirements for Discharges to a Playa).

(6) All control facilities, including holding pens and RCSs, must be located outside of the 100-year flood plain unless the control facilities are protected from inundation and damage that may occur during the flood event.

(7) Where applicable, equivalent measures contained in a site-specific plan which meet the requirements of this subchapter may be substituted for applicable best management practices and/or portions of the technical requirements in this subchapter. Equivalent measures may be contained in:

(A) United States Department of Agriculture (USDA) - Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG) for Texas; and/or

(B) TSSWCB regulations; and/or

(C) a certified water quality management plan certified by the TSSWCB; and/or

(D) a comprehensive nutrient management plan (CNMP) certified by the TSSWCB, the USDA - NRCS, or their designee.

(d) Control facilities.

(1) The AFO operator shall minimize entry of non-process wastewater into RCSs. Such measures may include the construction of berms, embankments, or similar structures.

(2) Proper pen drainage shall be maintained at all times. Earthen pen areas shall be maintained to ensure good drainage by scraping uncompacted manure and shaping pen surfaces as necessary to minimize odors and ponding and to minimize the entrance of uncontaminated storm water to the RCS

(3) The AFO operator constructing a new or modifying an existing RCS shall ensure that all construction and design is certified by a licensed Texas professional engineer. The certification shall be signed and sealed in accordance with the requirements of the Texas State Board of Professional Engineers. All RCS design and construction shall, at a minimum, be in accordance with the technical standards developed by the NRCS. The operator must use those standards that are current at the time of construction. Where site-specific variations are warranted, the operator must ensure a licensed Texas professional engineer documents these variations and their appropriateness to the plan.

(4) Existing facilities which have been properly maintained without any modifications and show no signs of structural breakage or leakage will be considered to be properly constructed. Structures built in accordance with site-specific NRCS plans and specifications will be considered to be in compliance with the design and capacity requirements of this subchapter if the site-specific conditions are the same as those used by the NRCS to develop the plan (numbers of animals, runoff area, wastes generated, etc.).

(5) RCS embankments and liners shall be designed and constructed in accordance with the requirements of §321.38 of this title.

(6) The AFO operator shall adhere to the well buffer requirements in §321.38 of this title.

(7) The AFO operator must maintain copies of documentation of the sources of information, assumptions, and calculations used in determining the appropriate volume capacity of the retention facilities.

(8) RCSs shall be equipped with either irrigation, evaporation, or liquid removal systems capable of dewatering the RCSs.

(9) Sludge shall be removed from RCSs in accordance with the design schedule for cleanout to prevent the accumulation of sludge from exceeding the designed sludge volume of the structure.

(e) Operation and maintenance.

(1) Sufficient volume shall be maintained at all times within the RCS to accommodate sludge, wastewaters, and contaminated storm water (rainwater runoff and direct precipitation) from the AFO facility.

(2) The operator shall restore such capacity after each rainfall event or accumulation of manure, sludge, or process-generated wastewater that reduces such capacity, when conditions are favorable for irrigation. Favorable conditions shall be when the soil moisture level decreases so that irrigation will not cause runoff.

(3) The normal operating wastewater level in the RCS shall be maintained within the design of the RCS. If the water level in the RCS encroaches into the storage volume reserved for the design rainfall event (25-year or 100-year) the operator must document the conditions that resulted in this occurrence. As soon as irrigation is not prohibited, the AFO operator shall irrigate until the water level is at or below the design rainfall level.

(4) Adequate equipment shall be available and maintained in good working order to remove such waste and wastewater as required to maintain the retention capacity of the facility for compliance with this subchapter.

(5) A rain gauge capable of measuring the required rainfall event shall be installed on site and properly maintained.

(6) A permanent pond marker (measuring device) shall be maintained in the RCS to show the following: the volume for a 25-year, 24-hour rainfall event or a 100-year, 24-hour rainfall event, as required by the facility's design standard; and the predetermined minimum treatment volume within any treatment lagoon. The markings on the marker shall be visible from the top of the levee.

(7) The AFO operator shall ensure that liners are protected from animals by fences or other protective devices. No tree shall be allowed to grow such that the root zone would intrude or compromise the structure of the liner. Any mechanical or structural damage to the liner shall be evaluated by a licensed Texas professional engineer within 30 days of the damage.

(8) The AFO operator shall maintain ponds, pipes, ditches, pumps, and diversion and irrigation equipment to ensure ability to fully comply with the terms of this subchapter.

(9) An AFO operator using a liquid manure handling system shall scrape or flush accumulated manure at least once per week or in accordance with proper design and maintenance of the facility.

(10) If an RCS is in danger of imminent overflow from chronic or catastrophic rainfall or catastrophic conditions, the AFO operator shall take reasonable steps to irrigate wastewater to LMUs only to the extent necessary to prevent overflow from the RCS.

(f) Land application.

(1) The runoff of manure, litter, or wastewater to water in the state as the result of the application of manure, litter, or wastewater from an AFO is authorized provided the land application activity is implemented in accordance with a plan for nutrient management detailed in this section.

(2) The AFO operator shall apply manure, litter, and wastewater uniformly to suitable land at appropriate times and at agronomic rates. Timing and rate of applications shall be in response to crop needs, assuming usual nutrient losses, expected precipitation, and soil conditions.

(3) The AFO operator shall develop and utilize the information in this paragraph for land application unless an NMP is developed and implemented. At that time, the NMP must be followed for land application. The AFO operator must adhere to the following:

(A) a site map showing the location of any land application areas, either on site or off site which are owned, operated, controlled, rented, or leased by the facility owner or operator which will be utilized for land application of waste or wastewater;

(B) the location, description, and limitations of the major soil types within the identified LMUs, and a plan to address the soil limitations;

(C) crop types and rotations to be implemented on an annual basis;

(D) predicted yield goals based on the major soil types within the identified LMUs;

(E) procedures for calculating nutrient budgets to be used to determine application rates;

(F) a detailed description of the type of equipment and method of application to be used in applying the waste or wastewater; and

(G) projected rates and timing of application of the manure and wastewater as well as other sources of nutrients that will be applied to the LMUs.

(4) Discharge of manure, litter, or wastewater from the LMU is prohibited and shall not cause or contribute to a violation of surface water quality standards, contaminate groundwater, or create a nuisance condition.

(5) Application rates shall not exceed the crop requirement of the crop or planned crop planting with any land application of wastewater and/or manure. Land application rates of manure and wastewater shall be based on the available nutrient content.

(6) Land application shall not occur when the ground is frozen or saturated or during rainfall events, unless in accordance with §321.39(b)(3) of this title (relating to Control Facility Requirements Applicable to Concentrated Animal Feeding Operations (CAFOs).

(7) Irrigation practices shall be managed so as to minimize ponding or puddling of wastewater on the site, prevent discharge of tailwater to waters in the state, prevent pollution of waters in the state, and prevent the occurrence of nuisance conditions.

(8) The land application of manure, litter, and wastewater at agronomic rates shall not be considered surface disposal and is not prohibited.

(9) Manure, litter, or wastewater may be applied to the areas in the 100-year flood plain at agronomic rates not to exceed the hydrologic needs of the crop.

(10) The AFO operator shall develop and maintain the calculations and assumptions used for determining land application rates and all nutrient analysis data.

(11) The AFO operator shall annually analyze at least one representative sample of irrigation wastewater, if applicable, and one representative sample of manure/litter for total nitrogen, total phosphorus, and total potassium.

(12) Vegetative buffer strips shall be no less than 100 feet of vegetation to be maintained between waste or wastewater application areas and surface water and watercourses. The AFO operator shall maintain the buffer strips in accordance with NRCS guidelines.

(13) Manure/litter storage capacity requirements based upon manure/litter and waste production, land availability, and the USDA - NRCS FOTG for Texas shall be provided. Permanent storage structures for AFO operations must meet NRCS design specifications. All litter/manure removed from operation and not temporarily stored must be located within the drainage of the RCS, in a well-drained area with no ponding of water, and where the top and sides of stockpiles are adequately sloped to ensure proper drainage to prevent polluted rainfall runoff.

(14) Temporary storage of manure in the 100-year flood plain, near water courses or recharge features is prohibited unless protected by berms or other structures sufficient to prevent inundation during a 100 year-year storm. Temporary storage of manure/litter shall not exceed 30 days and is only allowed in LMUs. Polluted runoff from manure/litter storage piles must be retained on site.

(15) Any dairy AFO that is located in the major sole-source impairment zone, as defined under §321.32 of this title (relating to Definitions), at a minimum must provide for management and disposal of waste in accordance with §321.42(i) of this title (relating to Requirements Applicable to the Major Sole-Source Impairment Zone).

(16) Nighttime application of liquid or solid waste shall be allowed only in areas with no occupied residence(s) within 1/4 mile from the outer boundary of the LMU receiving manure/litter or wastewater application. In areas with an occupied residence within 1/4 mile from the outer boundary of the LMU, application shall only be allowed from one hour after sunrise until one hour before sunset, unless the current occupants of such residences have, in writing, agreed to such nighttime applications.

(17) AFOs introducing wastewater or chemicals to water wellheads for the purpose of irrigation shall install backflow prevention devices in accordance with requirements contained in 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers).

(18) Composting on site at an AFO shall be performed in accordance with Chapter 332 of this title (relating to Composting). AFOs may compost waste generated on site, including manure, litter, bedding, feed, and dead animals. In accordance with Chapter 332 of this title, an AFO operator may add agricultural products to provide an additional carbon source or bulking agent to aid in the composting process. If the compost areas are not roofed or covered with impermeable material, protected from external rainfall, or bermed to protect from runoff in the case of the design rainfall event, the compost areas shall be located within the drainage of the RCS. The runoff volume from compost areas shall be accounted for in the design of the RCS.

(19) Maintenance of animals.

(A) Animals confined at the AFO shall be restricted from coming into direct contact with surface water in the state through the use of fences or other controls.

(B) An AFO that maintains animals in pastures must maintain crops, vegetation, forage growth, or postharvest residues in the normal growing season, excluding the feed and water trough areas and designated open lots.

(g) Soil sampling and testing.

(1) The AFO operator is not required to collect soil samples from LMUs where manure, litter, or wastewater has not been applied during the preceding year. The AFO operator must comply with paragraph (2) of this subsection before resuming land application to such LMUs the unused LMU.

(2) Prior to commencing wastewater irrigation or manure, litter application on land owned, operated, controlled, rented, or leased by the AFO operator, and annually thereafter, the operator shall collect and analyze representative soil samples from each of the LMUs according to the following procedures.

(3) Sampling procedures shall employ accepted techniques of soil science for obtaining representative samples and analytical results. Samples should be collected using approved procedures described in the executive director's guidance document entitled "Soil Sampling for Nutrient Utilization Plans" as updated.

(4) Samples should be collected within the same 45-day time frame each year.

(5) One composite sample shall be collected for each soil depth zone per LMU and per uniform soil type (soils with the same characteristics and texture) within the LMU.

(6) Composite samples shall be comprised of ten to 15 randomly sampled cores obtained from each of the following soil depth zones:

(A) Zone 1: zero to six inches for LMUs where the manure or litter is incorporated directly into the soil or zero to two inches for LMUs where the waste is not incorporated into the soil; if a zero to two- inch sample is required under this subsection, then an additional sample from the two to six-inch soil depth zone shall be obtained in accordance with the provisions of this section; and

(B) Zone 2: six to 24 inches.

(7) Soil samples shall be submitted to a soil testing laboratory along with a previous crop history of the site, intended crop use, and yield goal. Soil test reports shall include nutrient recommendations for the crop yield goal.

(8) Chemical/nutrient parameters and analytical procedures for laboratory analysis of soil samples from LMUs shall include the following:

(A) nitrate reported as nitrogen in parts per million (ppm);

(B) phosphorus (extractable, ppm) - Mehlich III (ppm), using Inductively Coupled Plasma (ICP);

(C) potassium (extractable, ppm);

(D) sodium (extractable, ppm);

(E) magnesium (extractable, ppm);

(F) calcium (extractable, ppm);

(G) soluble salts/electrical conductivity (deciSiemens/meter (dS/m)) - determined from extract of 2:1 (volume to volume (v/v)) water/soil mixture; and

(H) soil water pH.

(h) Nutrient utilization plans (NUPs).

(1) An operator shall not land apply any waste or wastewater to the LMU unless the waste or wastewater application is implemented in accordance with a detailed NUP when results of the annual soil analysis for extractable phosphorus indicate:

(A) a level greater than 200 ppm of extractable phosphorus (reported as P) in Zone 1 for a particular LMU; or

(B) a level greater than 350 ppm of extractable phosphorus in Zone 1 (zero to six-inch depth) for an LMU where the average annual rainfall is 25 inches or less, erosion control is adequate to keep erosion at the soil loss tolerance (T) or less, and the closest edge of the field is more than one mile from a named stream; or

(C) if ordered by the commission to do so in order to protect the quality of waters in the state.

(2) An NMP, based on crop removal, certified in accordance with NRCS Practice Standard Code 590 complies with the requirements of a complete and effective NUP.

(3) A NUP, based on crop removal, shall be developed by an employee of the NRCS, a nutrient management specialist certified by the NRCS, the TSSWCB, Texas Cooperative Extension, an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas, or a professional agronomist or soil scientist certified by the American Registry of Certified Professionals in Agronomy, Crops and Soils, after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner. No land application under an approved NUP shall cause or contribute to a violation of water quality standards or create a nuisance.

(4) Land application under the terms of the NUP may begin as soon as the plan is developed in accordance with this subsection. After a NUP has been implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below 200 ppm. Thereafter, the AFO operator shall apply manure, litter, or wastewater at agronomic rates according to the requirements of this section.

(i) Recordkeeping requirements.

(1) Records required under this subsection must be kept on site for a minimum of five years from the date the record was created. Any AFO operator that does not use an RCS is not subject to subparagraphs (B) - (D) and (F). Unless otherwise specified, records shall include:

(A) a list of any significant spills of pollutants with the potential to reach water in the state;

(B) a schedule for liquid waste removal;

(C) a date log indicating weekly inspection of wastewater level in the RCS;

(D) a log of all measurable rainfall events;

(E) a copy of the results of initial and annual soils, manure, litter, and wastewater analyses;

(F) records of dates of inspection of the RCS, and a log of the findings of such inspections as required under subsection (k)(2) of this section;

(G) the groundwater monitoring plan associated with the use of a playa;

(H) a copy of the NUP, if required;

(I) site-specific documentation that no significant hydrologic connection exists between the wastewater in the RCS and water in the state; and

(J) any written agreement with a landowner which documents the allowance of nighttime application of manure, litter, or wastewater.

(2) For facilities where manure, litter, or wastewater is applied on property owned, operated, controlled, rented, or leased by the AFO owner or operator, such records shall include the following information:

(A) the date of manure, litter, or wastewater application to each field;

(B) the location of the specific application site and the number of acres utilized during each application event;

(C) the acreage of each individual crop on which manure, litter, or wastewater is applied;

(D) the basis for and the total amount of nitrogen and phosphorus applied per acre to each field, including sources of nutrients other than manure, litter, and wastewater; the number of dry tons; and the percentage of nitrogen/phosphorus based on a dry basis;

(E) the percentage of moisture content of the manure; and

(F) the actual annual yield of each harvested crop.

(3) Where manure, litter, or wastewater, if applicable, is removed from the facility, records must be maintained in accordance with §321.46(d)(8) of this title (relating to Concentrated Animal Feeding Operation (CAFO) Pollution Prevention Plan, Site Evaluation, Recordkeeping, and Reporting). If manure is sold or given to other persons for off-site land application or disposal, the operator must maintain a log of: the date of removal from the CAFO; the name of hauler; and the amount, in wet tons, dry tons, or cubic yards, of waste removed from the CAFO. (A single pickup load need not be recorded.) Where the wastes are to be land applied by the hauler, the operator must make available to the hauler any nutrient sample analysis of the manure from that year.

(j) Documentation of liner maintenance. The operator shall have an NRCS engineer, licensed Texas professional engineer, or licensed Texas professional geoscientist review the documentation and do a site evaluation every five years.

(k) Groundwater monitoring. In the event that one or more samples of groundwater are required, the operator must sample each well annually for nitrate as nitrogen, chloride, and total dissolved solids using the methods outlined in the pollution prevention plan, and compare the analytical results to the baseline data. Data from any required monitoring wells must be submitted to the executive director and kept on site for five years. The first year's sampling shall be considered the baseline data and must be retained on site for the life of the facility, unless otherwise provided by the executive director. If a 10% deviation in concentration of any of the sampled constituents is found, the operator must notify the executive director within 30 days of receiving the analytical results.

(l) Inspections. The AFO operator must conduct the following inspections to assure the facility maintains its efficiency.

(1) Preventative maintenance program. The operator shall periodically inspect designated equipment at the control facility and LMUs. Material handling areas shall be inspected for evidence of, or the potential for, pollutants entering the drainage system or the creation of a nuisance. Inspections shall include visual inspections and

equipment testing to uncover conditions that could cause breakdowns or failures resulting in discharge of pollutants to waters in the state or the creation of a nuisance condition.

(2) Site inspection. A complete inspection of the control facility and LMUs shall be done and a report documenting the findings of the inspection made at least once a year. The inspection shall be conducted by the operator to verify that the description of potential pollutant sources is accurate, and the controls necessary to reduce pollutants and avoid nuisance conditions are being implemented and are adequate. Records documenting significant observations made during the site inspection shall be retained. Records of inspections shall be maintained for a period of five years.

(m) Notification. An existing or new AFO operator has the continuing obligation to provide the executive director notice of the number of animals in confinement in accordance with the following requirements.

(1) All new AFOs which confine a number of animals that fall within the range of the number of animals specified in any of the categories under §321.32(12)(B) of this title (relating to Definitions) shall notify the executive director of their legal entity name, physical location including a map or hand drawn sketch, mailing address, and number of head in confinement.

(2) Such notification shall be in writing and signed by the operator and shall be submitted not later than 180 days after commencement of operation.

(n) Closure required. The AFO operator shall properly close the AFO and RCS within one year of inactivity or ceasing of operations at the facility, or in accordance with an alternative schedule in a closure plan prepared by a licensed Texas professional engineer. The closure plan for the RCS must be developed using standards contained in the NRCS Practice Standard 360 (Closures of Waste Impoundments, as updated) and using the guidelines contained in the Texas Cooperative Extension/NRCS publication #B-6122 (Closure of Lagoons and Earthen Manure Storage Structures, as updated). AFOs shall maintain compliance with the requirements of this subchapter until the facility has been properly closed.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404253
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: July 15, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 239-5017

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30 TAC §321.48, §321.49

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general authority necessary to carry out its duties and general powers under its jurisdiction; TWC, §5.103, which provides the commission with the general authority to adopt rules; TWC, §5.105, which is the commission's authority to set policy by rule; and TWC, §5.013, which states the commission's authority over various statutory programs.

These repeals are also adopted under TWC, §26.011, regarding the commission's authority over water quality in the state; and TWC, §26.028, which provides the commission's authority to approve certain applications for wastewater discharge; and TWC, §26.0286, which requires the commission to process an application for authorization to construct or operate a CAFO located in the protection zone of a sole-source surface drinking water supply as an application for an individual permit.

These repeals are also adopted under TWC, §26.040, under which the commission has authority to amend rules adopted under §26.040 prior to its amendment by House Bill 1542 in 1997, in order to continue to regulate small AFOs under a permit by rule. In addition, §26.040 authorizes the commission to approve a general permit to authorize the discharge of waste into or adjacent to water in the state by a category of dischargers that engage in the same or substantially similar types of operations.

These repeals are also adopted under TWC, §26.041, which allows the commission to use any means provided by Chapter 26 to prevent a discharge of waste that is injurious to public health; and §26.048, which allows the commission to propose rules to prohibit the discharge into a playa or use of it as a wastewater retention facility. In addition, these amendments are adopted under TWC, §26.121, which prohibits the discharge of waste into or adjacent to any water in the state except as authorized with a commission permit or other authorization.

These repeals are also adopted under TWC, Chapter 26, Subchapter L, which requires the commission to authorize the construction or operation of a new or expanded dairy CAFO located in a major sole-source impairment zone through an individual permit, which must contain specific requirements for the management and beneficial use of animal waste, and sets forth waste application field soil sampling and testing requirements that apply to all dairy CAFOs within a major sole-source impairment zone.

These repeals are also adopted under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

Finally, these repeals are also adopted under Texas Health and Safety Code, §382.011, which provides the commission the authority to control the quality of the state's air; §382.017, which authorizes the commission to propose rules consistent with the policy and purposes of the Texas Clean Air Act and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state; §382.012, which authorizes the commission to prepare and develop a comprehensive plan for proper control of the state's air; and §382.051, which provides the commission the authority to issue air standard permits. These repeals are also adopted under Texas Health and Safety Code, §382.05195, which authorizes the commission to issue and amend air standard permits for new or existing similar facilities, and to propose rules to implement and administer the issuance, amendment, renewal, and revocation of authorizations to use standard permits.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404254

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Effective date: July 15, 2004
Proposal publication date: March 12, 2004
For further information, please call: (512) 239-5017

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 9. EXPLORATION AND LEASING OF STATE OIL AND GAS

The Texas General Land Office adopts the amendments to §9.51, relating to Royalty and Reporting Obligations to the State and §9.93, relating to Assignments without changes to the proposed text as published in the February 6, 2004, issue of the *Texas Register* (29 TexReg 1145). The text will not be republished.

The amendment to TNRC 9.51(a) corrects a typographical error. The rest of the amendments conform the rules to legislative amendments to the Texas Natural Resources Code. The amendment to TAC §9.51(b)(2)(N) conforms the rule to an amendment to TNRC §52.136 by Acts 1997, 75th Leg., ch. 1324, §2, eff. Jan. 1, 1998. The amendment to TAC §9.51(b)(3)(A) conforms the rule to an amendment to TNRC §52.131(e) by Acts 1993, 73rd Leg., ch. 897, §30 eff. Sept. 1, 1993. The amendment to TAC §9.93(e) conforms the rule to amendments to TNRC §52.026 made by Acts 1999, 76th Leg., ch. 1125, §1, eff. Sept. 1, 1999 and by Acts 1999, 76th Leg., ch. 1483, §2, eff. Aug. 30, 1999. The changes are made pursuant to §2001.039 (Agency Review of Existing Rules) of the Government Code.

The General Land Office received a written comment on the proposed adoption with amendment of TAC §9.93(e) from Ben Vaughan, III, an attorney.

Mr. Vaughan's comment on the proposed adoption with amendment: The proposed change would release the assignor from liability for future breaches in the event the Commissioner concluded that at the time of the proposed assignment the assignee was fiscally responsible. I would suggest that two obligors of performance of the lease obligations are better than one and that the lessee's financial resources can evaporate on a moment's notice or without any notice at all viz: Enron. Hence I would recommend that the provision of Section 9.93(e) not be changed as proposed and that the existing Section 9.93(e) continue as written.

Response: By amendment to TNRC §52.026, the Texas Legislature has mandated that the liability of the transferor to properly discharge its obligations under the lease shall pass to the transferee upon prior written consent of the commissioner. The amendment simply conforms the rule to the will of the Texas Legislature.

SUBCHAPTER D. PAYING ROYALTY TO THE STATE

31 TAC §9.51

The amendments are adopted under Texas Natural Resources Code §31.051, which authorizes the Commissioner of the Texas General Land Office to make and enforce suitable rules consistent with the law and Texas Natural Resources Code §32.062 which grants rulemaking authority to the School Land Board.

The following code is affected by this rule: Texas Natural Resources Code, Title 2, Subtitle D, Chapter 52.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404272
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Effective date: July 18, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 305-8598

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SUBCHAPTER F. DISCONTINUING THE LEASEHOLD RELATIONSHIP

31 TAC §9.93

The amendments are adopted under Texas Natural Resources Code §31.051, which authorizes the Commissioner of the Texas General Land Office to make and enforce suitable rules consistent with the law and Texas Natural Resources Code §32.062 which grants rulemaking authority to the School Land Board.

The following code is affected by this rule: Texas Natural Resources Code, Title 2, Subtitle D, Chapter 52.

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

Filed with the Office of the Secretary of State on June 28, 2004.

TRD-200404273
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Chief Clerk/Deputy Land Commissioner
General Land Office
Effective date: July 18, 2004
Proposal publication date: February 6, 2004
For further information, please call: (512) 305-8598

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 13. CONTROLLED SUBSTANCES

SUBCHAPTER E. PRECURSORS AND APPARATUS

37 TAC §13.101, §13.116

The Texas Department of Public Safety adopts amendments to §13.101 and new §13.116, concerning Precursors and Apparatus, without changes to the proposed text as published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4736).

Amendment to §13.101 paragraph (12) is necessary in order to clarify the use of the terms "precursor" and "chemical precursor." The addition of new paragraph (15) to §13.101 is necessary in order to explain that the term "immediate precursor" as used in the subchapter means a chemical substance item as listed in new §13.116 of this title (relating to Immediate Precursor List).

New §13.116 is necessary because the 78th Texas Legislature (2003) amended the Health and Safety Code, §481.002(22) to authorize the director of the Texas Department of Public Safety to establish an "immediate precursor" list. Previously, this function was held by the Commissioner of Health. New §13.116 identifies the substances that are designated by the director to be "immediate precursors."

No comments were received regarding adoption of the amendments and new section.

The amendments and new section are adopted pursuant to the Health and Safety Code, Chapter 481, including §481.003, which authorizes the director to adopt rules to administer the chapter, and §481.002(22) which authorizes the director to designate a substance to be an immediate precursor by rule.

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

Filed with the Office of the Secretary of State on June 24, 2004.

TRD-200404222
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: July 14, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 424-2135

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CHAPTER 21. EQUIPMENT AND VEHICLE STANDARDS

37 TAC §21.1

The Texas Department of Public Safety adopts amendments to §21.1, concerning Standards for Vehicle Equipment, without changes to the proposed text as published in the March 5, 2004, issue of the *Texas Register* (29 TexReg 2261).

The section provides specifications and performance standards for vehicle equipment to include: lamps, reflective devices, and other lighting devices; sunscreening and reflective window devices; and safety guards or flaps. The main purpose of this rulemaking is to implement changes resulting from the passage of Texas Senate Bill 345, 78th Legislature, Regular Session (2003), Chapter 136.

Senate Bill 345 amends Texas Transportation Code, §547.613, which restricts sunscreening devices on certain vehicle windows to at least 25 percent light transmission measured in combination with both the window glass and the sunscreening device. Additional amendments to §21.1 provide clarifying language explaining preemptive federal window glazing (sunscreening/window tint) standards and the procedure to obtain a medical exemption from the department for sunscreening devices and its limitations.

The department held a public hearing on the proposal in Austin on April 13, 2004, and the extended comment period closed on April 13, 2004. The department received several comments concerning the proposal. Following each comment summary is the department's response and any resulting change(s).

COMMENT: The International Window Film Association and Enpro Distributing, Inc. made comments referencing §547.613(d) which permits the department to allow a three percent tolerance from the standard on light transmission and luminous reflectance on after-market sunscreening materials. These comments include statements regarding meter accuracy used to test these materials when installed as plus or minus two percent. The comments suggested incorporation of this tolerance into the after-market window sunscreening device standard.

RESPONSE: These comments are outside the scope of this rule. This rule, regarding sunscreening devices (window tint), states the legal standard for after-market sunscreening devices. The measurement of window tint on motor vehicles generally occurs under two circumstances. The most frequent is during the annual safety inspection. The department rule administering that measurement is 37 TAC §23.42, Inspection of Sunscreening Devices (Glass Tinting) by Official Vehicle Inspection Stations. Section 23.42 currently provides inspection criteria compensating for meter accuracy. The second and less frequent occasion is during a traffic stop by law enforcement personnel. The applicable department rule for the second circumstance is 37 TAC §3.26, Inspection of Drivers and Vehicles. In the latter, law enforcement personnel inspect "as outlined in the statutes." These comments resulted in no changes to the proposal.

COMMENT: A station operator representing the Texas State Inspection Association members in San Antonio supported amendment of the rule, but expressed concern regarding the luminance reflectance specification. The speaker wanted to know if this specification would be part of the inspection criteria found under Chapter 23. If so, the speaker was concerned over the cost of new inspection equipment and the department to address the economics of time and cost requirements to inspection stations.

RESPONSE: These comments are outside the scope of this rule. As previously stated, 37 TAC §23.42 is the applicable rule for "Inspection of Sunscreening Devices (Glass Tinting) by Official Vehicle Inspection Stations." Texas Transportation Code, §547.613 contained restrictions for luminous reflectance before its revision during the last legislative session. In any event, Texas Transportation Code, §548.501 regulates the fee inspection stations may charge for the state's compulsory vehicle inspection. This comment resulted in no changes to the proposal.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §547.101, which authorizes the Department of Public Safety to adopt standards for vehicle equipment; and the provisions of Texas Senate Bill 345, 78th Legislature, Regular Session (2003), Chapter 136.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404140
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: July 12, 2004
Proposal publication date: March 5, 2004
For further information, please call: (512) 424-2135

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CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER A. VEHICLE INSPECTION STATION LICENSING

37 TAC §23.15

The Texas Department of Public Safety adopts amendments to §23.15, concerning Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings, with changes to the proposed text as published in the March 5, 2004, issue of the *Texas Register* (29 TexReg 2265) and will be republished.

The amendments clarify grounds for denial, revocation, and suspension of certificates for inspection stations and inspectors. The amendments explicate that listed violations in the rule are not exclusive, includes additional minor violations generally requiring retraining and/or warning enforcement actions, and further adds other serious violations contained in other department rules.

The department held a public hearing in Austin on April 13, 2004, and the extended comment period closed on April 13, 2004. The department received both written and oral comments concerning this proposal. Summaries of the comments are arranged according to the applicable subject area within the rule. Changes to the proposed amendments are in response to comments received and follow the department responses where indicated. Additionally, there are corrections for slight typographical errors.

Written comments were received from the Executive VP/Chief Counsel of the Texas Automobile Dealers Association (TADA). Written and oral comments were received from an attorney representing Express Sticker, PitStop USA, Stickerstop, Stickerstop USA, and Vehicle Inspections by MOGO consisting of twelve vehicle inspections stations (Stations(12)) and members of the department staff (Staff). Oral comments were received from: a representative from the Texas State Inspection Association (TSIA-1); a spokesperson for San Antonio members of the Texas State Inspection Association (TSIA-2); a spokesperson representing Texas State Inspection Association and LoneStar Lubrication (TSIA-3); and the owner/operator of Mr. Sticker, Inc., (Mr. Sticker). The comments received were generally favorable to the rule as proposed; however, many of the commenters had questions, specific concerns, or offered suggestions for change.

The following comments were received concerning the proposed amendments. The comments are consolidated and summarized in the same order as the proposed language appears in the rule. Following each comment summary is the department's response.

COMMENT: Stations(12) noted that the amended text to subsection (d) creates an "overall catch-all" clause. This subsection allows the department to address those violations not specifically listed. Stations(12) expressed concern that the penalty for the resulting violations could be anything from re-education to lifetime revocation. The recommended language by Stations(12) would provide that all such violations be classified as "Category A" violations.

RESPONSE: Stations(12) correctly stated in its comments that while the department, after making the effort to enumerate every violation, could not possibly list all of them. The department never intended the rule to be an all-inclusive list. The amendments make this position clear to all. Categorizing the resulting penalty for such a violation would be premature. When presented with circumstances where an inspector or inspection station violates a law, statute, or rule requiring administrative action against the license holder, the department during the review process will make a determination regarding the appropriate penalty category. No change was made based on this comment.

COMMENT: Stations(12) noted that subsection (e)(1)(B) uses the word "verifying" relating to the statutory requirement placed upon an inspection station and inspector regarding proof of financial responsibility during the vehicle inspection. With no definition given, "verifying" gives rise to doubt as to what measures are required. Stations(12) recommends use of language similar to that contained in department's manual, *Rules and Regulations Manual for Official Vehicle Inspection Stations and Certified Inspectors* (Manual).

RESPONSE: The department agrees. The use of the word "verifying" would indicate a duty above that which is statutorily required. The department is making the following minor change due to this comment to clarify the intent and improve the accuracy of subparagraph.

COMMENT: Stations(12) noted that subsection (e)(1)(G) does not define the term "properly safeguard" and does not provide guidance as to the actions necessary to meet the minimum "safeguard" threshold. Stations(12)'s comments focus on the PIN number used by inspectors and states that the lack of written password standards provides no quantifiable method for the department to categorically determine violations by inspectors. Stations(12) suggests that the department develop guidelines for the physical safeguarding of cards and PINs including password (PIN) selection standards similar to those in use in the private sector.

RESPONSE: The department disagrees with the comment. This violation stems from two separate department rules. First, 37 TAC §23.25, Safeguarding Certificates, defines properly safeguard as it relates to certificates: "The certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device." Second, 37 TAC §23.96, Emissions Analyzer Access/Identification Card concerns safeguarding the PIN number. Subsection (c)(3) of the latter rule states: "Inspectors may not give, share, lend, or divulge this PIN to another person without the explicit consent of appropriate department personnel. Failure to comply with this paragraph shall result in suspension or revocation of the inspector's certification as well as any appropriate criminal action or administrative disciplinary action. Inspectors are responsible for unauthorized access of the Texas Information Management System resulting from their negligence or carelessness in maintaining the confidentiality of their

Personal Identification Number (PIN)." No change was made based on this comment.

COMMENT: TSIA-2 expressed concern about subsection (e)(1)(H) that was not affected by revision, but wants clarification because human errors do occur and sometimes numbers are transposed on the records.

RESPONSE: The comment is outside the scope of this rule making. Subsection (e)(1)(H) is a violation of an inspection station to follow department rules contained in 37 TAC Subchapter D and the department Manual. As stated in the previous department response, the inspection business exists because of state regulation and all highly regulated businesses are required to keep accurate records. This rule limits administrative punishment to a minor violation that would result in re-education, warnings, and finally license suspension for habitual violators.

COMMENT: TSIA-2 is concerned that subsection (e)(1)(J) penalizes small stations in rural areas where the station removes a bad employee or when they don't have anybody. (In both cases, the department assumes TSIA-2 means instances where the station has only one certified inspector.)

RESPONSE: The department disagrees. The station is not penalized because an inspection station without an inspector can not inspect vehicles. It is the duty of an inspection station to inspect vehicles for the public. This is a category A violation. The station operator is first re-educated on the requirement of an inspector on duty. Next, the operator may receive a warning for failing to heed the instruction. Finally, if another violation occurs within two years of the first, the operator receives a three months suspension. No change was made based on this comment.

COMMENT: TSIA-1 and TSIA-2 both commented on subsection (e)(1)(M). TSIA-1 states the violation is vague and results in adverse actions against the stations. The stations need to know the correct way to do it. As an example, stations performing emissions testing may have more than one inspection lane, but use only one book of certificates. Certificates issued from one book, entered into the analyzer in each lane then appear issued out of sequence. If stations are required to have a complete series of books of each type of certificate for each lane, it could double or triple the inventory cost of inspection certificates for which the station has to prepay. TSIA-2 states this often results from human mistakes with most stations usually having more than one book of certificates. One inspector issues from one book, returns it to the lock box and the next inspector on duty inadvertently picks up the other book of certificates resulting in a break in the sequence. TSIA-2 is concerned that this human error will be result in adverse action against the station. TSIA-2 states, based on monthly issuance of several thousands of certificates, there are printing errors in the certificate books, e.g., poor printing quality, portion of certificate missing, whole certificates missing, and certificates with duplicate numbers. TSIA-2 believes that these printing errors unfairly jeopardize stations.

RESPONSE: The department disagrees that the violation is vague. These comments are outside the scope of this rule. The subparagraph at issue details the penalty resulting from violation of 37 TAC §23.21, Issuance of Inspection Certificates. Section 23.21(a)(1) states: "An inspection certificate shall be issued in numerical sequence for every vehicle inspected and approved." Section 23.15 is not the procedural instruction for inspections or operation of a certified inspection station. The department and the Texas Department of Criminal Justice, which prints the inspection certificates, take great pains to prevent printing errors, but with tens of millions of certificates printed each year some mistakes will be present. As TSIA-2 indicates, each inspection station should routinely check all the inspection certificate books after purchase and notify the department of any errors found. This will prevent any adverse action against the station and further the quality control process for printing the certificates. Regarding TSIA-1's comments on multiple lane operations, the state inspection program design is based on one inspection area per station. With the advent of emission testing, many large-scale operators entered the program. The department allowed multiple lane operation under one inspection station license on the provision that each separate inspection area is complete, i.e., each inspection lane has an emissions analyzer. No change was made based on this comment.

COMMENT: TSIA-1 and Stations(12) both commented on subsection (e)(1)(R). TSIA-1 states it is vague and stations can not determine what careless or negligent means, since this is a rule and not a law. Stations(12) uses one recognized legal definition of negligence as "simple inadvertence" and suggests the standard of care is high as evidenced by references to the department Manual. Stations(12) suggests changing the standard from careless or negligent to recklessly indifferent and further define it as "as such conduct that under the circumstances evinces disregard or indifference to consequences." Stations(12) also notes that the phrase "vehicle information" is not defined, however they assume the term encompasses all information required by the analyzer.

RESPONSE: The department disagrees with TSIA-1, generally agrees with Stations(12) definitional uses, but declines to lower the standard of care as suggested. First, administrative rules are a creation of the law, therefore legal terms apply, and as Stations(12) comments show the violation is not vague. This is a violation of Transportation Code §548.601(a)(2), (3)(B), and (9). It occurs when an inspector enters vehicle information required by the emissions analyzer, with an additional opportunity to verify and correct that which is incorrect, and causes the vehicle to fail the emission test during the inspection. Entering the correct vehicle information is extremely important to the vehicle inspection and maintenance (I/M) program because: 1) federal and state regulations require this information for each vehicle; 2) accurate vehicle information is required for mobile emissions planning; and 3) false failures cause public resentment and distrust of the I/M program. No change was made based on this comment.

COMMENT: Staff requests, in reference to subsection (e)(1)(S), clarification in counting the two-year period for subsequent violations, i.e., if the license holder received a suspension for a third Category A violation, does the two-year period start on the date of that violation or when the three month suspension was over. TSIA-2 also requested the department to clarify this issue and recommended the two year period include the suspension period.

RESPONSE: The department agrees with Staff and TSIA-2 and will clarify the procedure for assessment of Category A violations, along with other categories, elsewhere in the rule resulting from these comments.

COMMENT: Stations(12) stated that the distinction between subsection (e)(2)(E), a Category B violation and subsection (e)(3)(H), a Category C violation, is unclear. The comment provides a semantical analysis focusing on the terms "allowing," "permitting," and "issuing." Stations(12) suggests the

department: 1) clearly distinguish the criteria between the two violations; 2) define "allowing" by developing a set of minimum standards for owner/operator control procedures and policies over inspectors for which any violation would be considered "allowing" conduct in violation of these rules; and 3) add an element for knowledge and culpability on the part of the owner/operator resulting in a violation.

RESPONSE: The department disagrees that the distinction between the two violations is unclear and declines to define "allowing" as suggested. The department agrees that the words allowing and permitting are synonymous; redundant use was for emphasis. Unless defined otherwise, words have their common meanings when considered in the context in the rule. Within the context of this rule, the common meaning of "allow" is to neglect to restrain or prevent and "permit" is to consent or to make possible. For clarification, "issuing" a certificate by attaching it to the vehicle, is the culminating act incorporating the whole of the inspection procedure. Discussion of the subsection (e)(2)(E) violation was at some length during the prior rule making. It results from violating department rules on tag-team inspections and hands-on on-the-job training, both of which are strictly prohibited, where uncertified helpers perform some or all of the inspection and the certified inspector merely signs off on their work. The violation primarily focuses on the inspector, although a station operator with knowledge of this activity is responsible. The subsection (e)(3)(H) violation added, at the Category C level, focuses primarily on the station operator who authorizes an uncertified person to perform inspections. The use of the term issuing is key because the inspection station operator must allow (neglect to restrain, prevent, or permit) the uncertified person access to the certificates which the station operator is charged to safeguard. The knowledge or culpability is clear. The department is making the following minor change due to this comment in order to clarify the intent and improve the accuracy of subparagraph.

COMMENT: TSIA-1 and TSIA-2 commented on subsection (e)(2)(I). TSIA-1 wants the department to define the term "gross negligence" and asks if it will stand up in district court. Both proffered questions regarding securing inspection certificates based on anecdotal situations, e.g., if a loss occurs is gross negligence assumed, inspectors keeping the certificates in their shirt pockets, leaving the book lying on the analyzer with no one present but the department technician while stepped away, and lock failure on safes, lock boxes, or cash drawers used.

RESPONSE: The majority of questions proffered are outside the scope of this rule. This subparagraph addresses the penalty for violation of 37 TAC §23.25, Safeguarding Certificates that requires: "Adequate facilities shall be provided for safeguarding all certificates. The certificates shall be kept under lock and key at all times in a metal box or a secure container with a locking device." The department uses the term "gross negligence" as is generally accepted in legal usage and defined in *BLACK'S LAW DICTIONARY 1057* (7th ed. 1999), to include the annotations. While the precautions are simple, the assumption of gross negligence is not predicated on loss of the certificate alone. No change was made based on this comment.

COMMENT: The Staff commented the rule does not include instances where the inspection station does not have a certified inspector available i.e., sole inspector quit, fired, or under suspension. Staff recommends it be Category D violation in subsection (e)(4). TSIA-2 appeared to support staff's recommendation. TSIA-3 stated closing a station is a concern. TSIA-3 comments it should not happen due to an inspector sick day where the department locks out the analyzer and it takes three days to unlock it (used for emissions testing), otherwise it would not be a problem.

RESPONSE: The department agrees with the comments. Category D violations are temporary eligibility situations where an inspection station or inspector is temporarily prohibited from inspecting vehicles until a prescribed department requirement is met. It is to put the inspector or inspection station on notice of the problem. Obviously, vehicle inspections performed by uncertified personnel would result in a more serious violation. It is the policy of the department to unlock emissions analyzers immediately when any problem is cleared. The department is making the following minor change to subsection (e)(4)(B) due to the comments to include this omission.

COMMENT: TSIA-1 and Stations(12) both commented on subsection (e)(5)(A)(xi). TSIA-1 agrees with the department if the violation defrauds the public or the state. Stations(12) noted that this violation is broader than contained in subsection (e)(1)(R) and as a result any mistake that results in the entry of incorrect, e.g. false, information, no matter the cause, is applicable. Stations(12) stated that it has no knowledge requirement, not even a careless or negligence aspect, in the violation. TSIA-1 also inquired about differentiating who did it and what was the intent. Stations(12) noted that as opposed to subsection (e)(1)(R), this violation concerns any type of information and not just vehicle information.

RESPONSE: The department agrees with most of the comments but declines to change the subparagraph because the violation goes to the heart of why and how the department administers an I/M (emissions testing) program. The Clean Air Act, both federal and state, requires vehicle emissions testing to find and fix polluting vehicles. Under the State Implementation Plan (SIP), adopted by the State, prepared in accordance with federal rules, and adopted in the *Federal Register*, the requirement for enforcement against inspection stations and inspectors is clear: "Substantial penalties or retainage shall be imposed on the first offense for violations that directly affect emission reduction benefits. At a minimum, in test-and-repair programs inspector and station license suspension shall be imposed for at least 6 months whenever a vehicle is intentionally improperly passed for any required portion of the test. In test-only programs, inspectors shall be removed from inspector duty for at least 6 months (or a retainage penalty equivalent to the inspector's salary for that period shall be imposed)." (40 CFR 51.364(a)(2)) To answer TSIA-1's "who" question, the violation includes all information collected during the emissions test because a key informational item is the identity of the inspector as proven by use of the access card and PIN number. Inspector knowledge in this violation is clear since each inspector has two opportunities to ensure that the correct vehicle information is entered into the analyzer in order to conduct the emissions test. The intent is clear: "entering false information" "in order to issue an inspection certificate." The design of the emissions analyzer causes the testing of a vehicle based on the information the inspector is responsible for entering or verifying. A vehicle may only be issued a certificate is if it passes the emission test or, in other words, by entering the correct information to issue a certificate. The issue is whether the inspector has circumvented the test protocol to allow a polluting vehicle to continue to pollute, despite the entire vehicle emissions testing program instituted by the state. Above the cost of the annual safety inspection and based on the previous 12 months of certificate sales, the State, in round numbers, will require that

approximately 5.5 million vehicles to be emissions tested at a cost to the public in excess of $147 million per year to find and fix vehicles polluting the air. The majority of these funds go to the inspection stations. Allowing an inspector to enter false information to circumvent the I/M program is a fraud perpetrated against the public and the state. Texas law contains no provision for monetary fines for inspection stations or inspectors, therefore any violators are suspended from inspecting for six months. No change was made based on this comment.

COMMENT: The department received numerous comments concerning subsection (f). Some of these comments also referred to subsection (e)(4)(D), which gives effect to subsection (f), while others did not. Stations(12) made mention of subsection (f)(2), referring to criminal violations of deceptive trade practices, and use of subsection (d) to expand it to include violations as a result of civil suits based on the Texas Deceptive Trade Practices Act (DTPA). TADA expressed similar concerns about confusion over civil DTPA actions and suggested either strict adherence to the language of the statute and restricting those convicted of a felony or a Class A or B misdemeanor or changing subsection (f)(2) to read: "a criminal conviction of a statute that protects a consumer against an unlawful business practice." TSIA-1 and TSIA-2 voiced their support for raising the "bar" and removing "bad actors," but subsection (f)(15) incorporates the entire Transportation Code and the inclusion of Chapter 548 which does not apply to the "program" creates potential for "big dragnet" and could deliver the "death penalty" (lifetime revocation) to an inspector or station. TSIA-1 commented that a conviction of a person at age sixteen should not be held against them when they are thirty-five. TSIA-2 stated it contained no time limitation. TSIA-1 believed that the requirement is not evenly enforced since prospective employees they turndown because of criminal background appear in competitors' stations. TSIA-1 and TSIA-2 voiced concern about the economy impacts of the standard, paying for the background check and paying higher wages. TSIA-2 restated as two years ago, that this is an entry-level position and that 80% of the employees would not meet this standard and it is not doable at this time. TSIA-1 and TSIA-2 would like this paragraph removed.

RESPONSE: The department agrees with TADA that under Transportation Code, §548.405(a)(7)(A) - (D) the department can deny, revoke or suspend the certificate of a person either inspector or station operator for the conviction of any felony, Class A, or B misdemeanor without time limitation. In addition to the legal authority cited by TADA, under Transportation Code, §548.407(d)(8) - (10), adverse action can be taken immediately without a prior notice or hearing for criminal violations of Subchapter F (emissions testing), §548.603, and conviction of a felony or a Class A or B misdemeanor directly relating to or affecting vehicle inspection station or inspector duties or responsibilities. Finally, a violation under §548.603 includes any violation under Chapter 548, any department rule; or a law of another state, the United States, the United Mexican States, a state of the United Mexican States, Canada, or a province of Canada. For all those who commented, subsection (e)(4)(D) provides for the temporary removal from the inspection program for a conviction of the crimes listed in subsection (f) until the court imposed punishment or supervision elapses. This means civil judgment under the Business and Commerce Code, Chapter 17, Deceptive Trade Practices are not applicable. However, a criminal conviction under that chapter would apply until any punishment is complete just as would a conviction under Penal Code §32.42, Deceptive Business Practices. Past convictions of other crimes listed in subsection (f) do not prohibit inspection activities after the sentence has been completed. The amendment of subsection (f) is minor, only for clarification purposes, and not a fundamental change. The concerns of TSIA-1 and TSIA-2 regarding this subsection are apparently the result of misunderstanding of reading subsection (f) alone. Subsection (f) must be read in conjunction with subsection (e)(4)(D). Regarding comments concerning subsection (f)(15), this violation is not new; it is in the current rule in exactly the same form. Formatting used in publication in the *Texas Register* made paragraph (15) appear as added text instead of renumbered from paragraph (13). Including the chapter number in referring to one of its sections is a citation convention; however, as stated earlier in this response, Chapter 548 is included in the violation. No change was made based on these comments.

COMMENT: Staff asked that consideration be given for a time limitation for the other categories of violations, besides Category A. The difficulty of tracking violations more than five years old and after that time, the circumstances of the past violation may have little relevance to the current violation. TSIA-2 believes that five years may be too long to be held accountable for bad acts and because of employee turn-over three years may be better.

RESPONSE: The department agrees with Staff and believes that the turnover TSIA-2 indicates justifies establishing a period to consider past Category B, C, and E violations. While three years may appear appropriate for inspection stations with high employee turnover, the violation also applies to station operators as well as long time inspectors. Additionally a revocation carries a three year prohibition on reapplication, a three year limitation for subsequent violation allows a previous serious violator to start with a clean record under the penalty schedule, which is not desirous. The department is revising subsection (g) based on this comment and another regarding Category A violations to consolidate and clarify the manner in which subsequent penalties are calculated.

COMMENT: The department received numerous comments concerning subsection (h). Stations(12) stated a strict construction of the subsection would allow no family member to take over a station once the department has initiated action under any circumstance and previously the provision became applicable when an actual suspension or revocation became effective. Stations(12) believed the affidavit language does not modify family member takeovers but applies to non-family members and suggests revised language to clarify the affidavit applies to a family member takeover. TSIA-1 and TSIA-2 stated it closes a station without giving due process. TSIA-1 stated the expressed intent of House Bill 3071 is to prevent the department from making a rule to suspend due process. TSIA-2 stated that most inspection stations are family owned businesses and contends that House Bill 3071 says that a family member "can be certified," however with requirements such as the affidavit, which TSIA-2 supports. TSIA-2 recommends removal of the subsection; but supports the affidavit requirement and even additional requirements such as additional audits by the department.

RESPONSE: The department disagrees with the interpretations of House Bill 3071 by TSIA-1 and TSIA-2. The department agrees with TSIA-2 that a significant number of inspection stations are family businesses, with operational control shared in varying degrees by close family members. House Bill 3071 amended Transportation Code, §548.405, Denial, Revocation, or Suspension of Certificate, relating to inspection stations

and inspectors. The purpose was to strengthen this law and include certain family members of the certificate holder as well as other individuals, such as partners and shareholders. The statute, as amended, clearly provides that a person who has an immediate family member suspended or revoked "may not" be granted certification at the same location. This prohibition is not total since it does not extend to another location. Additionally, the certificate seeker may overcome it with proof that the immediate family member whose certificate is suspended or revoked will not be involved in that place of business. Contrary to TSIA-1 and TSIA-2, House Bill 3071 does not address "due process." The department disagrees with TSIA-1 and TSIA-2; the subsection does not suspend due process. There are various legal principals concerning due process. Under administrative law, it is generally procedural due process where there are two requirements, notice and a hearing. This rule and individual notification of denial are notice and a hearing is available upon request with the State Office of Administrative Hearings (SOAH). Stations(12) generally reads the subsection correctly with two exceptions. First, Stations(12) overlooks the operative word "may" in the restriction, meaning that it can be overcome. Second, the affidavit later mentioned is the primary method to overcome this specific restriction, therefore the previous certificate holder must be an immediate family member whose certificate is suspended or revoked or for whom the suspension or revocation process has been initiated. By parsing the subsection, instead of reading it as a whole, Stations(12) applies the use of the affidavit in a circumstance addressed by 37 TAC §23.17, concerning the lease or sale of inspection station during suspension, rather than intra family transfers or the affidavit requirement. From this comment, the department recognizes that both cases of new certifications, with immediate family members and strangers or non-immediate family members, should be treated the same with certain obvious exceptions. The department is revising subsection (h) based on the Stations(12) comment to clarify new inspection station certification pending or during suspension or revocation.

COMMENT: During the public hearing, TSIA-1 made reference to his comments during the previous amendment of this rule and indicated submission of written comments.

RESPONSE: The department received no written comments from TSIA-1 but has included the substance of all oral comments made by TSIA-1. No change was made based on this comment.

COMMENT: TSIA-2 was curious as to the reason this rule is being revised after two years, because they thought that the issues have already been resolved. While supportive of removing bad actors quickly and fining them, TSIA-1 and TSIA-2 have concerns about due process, shutting down an entire business, or family business, and the many thousands of dollars if not tens of thousands of dollars for legal defense. TSIA-1 complained about SOAH rules of procedure, the length of the hearing process, and limited defenses available at SOAH.

RESPONSE: The reason for the amendment of the section is included in the preamble of the proposed amendment, to clarify the rule and include earlier oversights. The department has no authority to levy monetary fines, does not target businesses, family owned or otherwise. The costs of legal defense and SOAH rules of procedure are beyond the scope of this rule. No change was made based on this comment.

COMMENT: TSIA-3 commented that the livelihood of inspection stations is in the hands of the department (in Austin) and they have to trust the department not to write overly punitive rules and fairly implement them. For the most part, everything is fine except for "local rules" (local application of agency rules). Some of the non-commissioned department technicians don't have the training or temperament for the job. A small mistake, instead of being worked out, is turned into a big mistake and the technician becomes punitive, repeatedly trying to get the inspector or station. TSIA-3 recommends more training and some testing, like department troopers for the technicians.

RESPONSE: These comments regarding testing, training, and conduct of department personnel are generally outside the scope of this rule. The testing and training of department personnel is an internal matter. Complaints about department personnel should be addressed under 37 TAC §1.38. No change was made based on this comment.

COMMENT: Mr. Sticker agreed with TSIA-3 comments and recommendations. Noting a technician job is neither high paying nor one that he would want, it is, probably for some, the first with any kind of authority, complete control over your family's business, and a few abuse it extremely. They come to the station at the busiest time and stay there until customers and employees are mad or find something whether right or wrong. Mr. Sticker complained about the technician "clocking-in" on the station analyzer and tying it up for hours, while going over records from 3 months before, even on the busiest days, losing customers, until they leave. Mr. Sticker noted that a failing equipment audit results in immediate shut down and correction; however with a covert audit (undercover inspection to detect faults) the problem is not immediately brought to their attention for a response. Mr. Sticker recommends immediate notification while realizing that this would identify the covert auditor and counters that rotation would solve this issue.

RESPONSE: The comments, attitude, and conduct of department personnel are generally outside the scope of this rule. Complaints about department personnel should be addressed under 37 TAC §1.38. Federal and state regulations require use of covert audits and identification of the technician exclude their further use. The audit procedure, technician log-in, the timing of audits, and length of audits is outside the scope of this rule. No change was made based on this comment.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, Chapter 548, Subchapter A, §548.002, which authorizes the department to adopt rules to administer and enforce the compulsory inspection of vehicles, and Subchapter G, §548.405, which allows the department to deny, revoke or suspend the certificate of an inspection station and or inspector.

§23.15. Inspection Station and Certified Inspector Denial, Revocation, Suspensions, and Administrative Hearings.

(a) As provided in Transportation Code, Chapter 548, §548.405, the department may deny an application for a certificate, revoke or suspend the certificate of a person, inspection station, or inspector, place on probation, or reprimand a person who holds a certificate in accordance with this section.

(b) Applicability. This section applies to any entity capable of applying for or holding a certificate from the department to include:

(1) a natural person,

(2) a business association entitled to do business in the state, including but not limited to:

(A) a corporation,

(B) a partnership,

(C) a limited liability partnership, and

(D) a limited liability company,

(3) each member of a partnership or association issued a certificate under this title,

(4) each director or officer of a corporation issued a certificate under this title, and

(5) a shareholder that receives compensation, in the form of a salary, from the day-to-day operation of an inspection station by a corporation issued a certificate.

(c) Terms and/or Definitions. Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Department of Public Safety (DPS), the terms used in this section have the meanings commonly ascribed to them in the fields of air pollution control and vehicle inspection. In addition to the terms defined by the TCAA, the following words and terms, when used in this section, shall have the following meanings.

(1) Suspension--means a temporary cessation of the authority associated with the certification of an inspection station or inspector.

(2) Revocation--means the withdrawal of the authority granted by the department to inspect vehicles under the certificate of an inspection station or inspector and the inability to re-apply for such a certificate for a period of at least three years.

(3) Lifetime Revocation--means the withdrawal of the authority granted by the department to inspect vehicles under the certificate of an inspection station or inspector and the inability to re-apply for such a certificate for the lifetime of the applicant.

(4) Warning--means a written reprimand based on a minor violation which if repeated will result in a more severe administrative sanction.

(5) Re-education--means to provide mandatory, additional and/or remedial training to a certificate holder to correct errors observed or discovered by department personnel. The technician provides this training immediately on-site, or later as scheduling permits. It is for errors sufficient to warrant adverse administrative action against the certificate holder but is administered for first time infractions, as opposed to re-certification.

(A) Re-education shall be recorded in the certificate holder's department file. This record will contain the date of re-education, the violation requiring re-education, and the name of the department personnel who administered the re-education.

(B) Re-education will not be administered again for a subsequent Category A violation.

(6) Re-certification--means required training and examination, both written and practical demonstration tests, required by the department per 37 TAC §23.61 after a holder's certificate has been suspended or revoked.

(d) Penalty Schedule. Pursuant to Transportation Code, Chapter 548, §548.405(h) - (i) the department will administer penalties by the category of the violation. The list of violations listed in this section is not an exclusive list of violations. The department shall assess penalties for any violations of Texas Transportation Code, Chapter 548, rules adopted by the department, or other statutes not provided for in this section. Any penalty assessed for a violation not provided for in this section shall be approved by the director or designee before it is assessed.

Figure: 37 TAC §23.15(d) (No change.)

(e) Violation categories are as follows:

(1) Category A.

(A) Issuing an inspection certificate without inspecting an item of inspection.

(B) Issuing an inspection certificate without the requiring the owner or operator to furnish proof of financial responsibility for the vehicle at the time of inspection.

(C) Failure to complete the reverse side of an inspection certificate.

(D) Failure to place an inspection certificate in the proper location.

(E) Issuing out of date inspection certificates.

(F) Refusing to inspect a vehicle without an objective justifiable cause, i.e. fuel leak, unsafe tires, etc.

(G) Failure to properly safeguard inspection certificates, department issued forms, and Emissions Analyzer Access/Identification Card and/or PIN number.

(H) Failure to properly maintain required records.

(I) Failure to keep an adequate supply of certificates.

(J) Failure to have at least one certified inspector on duty during the normal working hours of the vehicle inspection station.

(K) Failure to properly display the official department issued station sign, certificate of appointment, procedure chart, and other notices required by the department.

(L) Failure to keep department approved inspection area clean.

(M) Failure to issue certificates in numerical sequence for every vehicle inspected and approved.

(N) Failure to account for an inspection certificate.

(O) Failure to maintain minimum requirements.

(P) Issuing a certificate to a vehicle with one failing item of inspection.

(Q) Transferring an inspection certificate from an old windshield to a new windshield on the same vehicle or failing to properly affix the certificate to the windshield of a passenger vehicle, if one is present.

(R) Carelessly or negligently entering incorrect vehicle information into an emission analyzer at an inspection station, where emission testing is required by §23.93 of this title (relating to Vehicle Emissions Inspection Requirements), resulting in a false failure of the vehicle or the reporting of erroneous information concerning vehicle.

(2) Category B.

(A) Issuing an inspection certificate without inspecting the vehicle.

(B) Improperly issuing inspection certificate to a vehicle with multiple failing items of inspection.

(C) Requiring repair or adjustment not required by law, rule, or regulation.

(D) Refusing to allow owner to have repairs or adjustments made at location of owner's choice.

(E) Allowing an uncertified person to perform, in whole or part, the inspection and/or rejection of a required item during the inspection of a vehicle.

(F) Charging more than statutory fee.

(G) Requiring an additional fee or service charge in conjunction with the inspection.

(H) Inspector performing inspection while under the influence of alcohol or drugs.

(I) Gross negligence resulting in the failure to properly safeguard certificates and/or department issued forms from theft or loss.

(J) Issuing a certificate from a location other than on the premises or licensed location authorized and approved by the department as listed on the station application (VI-2).

(K) Altering a previously issued inspection certificate to include changing the expiration numeral insert or issuing an inspection certificate removed from another vehicle.

(L) A fleet or government inspection station inspector issuing an inspection certificate to an unauthorized vehicle to include those not owned, leased, or under service contract to that entity or personal vehicles of officers and employees of the fleet or government station and/or the general public.

(M) Intentionally or knowingly preparing and/or submitting to the department a false, incorrect, incomplete, or misleading form or report.

(N) Issuing an inspection certificate without inspecting multiple inspection items on the vehicle.

(O) Issuing an inspection certificate by using the Emissions Analyzer Access/Identification Card and/or the associated PIN number of another inspector.

(P) Giving, sharing, or lending an Emissions Analyzer Access/Identification Card and/or divulging the associated PIN number to another person without the explicit consent of appropriate department personnel.

(3) Category C.

(A) Issuing more than one inspection certificate without inspecting the vehicles.

(B) Multiple instances of issuing inspection certificates to vehicles with multiple defects.

(C) Emissions testing the exhaust or electronic connector of another (clean) vehicle fraudulently causing a vehicle to pass the emissions test (clean piping or clean scanning).

(D) Multiple emissions related violations on one vehicle or violations on more than one vehicle.

(E) Allowing a person whose certificate has been suspended or revoked to participate in a vehicle inspection or to participate in the operation of the inspection station where the current certificate holder was required to provide proof as prescribed in Transportation Code, Chapter 548, §548.405(e).

(F) Charging more than statutory fee in addition to not inspecting vehicle.

(G) Material misrepresentation in any application to the department or any other information filed pursuant to Transportation Code, Chapter 548, or department rules.

(H) Permitting or allowing an uncertified person to issue an inspection certificate.

(4) Category D.

(A) Failure to possess a valid driver's license from state of residence.

(B) Failure to posses an operational item of inspection equipment or a certified inspector on duty during normal working hours as required by the department.

(C) Failure to enter into and maintain a business arrangement with the Texas Information Management System contractor to obtain a telecommunications link to the Texas Information Management System Vehicle Identification Database (VID) for each vehicle exhaust gas analyzer, if in an affected county as defined in §23.93(b)(1) of this title.

(D) Conviction under the laws of this state, another state, or the United States of any crime as detailed in subsection (f) of this section. A conviction will be cause for denial, suspension, or revocation, under this subsection, until after the court imposed punishment or supervision has elapsed. For the purposes of this section, a person is convicted of an offense when an adjudication of guilt for the offense is entered against the person by a court of competent jurisdiction. A dismissal and discharge in a deferred adjudication proceeding shall not be considered a conviction for the purpose of this section.

(5) Category E.

(A) The following applies to inspectors and inspection stations in which emission testing is required by §23.93 of this title applies:

(i) Failure to perform applicable emission test as required.

(ii) Issuing an emissions inspection certificate without performing the emissions test on the vehicle as required.

(iii) Failure to perform the gas cap test or use of unauthorized bypass for gas cap test.

(iv) Issuing an emissions inspection certificate when the required emissions adjustments, corrections, or repairs have not been made after an inspection disclosed the necessity for such adjustments, corrections or repairs.

(v) Falsely representing to an owner or operator of a vehicle that an emission related component(s) must be repaired, adjusted, or replaced in order to pass emissions inspection.

(vi) Requiring emissions repair or adjustment not required by law, rule or regulation.

(vii) Tampering with the emissions system or an emission related component in order to cause vehicle to fail emissions test.

(viii) Refusing to allow owner to have emissions repairs or adjustments made at location of owner's choice.

(ix) Allowing uncertified person to conduct an emission inspection.

(x) Charging more than the authorized emissions inspection fee.

(xi) Entering false information into an emission analyzer in order to issue an inspection certificate.

(B) The following applies to inspectors and inspection stations in which §23.93 of this title is not applicable: issuing a safety only inspection certificate to a vehicle required to undergo a safety and emissions inspection without requiring a signed and legible affidavit, approved by the department (VIE-12), from the owner or operator of the vehicle.

(f) The department has determined a certified inspection station and certified vehicle inspector is in a position of trust, performing a service to members of the public where the Transportation Code, Chapter 548, requires the public to report for vehicle inspection. Therefore, the department has determined that conviction of a felony or Class A or Class B misdemeanors of the following crimes relate directly to the duties and responsibilities of a certified vehicle inspector and/or those for whom this section is applicable as detailed in subsection (b) of this section. For the purpose of this section, this also includes a similar crime under the jurisdiction of another state or the federal government that is punishable to the same extent as a felony or a Class A or Class B misdemeanor in this state; or a crime under the jurisdiction of another state or the federal government that would be a felony or a Class A or Class B misdemeanor if the crime were committed in this state. Those crimes include:

(1) any crime of which fraud is an element,

(2) deceptive business practices, deceptive trade practices, or any criminal violation of statutes that protect consumers against unlawful business or trade practices,

(3) murder,

(4) burglary,

(5) robbery,

(6) aggravated robbery,

(7) aggravated sexual assault,

(8) indecency with a child,

(9) sexual assault,

(10) aggravated assault,

(11) any violent crime against a person involving knowledge or purpose,

(12) theft,

(13) violation of the Texas Controlled Substance Act (Health and Safety Code, §§481.112 - 481.126),

(14) driving while intoxicated, and

(15) conviction of an offense as detailed in Texas Transportation Code, Chapter 548, §548.601, and §548.603.

(g) When assessing administrative penalties, the following procedures will be observed.

(1) Multiple certificate holders. Violations will not be aggregated or pooled in the case of a multiple inspection station certificate holder. The department will deny, suspend, and/or revoke all certificates of a certificate holder only if they have been found culpable in a prior adverse administrative action resulting in a denial, suspension, or revocation.

(2) Multiple violations. If multiple violations are found, the department will impose separate penalties for each violation as required by the penalty schedule. All suspensions will be served concurrently.

(3) Subsequent violations.

(A) Determination of a second or more subsequent violation is based on previous violations in the same category.

(B) For Category A violations, subsequent violations, second or more, are based on the number of previous violations in this same category within the preceding two-year period. When determining the appropriate penalty, the department will count the number of previous Category A violations, using the actual date of the violation and stop after reaching two years preceding the date of the current violation."

(C) For Category B, C, and E violations, subsequent violations, second or more are based on the number of previous violations in the same category within the preceding five year period of operation. No credit is given for any time serving a suspension or revocation. In determining the appropriate penalty, the department will count the number of previous violations in the same category, using the actual date of the violation. The department will stop counting violations after reaching five years, not counting any time spent while suspended or revoked, preceding the date of the current violation.

(D) Violations incurred before September 9, 2002 are not counted in determining subsequent violations in subparagraphs (B) and (C) of this paragraph.

(h) Certification of an inspection station where the current owner or operator is pending or currently serving a suspension or revocation is subject to additional restrictions that may result in denial, suspension, or revocation of certification.

(1) An immediate family member may not be granted certification for an inspection station if an immediate family member is suspended or revoked as an inspection station owner or operator at that same location.

(A) This restriction applies when the department initiates any administrative action that may result in a suspension or revocation of the inspection station certification until the suspension or revocation has been completed.

(B) The department may permit certification with proof that the immediate family member who was the prior certificate holder and is the subject of suspension or revocation has no further involvement in the place of business. This proof shall at least meet the requirements of paragraph (4) of this subsection.

(2) A person may be granted new certification for an inspection station at the same location where the previous certificate holder as an owner or operator is pending or currently serving a suspension or revocation. The person requesting certification must not be an immediate family member of the previous certificate holder or paragraph (1) of this subsection applies. This transaction must be the result of a complete change in ownership of the inspection station, by lease or sale.

(A) When the change of ownership of the inspection station is by lease of building and/or inspection bay, the person seeking certification must have:

(i) A copy of the lease agreement on file with the county clerk.

(ii) A certified copy of the lease agreement included with the application for appointment as an official inspection station.

(B) The person seeking certification must provide the department with proof that the prior certificate holder, who is the subject of the suspension or revocation, has no, nor will have, any further involvement in the business of state inspections. This proof shall at least meet the requirements of paragraph (4) of this subsection.

(3) As with all certifications, the application, investigation, forms, and procedure will be the same as set forth in §23.1 of this title (relating to New Applications). Any additional documentation required by this subsection shall be provided, as well.

(4) Establishing proof is by a notarized affidavit signed by the applicant. This affidavit must state that the previous certificate holder may not inspect vehicles; deal with inspection customers; handle any certificates, department forms, or certificate related materials; supervise; or to any extent manage any portion of the inspection station business. The affidavit must also contain the statement that the affiant understands and agrees that in the event the department discovers that the previous certificate holder is involved in the inspection business at that location, the certificate will be revoked immediately, under Transportation Code §548.407(d).

(i) When there is cause to deny an application for a certificate of any inspection station or the certificate of any person to inspect vehicles or revoke or suspend the outstanding certificate, the director shall, in less than 30 days before refusal, suspension, or revocation action is taken, notify the person in writing, in person, or by certified mail at the last address supplied to the department by the person, of the impending refusal, suspension, or revocation, the reasons for taking that action, and of his right to an administrative hearing for the purpose of determining whether or not the evidence is sufficient to warrant the refusal, suspension, or revocation action proposed to be taken by the director.

(j) The director, without a hearing, may suspend or revoke or refuse to issue any certificate if, within 20 days after the personal notice of the notice is sent or notice has been deposited in the United States mail, the person has not made a written request to the director for this administrative hearing.

(k) On receipt by the director of a written request of the person within the 20-day period, an opportunity for an administrative hearing shall be afforded as early as is practicable.

(l) Said hearing shall be held in accordance with Texas Transportation Code, Chapter 548, and applicable rules of the department.

(m) On the basis of the evidence submitted at the hearing, the director, acting for himself or upon the recommendation of his designee, may refuse the application, suspend, or revoke the certificate.

(n) Any person dissatisfied with the action of the director may appeal the action of the director in accordance with Texas Transportation Code, Chapter 548.

(o) The department will investigate all violations of Texas Transportation Code, Chapter 548, and all violations of rules and regulations promulgated under Texas Transportation Code, Chapter 548.

(p) Vehicle inspection station or certified inspector may waive the right to an administrative hearing in writing by completing Form VI-63, voluntary waiver of administrative hearing.

(q) The procedure of the administrative hearing shall be covered by the general rules of practice and procedure of the Texas Department of Public Safety, Chapter 29 of this title (relating to Practice and Procedure), except where other provisions are provided herein.

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

Filed with the Office of the Secretary of State on June 22, 2004.

TRD-200404141
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: July 12, 2004
Proposal publication date: March 5, 2004
For further information, please call: (512) 424-2135

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PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.12, concerning parole considerations. The amendments are adopted by the board on June 16, 2004, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4433). The text of the rule will not be republished.

The amended rule is adopted to incorporate new language under Chapter 145, Parole. The function of the amended rule is to establish a voting option for placement of offenders into the Serious and Violent Offender Reentry Initiative (SVORI) program and to restore language about subsequent reviews of parole after denial.

No comments were received regarding adoption of the amendment.

The amendments are adopted under §508.036, Government Code, which provides the board with the authority to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404176
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: July 13, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 406-5458

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37 TAC §145.17

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.17, concerning parole considerations. The

amendments are adopted by the board on June 16, 2004, without changes to the proposed text as published in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4434). The text of the rule will not be republished.

The amended rule is adopted to incorporate new language under Chapter 145, Parole. The function of the amended rule is to establish an additional circumstance in which a request for special review can be considered, and to conform the language of the rule to the current board practice.

No comments were received regarding adoption of the amendment.

The amendments are adopted under §508.036, Government Code, which provides the board with the authority to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, providing the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

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

Filed with the Office of the Secretary of State on June 23, 2004.

TRD-200404177
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Effective date: July 13, 2004
Proposal publication date: May 7, 2004
For further information, please call: (512) 406-5458

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 21. RIGHT OF WAY

SUBCHAPTER M. QUARRY AND PIT SAFETY

43 TAC §§21.701 - 21.723

The Texas Department of Transportation (department) adopts new §§21.701 - 21.723, concerning quarry and pit safety. Sections 21.701 - 21.723 are adopted without changes to the proposed text as published in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3602) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

House Bill 2847, 78th Legislature, Regular Session, 2003, transferred all powers, duties, functions, and activities performed by the Railroad Commission of Texas under Texas Aggregate Quarry and Pit Safety Act, Chapter 133, Natural Resources Code, to the Texas Department of Transportation.

The rules previously adopted by the Railroad Commission in Title 16, Chapter 11, Subchapter E, concerning quarry and pit safety, have been transferred to the department. The department adopts the repeal of Title 16, Chapter 11, Subchapter E and simultaneously adopts new §§21.701 - 21.723 in an amended form. Due to fundamental differences in structure and operation between the Railroad Commission and the department, the rules cannot be implemented by the department in their current form, and have been amended in a form that can be implemented by the department.

References to specific Railroad Commission departments or positions have been changed to specify the appropriate counterparts in the department. Several provisions designed solely to place the program in its proper context within the Railroad Commission's structure, as well as references to federal statutes and funding provisions that affect the operations of the Railroad Commission but not the department, have been deleted. Certain other provisions were adopted by the Railroad Commission at the inception of the program to provide the regulated community with a transition period, but they have since expired. Those provisions have likewise been deleted. Further changes have been made to either remove redundancies from or clarify language in the existing rules.

COMMENTS

No comments were received on the proposed new sections.

STATUTORY AUTHORITY: The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Natural Resources Code, §133.011, which provides the commission with authority to adopt rules regarding the Texas Aggregate Quarry and Pit Safety Act, and House Bill 2847, which transfers the powers performed by the Railroad Commission of Texas under Chapter 133, Natural Resources Code, to the department.

CROSS REFERENCE TO STATUTE: Texas Natural Resources Code, §133.011.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404236
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: July 15, 2004
Proposal publication date: April 9, 2004
For further information, please call: (512) 463-8630

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CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation (department) adopts amendments to §31.3, concerning definitions, §31.11, concerning formula program, §31.13, concerning discretionary program, and §31.36, concerning Section 5311 Grant Program. Sections 31.3, 31.11 and 31.36 are adopted with changes to the proposed text as published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4743). Section 31.13 is adopted without changes to the proposed text as published in the May 14, 2004, issue of the *Texas Register* (29 TexReg 4743) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 3184, 78th Legislature, Regular Session, 2003, amended Transportation Code, §456.022, and repealed Transportation Code, §456.024 (effective September 1, 2004) to

remove the statutory formula for allocating funds among individual eligible public transportation providers. The amendment authorized the Texas Transportation Commission (commission) to adopt rules to establish a formula that may take into account a transportation provider's performance, the number of its riders, the need of residents in its service area for public transportation, population, population density, land area, and other factors established by the commission.

Extensive public input was received considering the changes to this formula before the rules were proposed. Public meetings were held in Sugar Land, Waco, Tyler, San Angelo, Fort Worth, Edinburg, and Austin. The Austin meeting, held via videoconference, was accessible to the public at the department's downtown location, and the 24 statewide department district offices, not including Austin. Comments were also accepted by the department via the Internet and mail. The final report, summarizing those meetings, is available at http://www.dot.state.tx.us/ptn/geninfo.htm.

The Public Transportation Advisory Committee (PTAC) met several times to discuss the proposed formula and rules. PTAC provides a forum for the exchange of information between the department, the commission, and committee members.

Four PTAC committee members represent a diverse cross-section of public transportation providers; three members represent a diverse cross-section of public transportation users; and two members represent the general public. Advice and recommendations expressed by the committee provide the department and the commission with a broader perspective regarding public transportation matters that will be considered in formulating department policies.

PTAC's duties include advising the commission on the needs and problems of the state's public transportation providers, including recommending methods for allocating state public transportation funds, and commenting on proposed rules or rule changes involving public transportation matters during their development and prior to final adoption. PTAC recommended that the funds be allocated between urban and nonurbanized areas with 75% of the funding based on population and 25% of the funding based on land area; that after the urban and nonurbanized areas receive their allocation, that those areas be allocated funding on an 80%/20% basis with 80% based on general population (nonurbanized formula also includes land area) and 20% based on local funds per capita, operating expenses per mile (inverted), ridership per capita, and vehicle revenue miles. PTAC recommended that operating expenses per mile (inverted), ridership per capita, and vehicle revenue miles be calculated comparing a transit agency against its previous performance. PTAC also recommended that a five year transition plan be adopted which would cap reductions for an agency at 10% of the previous year and additions in funding to 120% of the previous year. The Public Transportation Advisory Committee, at its June 10, 2004, meeting submitted three additional comments. PTAC requested that the department clarify the term "good standing." The department agrees and has added a definition of good standing to §31.3. PTAC indicated that its comments on the formula apply only to fiscal year 2005 and it wishes to revisit the formula allocation for subsequent years. PTAC also recommended to the commission that the allocation of funds for the small urban areas be tied to an earlier draft spreadsheet that contains certain caps for designated recipients located in an urbanized area which includes a transit authority but is not served by that transit authority. Transportation Code, §456.006, capping these areas is still in effect and has not been repealed. The final numbers will approximate the earlier spreadsheet that PTAC mentioned.

The amendments to §31.3 update the terms "local funds" and "operating expense," to clarify the types of funding that would be considered in the allocation formula and to include more examples of what are considered operating expenses. The amendments also remove the term "service expansion" which is no longer used since the new formula addresses service needs, including expansion, by considering a systems base need of its geographical service boundary. The term "state data center," was removed because the new formulas rely on the United States Federal Census as does the original federal apportionment. Marketing expenses are deleted as part of the definition of administrative expenses. In following the federal regulations and the uniform system of accounts, marketing is not always considered an administrative expense, but may also be categorized as an operating or planning expense. This change does not shift any funds or change the manner in which the transit systems do business. It clarifies and allows for a proper place to budget or expend. A definition for "strategic priorities" has been added to describe the types of projects that the commission may approve using the discretionary 20% of the formula. Section 31.3 is adopted with changes to add a definition for the term "good standing" for clarification. The definition states that good standing is a status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

The amendments to §31.11, Formula Program, create a new formula. The funds will be allocated between small urban and nonurbanized areas with 75% of the funding based on population and 25% of the funding based on land area. Currently, this would result in approximately 35% of the funding allocated to urban and 65% of the funding allocated to nonurbanized areas. This approximately matches the urban/nonurbanized appropriation for fiscal years 2004 - 2005.

The commission will distribute the allocation to recipients operating public transportation services in urbanized areas. Eighty percent will be awarded giving consideration to population relative to the sum of all urbanized areas. The commission may elect to use all or part of the remaining 20% to address strategic priorities to be awarded on a competitive basis or to address funding anomalies in the formula. If the commission does not utilize all or part of the 20%, then the remainder will be awarded giving equal consideration to local funds per capita, and the following three criteria as compared to the system performance from the previous year: operating expenses per mile (inverted), ridership per capita, and vehicle revenue miles. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records. A transit district will not be awarded any of the 20% if it is not in good standing with the department.

The current formula grants all funding based on a calculation of need. The revision, an 80%/20% allocation, takes into consideration the performance indicators required by House Bill 3184. PTAC and many of the commenters at the meeting suggested that the formula should take into consideration the general population. The performance measures were suggested by PTAC. These measures are based on verifiable criteria so that a fair comparison can be made, and take into consideration the industry's need for standard data reporting. Three of the four measures compare each system to itself in order to compensate for

the diverse systems and geographic areas. The formula gives incentives for local governments to contribute to transit agencies, for transit agencies to be more efficient and economical, and to encourage full use of their service while addressing the needs of underfunded systems.

The amount allocated to recipients in nonurbanized areas will be determined by using the same formula as the urban areas with one exception as recommended by PTAC. The 80% in the 80%/20% allocation will be determined by the commission giving a 75% weight to population and a 25% weight to land area for each nonurbanized area relative to the sum of all nonurbanized areas. The land area consideration is added to recognize that the land areas for the nonurbanized areas differ greatly and to encourage all areas to extend their service to the greatest land mass possible.

The amendments include a five-year phase-in process whereby no entity will receive less than 90% or more than 120% of the award that it received for the previous fiscal year. This will guarantee that an entity will have five years of planning before it will be affected by a significant reduction and will not grow so fast that it cannot accommodate the additional funding.

In order to accommodate a change in service area, if a transit district's service area is altered, the department and the transit district shall negotiate an appropriate adjustment to its funding award.

Section 31.11 is adopted with changes to correct two typographical errors in the proposed rule. In §31.11(b)(2)(B), which relates to nonurbanized areas, the word "urbanized" has been changed to "nonurbanized" in clause (i). The cross-reference in §31.11(d) has been corrected from subsection (b) to (c).

The amendments to §31.13, concerning the discretionary program, are technical corrections affecting cross-references.

The amendments to §31.36, concerning the Section 5311 Grant Program, contain technical corrections and clarifications. Subsection (e)(1) is changed to allow the department to use up to 15% of 5311 apportionment to defray administrative expenses instead of requiring the department to do so which may allow more funds to be available for transit. The amendments also revise the formula for the distribution of funds to rural transportation providers using the same formula described for nonurbanized areas in §31.11 of this subchapter, taking into consideration the same five-year phase-in period, and the same change in service adjustment. The formula for intercity buses remains unchanged.

Section 31.36 is adopted with changes to correct two typographical errors. In §31.36(g)(2)(B)(i) relating to nonurbanized areas, the word "urbanized" has been changed to "nonurbanized." In §31.36(g)(4) the cross-reference to paragraphs (1) and (2) has been corrected to paragraph (3).

COMMENTS

Hearings on the proposed amendments were held in Austin, El Paso, Lubbock, McAllen and Tyler during May and June. The department received comments from 46 individuals and entities. Four indicated they were in favor of the proposed rules and four indicated that they were opposed.

Several comments were submitted in regards to local transit services and the importance of these services to the residents who rely on these services. Comments varied from issues with local bus service routes and fares, to the impact that would be realized if services were cut due to funding reductions. Oral comments were received from: four individuals; a social service coordinator of the William Booth Apartments; the Salvation Army; the East Texas Workforce Center; The United Mounted Peace Officers of Texas; and a social worker at a dialysis center.

Comments: Several individuals commented in favor of the rules. The Alamo Area Council of Governments submitted oral comments expressing thanks to the department and PTAC for developing a fair and equitable formula for the entire state. The commenter spoke in support of the formulas and stated he looked forward to the changes.

Greater East Texas Transit Association submitted oral and written comments thanking the department and members of PTAC for their work on the rules. The commenter expressed his support for the proposed formula. He noted the negative impact the proposed formula would have on Tyler Transit, but the positive impact it would bring to North East Texas rural areas. The commenter also expressed appreciation to the department for its work in attempting to reach consensus for anomalies in the funding formula, and a need to increase the current state investment in public transportation.

Rusk County Transportation Committee submitted oral and written comments that support the proposed formula and encourage the department to continue working with the development of transportation systems. They stated that the department should aggressively seek new and innovative ways of funding and recommended that the department monitor the performance measures to ensure their effectiveness as the formula is utilized today and in the future.

Response: The department will continue to look for ways in which it can assist transit systems, especially in concert with appropriated funding levels.

Comment: Just Transportation Alliances (JTA) submitted oral comments. JTA suggested the department develop a mechanism to provide feedback to the comments it receives. JTA stated the formula change is fair in regards to distribution, but places caps for systems in transition. JTA recommended the department base formulas on the market for public transportation. JTA also expressed a need for more flexibility in the formula, stating that standard performance measures are static and do not accurately reflect what happens on the ground by individual operators. JTA stated that there is a need to start multi-tasking by lining up multiple funding with the formula. JTA encouraged the Public Transportation Division to take a leadership role and model performance measures for themselves to gauge how they can do better.

Response: Concerning the suggestion that the department develop a mechanism to provide feedback to comments, the department publishes its responses to comments on proposed rules in the *Texas Register* as well as the department's website. The department did not base its formula on the market for public transportation since the need for public transportation far outpaces the available funding. There has not been any indication that Texas has any areas that are overserved by public transportation. The department designed flexibility into the formula by allowing the commission to allocate funding for strategic priorities and to address funding anomalies. It is not clear what is meant by multiple funding, but the department is receptive to ideas that would create additional funding. The department has performance measures, including measures for public transportation.

Comment: East Texas Just Transportation Alliance (ETJTA) submitted oral comments expressing appreciation to the commissioners and staff for their support and efforts to make changes to the existing funding formulas. ETJTA stated a need for the department to provide leadership and consider coordination as a key feature in funding allocation and that coordination must be a key performance factor based on a consumer model to get people where they need to go, not where they want to go. ETJTA also expressed difficulties with matching federal funds and the need for cities and counties to "pony up" funding to match federal dollars. It suggested that local elected officials be notified in regards to funding needs.

Response: The department is committed to working with local entities to enhance coordination and will continue to do so.

Comment: Texarkana Urban Transit District (TUTD) submitted written and oral comments regarding the data used for Texarkana as the system exists both in Texas and Arkansas. TUTD expressed its thanks to PTAC and the department for using performance measures and suggested greater emphasis on the use of performance measures as it would lessen the impending reduction in operating assistance. TUTD gave a cautionary comment regarding using operating costs as a performance measure since systems will be penalized for increases in certain operating costs such as insurance. TUTD suggested utilizing toll credits.

Response: PTAC did discuss giving a gradually greater emphasis to performance measures. PTAC did not adopt a graduation, but did express its intent to discuss this possibility in future changes to the rules. PTAC and the department considered various measures. Under the definitions, insurance may be considered as either an administrative or operating cost depending on the type of insurance. These rules are designed to address the disbursal of funds only. The department will continue to review the value of innovative financing options such as toll credits which are not part of this rule promulgation.

Comments: Several individuals commented against the rules. The Brazos Transit District (the District) submitted oral and written comments that detailed areas in which the District believes the formula is flawed including the allocated funding as viewed on a per capita basis as well as on a per square mile basis. The District also commented on the performance portion of the formula stating that a reduction in funding would have a negative reflection in its transit system's performance creating additional funding penalties to the system and its patrons in their access to needed goods and services. The District further expressed disappointment of the locations for the public hearings since, in its view, the hearings were located in areas that precluded the negatively affected transit districts, as well as their elected officials and patrons, from providing comment.

Another commenter from the District provided copies of, and indicated written support for, testimony given by the District's original commenter.

Texoma Area Paratransit System (TAPS) made numerous comments regarding the proposed rules. TAPS was pleased to see a five-year transition period complimented with the use of 20% commission discretionary funds. TAPS addressed the availability of Health and Human Service transportation program funds to transit districts, and stated that their introduction would not offset the realized decrease in state and federal funds under the proposed formula. TAPS expressed concern in the system's inability to match federal Section 5307 funds due to the loss of toll credits and now the loss of state funds under the proposed rules. TAPS expressed its support for the revised definition of local funds and also supports measuring performance against the same transit agency; however, TAPS expressed concern regarding the data used in calculation of the performance measures, opposes adoption of the rules as written in that many transit systems would realize a decrease in funding; expressed concern that overall funding levels were held constant in regard to the first five-year fiscal note calculation as a political move by the department; opposed the proposed rules as they would result in a disruption of service as presently being provided to residents of Texas; suggested there are alternatives not examined by the department; and recommended that the department keep funding at its current levels. TAPS expressed its concern that the department not cause a decrease in funding for a rural provider that is one of the largest and most coordinated in the state.

The Caprock Community Action Agency commented that it does not support the new formula because the agency stands to lose a great deal of money under the formula and rural systems cannot stand any cut at this time.

Response: The department recognizes that in creating a fair and equitable distribution of funds, some entities may experience a reduction in funding. However, since there are limited funds, there is no way to increase the funds to the agencies that have historically been underfunded without reducing others. The department also recognizes the contributions of all transit providers throughout the state and encourages public input on all of its rule changes. Because of the importance of this issue, the department chose to hold five public hearings in various cities versus the customary single hearing in Austin. While the department would like to be able to hear both citizens and providers from throughout the state, both time and resources make this impossible. Instead, the department provided an avenue by which comments could be submitted to the department via the mail.

The fiscal note funding level calculation was held constant because the department does not have an indication of what the funding will be over these years. The federal transportation bill is still pending and the state legislature had not yet funded the next few fiscal years. Based on historical funding, the funding probably will not be reduced, but there is no guarantee that it will be increased. The department is interested in learning about any other alternative funding that may be available.

Comment: East Texas Council of Governments (ETCOG) spoke in favor of the proposed formula and outlined the enhancements it would allow ETCOG to make. ETCOG further stated the performance measures should not be applied to the rural operators whose funding will be reduced.

Response: The department does not think it would be fair and equitable to apply performance measures to only those agencies that did not receive a reduction in funding. Those agencies may experience an increase in funding because they do well in those measures. The graduated caps and bases are designed to create stability in the funding stream.

Comment: East Texas Center for Independent Living (ETCIL) commented orally that the department should look for innovative ways to bring more federal dollars to the area. ETCIL also stated that it hoped the formula would be available for revision in the future. It suggested that the department and the Federal Transit Administration eliminate geographical and funding barriers.

Response: The department will continue to look for ways in which it can assist transit systems, especially in concert with appropriated funding levels. The department also agrees that

further review is appropriate regarding suggested items for possible inclusion in future amendments to the rules.

Comment: An individual submitted written and oral comments stating that a loss of funding for any system would result in reduced services. The commenter asked the department to cover the fiscal year 2005 shortfall for systems that would experience a reduction of funds under the proposed rules, and suggested the use of additional federal funds. The commenter also recommended the department: integrate health and human service programs and funds into a coordinated transportation program; wait to see what the legislature appropriates for public transportation for the next biennium; wait to see how Congress handles reauthorization; and ask PTAC to systematically develop a fully integrated and coordinated public transportation system for Texas. The commenter suggested engaging the services of the Texas Transportation Institute to prepare an inventory of current providers and programs which would most likely illustrate public transportation models in Texas which work well, overlapping services, and the real cost effectiveness of systems across the state.

A commenter from the Brazos Transit District submitted written support for this individual's testimony.

Response: The rules, as proposed, allocate the funds available for these programs. At this time, there is not another funding source to cover the reduction of funds. The department is committed to integrating services into a coordinated transportation program. The department is always available for input concerning efficiency and effectiveness, and also considers PTAC's recommendations concerning public transportation models and services.

Comment: A commenter from the County of El Paso stated that performance criteria vehicle revenue miles should be examined closely so as not to unfairly affect systems with large deadhead mileage.

Response: Upon conclusion of the public hearing in El Paso, this commenter retracted his comment noting that the department had already satisfactorily covered this item.

Comments: A commenter representing Citibus, a transit system in Lubbock, and also representing other properties managed by McDonald Transit, in which he serves as vice president, submitted written and oral comments. The commenter noted that of the seven systems managed by McDonald Transit in Texas, five are losing funding under the proposed formula. The commenter stated that he agreed with a five-year transition; believes in performance measures, specifically local funds; and suggested the comparison and rewarding of systems that perform well as compared to other systems. The commenter proposed that a greater percentage of funding (50%) be directed to performance; stated that local funds are the most important of the performance measures; and recommended the department establish a performance measure to encourage larger local contributions. The commenter also suggested a special award to systems that are in need of funding through no fault of their own. The commenter recommended: that no system receive a state funding reduction for fiscal year 2005; that the state take funds from other sources such as medical transportation or other federal resources to assist systems who need additional funds; the department establish goals and objectives for systems for the next five years; and the state require a local match for state funds for fiscal year 2005. The commenter also suggested the development of a pilot program for coordination and consideration of the use of toll credits by public transportation systems to match planning and capital expenditures to leverage available federal funds for such projects.

The Lubbock Transit Advisory Board commenter orally agreed with the comments provided by Citibus.

A commenter for the Texas Commission for the Blind and member of South Plains Transportation Alliance orally expressed concern with any formula that would reduce funding to the Lubbock area. The commenter supported the recommendations of Citibus and stated that special consideration should be given to Lubbock and other cities that have gone over 200,000 in population.

Response: PTAC considered graduated performance measures and has indicated they would like to discuss an increase in their weight for future changes to the rules. The department would have to define what would be considered "no fault" in order to include it as part of the criteria for award. The department does not have enough information at this time to make such a determination but is open to specific suggestions for future changes to the rules. If additional money is allocated for these programs, it will be distributed in accordance with the formula. The department does not have the authority to remove money from other programs such as medical transportation because those funds are dedicated by state and federal law to those programs. The department contractually addresses local match for those programs that require a local match. The department is committed to coordination; however, the funds that are the subject of these rules are to be distributed to the agency for specific transportation needs. The department will continue to review the value of innovative financing options such as toll credits that are not part of this rule promulgation.

In regards to cities over the 200,000 population level, state statute, specifically Texas Transportation Code, Chapter 456, stipulates those entities that are eligible and ineligible for state funds under this program.

Comment: A commenter from West Texas Opportunities submitted oral comments that the current proposed rules will not allow the system to keep up with the increases they have obtained over the past year. The commenter expressed the need for a better way to report local match since they are only allowed to report 20% under the rules. The commenter stated that everyone should be doing service in the same way. The commenter recommended coordination be part of the formula, and that the 2004 formula remain the same since it is too late to change it. Finally, the commenter stated that rural systems could not compete with populated areas since rural costs are greater than that of populated areas.

Response: The department also notes that the reference to only being allowed to report 20% local match under the rules appears to be a misunderstanding. The proposed amendments and existing rules do not place limits on reporting of local match. The department and the PTAC considered coordination as part of the criteria, but found it difficult to quantify. The department would consider quantifiable suggestions for future changes to the rules. The formula is divided between urbanized and nonurbanized, and takes land area into consideration for the nonurbanized areas.

Comment: A commenter from Pan Handle Community Services (PHCS) orally expressed support for the new formula because it takes land area into consideration. PHCS believes that agencies should be rewarded for coordinating trips and looks forward to

coordination of transportation with other state agencies through the department. PHCS suggested that the 20% being held by the commission could be used to offset some systems not being increased by the formula and expressed the need to support all systems. PHCS expressed support for the 10% and 20% cap and base. PHCS stated the real problem with the formula is that there are not enough funds and that costs have gone up, especially fuel. Finally, PHCS stated that every city should have access to transportation.

Response: The department is committed to coordination. The commission has the option of using part or all of the 20% to address funding anomalies. The statutes determine what entities are eligible for this funding, and under this formula, the department will provide funding for all eligible entities.

Comment: Citilink, the transit system in Abilene, submitted oral comments that suggested the department consider other options, such as performance, when developing the formula.

Response: The department agrees and has provided for the inclusion of performance in the funding formula.

Comments: Several comments were received concerning the cross-border populations. A United Transportation Union Local 1670 representative and coach operator for Laredo Municipal Transit system submitted oral comments that expressed concern for the systems along the Texas/Mexico border and commented that the proposed formula's 80/20--Needs/Performance split works against the systems along the border, with the possible exception of Harlingen and McAllen, as the border systems have heavy ridership from large cross-border transient populations. He suggested working with "scenario two" for implementation.

A commenter from Brownsville Urban System (BUS) opposed the proposed funding formulas in written and oral comments. BUS expressed concern with using population since 40% of its ridership is walking across the bridges from Mexico. BUS further stated that any reduction in funding would diminish performance and efficiency improvements. BUS requested the following proposal be considered and only applied to fiscal year 2005: (1) continue to seek input to determine a formula that would not decrease funding for any transit agency; (2) that transit systems which would be reduced under the formula should be funded at their fiscal year 2004 funding levels; (3) the 20% be required to be used to adjust funding to at least the fiscal year 2004 levels; and (4) incorporate a border area adjustment into both the temporary fiscal year 2005 and final funding formulas.

The Lower Rio Grande Valley Development Council orally commented that any changes would affect its system since they run all types of systems and funding cuts would affect any system's ability to provide service. The commenter proposed status quo as an option when looking at development of new rules. It was further stated that systems along the border have a uniqueness to provide service to United States citizens as well as citizens of Mexico. The commenter stated that efforts should be focused on finding new funding streams.

Response: The department realizes the unique situation and challenges faced by transit operations in the Texas/Mexico border area. The department believes that local, state, and federal governments need to focus attention, and possibly financial resources, in addressing this important aspect of the border area. In regards to "scenario two," the proposed rules do not list scenarios, and therefore the reference is unknown. Additional input in determining a formula for fiscal year 2005 would delay the distribution of the funding that will be available September 1, 2004. The formula has some flexibility since the commission has the authority to use all or part of the 20% to address funding anomalies. The department is willing to consider specific input concerning border area adjustments for future revisions to these rules.

Comment: A commenter from the Town of South Padre Island representing The WAVE, the local transit system, expressed concerns with the population and land area formula since their resident population versus the population they serve is quite varied. Basing the formula on performance may limit their option to explore other items such as route changes.

Response: The department realizes the unique situation and challenge faced by the transit operations on South Padre Island. The department and PTAC considered the tourist areas when considering the formula, but could not come up with a way to numerically accommodate the influx of tourists in various areas, while keeping in mind the needs of the rest of the state. The department suggests that local, state, and federal governments need to focus attention, and possible financial resources, in addressing this important aspect of a tourist area. The department is also willing to consider any specific suggestions in future amendments to these rules.

Comment: The City of Rio Grande City submitted oral comments that recommended reducing base needs and increasing performance percentages which should help with the transient population coming over from Mexico. The city stated that a change in the percentage would help the border area.

Response: The department will consider increasing performance percentages and other performance indicators such as a reduction in base needs, and agrees that further review of border area needs is appropriate for future rule amendments.

Comment: A commenter from Hildago County Metropolitan Planning Organization questioned the term "population." He spoke of transit dependent populations such as "low income." He suggested that "general population" is not reflective of "need."

Response: The department considered various types of populations, but determined that it would be difficult to ascertain reliable numbers indicating special populations such as low income, elderly, and disabled. The department also received various opinions at the public hearings and informally from the transit community. Although they agreed that population should be used, the transit community differed in how to categorize the transit dependent population. In addition, the department is committed to providing transportation for all persons wishing to use public transportation.

Comment: The Central Texas Rural Transit District submitted written comments that expressed concern that the data used in the performance measure of the formula does not treat their system fairly since their system expanded into two additional counties during the last four and one-half months of fiscal year 2003.

Response: The department will review the data used to fairly account for all transit providers. The rules address a change in service area. If a service area is otherwise altered, the department and the subrecipient will negotiate an appropriate adjustment in the funding awarded to that subrecipient for that funding year or any subsequent year, as appropriate.

Comment: The Texas Citizen Fund (TCF) submitted written comments that expressed their thoughts regarding the factuality of spreadsheets and information disseminated before and during the release of the proposed changes to the rules. TCF strongly recommends that the commission proceed, rather than start the process over, even with the concerns it raised.

TCF suggested that the commission could achieve greater equity in the distribution of state (and to a related extent federal) funding by tying the allocation of funds to: (1) the needs of transit customers and communities statewide; and (2) the performance of transit systems. As the fiscal year 2005 proposed funding formula moves forward, TCF strongly encouraged the commission to promptly re-examine of those criteria that define an eligible system and to make equitable the population calculations.

TCF suggested that the commission prioritize performance accountability by identifying state transit priorities, clarifying performance expectations and goals, standardizing the measurements of these expectations and goals with greater uniformity, and tracking performance. TCF commented that the performance measures contained within the proposed funding formula are driven by the past. TCF further stated that in fiscal year 2005, the commission should press staff, the public, transit operators, and others to move forward on developing criteria that would capture the performance and functioning of a system, not repackage operational measurements as "performance measures."

TCF suggested that the commission and department meet the legislature's mandates of innovation, efficiency, coordination, and exemplary performance by rewarding systems that meet the transportation needs of communities and individual customers. TCF encouraged the commission to provide a vision toward which PTAC members, the public, and the department could move.

TCF urged the commission to hold the department accountable for significant improvements in its advance preparations, logistical sensitivity, and mechanisms for public inclusion as it moved forward on the funding formula to be used post-fiscal year 2005. And finally, TCF strongly recommended that the commission move forward by restoring the allocations calculated and released by the department in a draft spreadsheet dated April 2004.

Response: There has been a misunderstanding about the spreadsheets. The cap for the designated recipients located in urbanized areas which include a transit authority but are not served by the transit authority is in effect. Transportation Code, §456.006, which this was based on, was not repealed. Therefore the final numbers will approximate the April 2004 spreadsheet. The proposed formula determines the needs as based on population, and for the nonurbanized areas, land area. The formula takes performance into consideration and is designed to meet the legislature's mandates. The department welcomes any specific, quantifiable suggestions for future rule amendments as to performance measures.

The department has performance measures, including measures for public transportation. The commission will allocate any additional funding and has discretion to allocate some funding on the basis of funding anomalies.

Comment: The Texas Transit Association (TTA) submitted written comments that suggested engaging the services of the Texas Transportation Institute to prepare an inventory of current providers and programs which would most likely show: (1) public transportation models in Texas which work well; (2) overlapping services; and (3) the real cost of effectiveness of systems across the state.

TTA implored the department to freeze rural and small urban providers at their fiscal year 2004 funding levels, and to use potential federal funds to cover the shortfall.

The commenter voiced concern over the use of operating expense per mile as one of the performance measures which could unfairly penalize providers when uncontrollable costs, such as fuel and insurance, increase dramatically. The commenter also expressed concern that performance data is not current. The commenter did, however, support the proposed change to the definition of local funds and supports the five-year transition period.

TTA also expressed concern regarding transit systems inability to match federal funds with reduced state funding under the proposed rules. It further expressed disappointment that the public hearings were not held via videoconference, and that the information provided to PTAC members at their June 10th meeting was not available prior to the scheduled public hearings.

Response: The department is always available for input concerning efficiency and effectiveness, and considers PTAC's recommendations concerning public transportation models and services. The legislature gave the commission the task to create a fair and equitable funding system. The commission has determined the current formula needs to be changed to meet this mandate.

Regarding operating expense, the department is willing to consider suggestions for future rule amendments; however, it has determined that at this time costs such as fuel and insurance affect all the providers. The department has performed outreach efforts concerning these rules. It held many public meetings, five public hearings, received comments via the mail, and posted information on the Internet.

Regarding information disseminated to PTAC, this committee serves in a special capacity as policy advisors to the department. Information is provided to this committee specifically to address items appearing on the committee's agenda, and the information that is scheduled to be given to PTAC is subject to change. It is considered internal policy decision-making until the documents are finalized. This information may coincide with other processes, such as public hearings, but is not mutually inclusive.

Comment: Colorado Valley Transit submitted written comments that the loss of funds under the proposed formula may result in service reduction or possible elimination. The consequences of this problem may affect delivery of service and therefore a loss of performance funds. With a loss of both funds, some agencies may be eliminated.

Response: The proposed rules are not intended to eliminate systems but provide for a fair and equitable distribution of funds.

Comments: Several commenters submitted written comments suggesting the department adopt "scenario two." The Honorable Richard Raymond, State Representative--District 42, submitted written comments that supported "scenario two" as the most beneficial for Laredo and the southern region.

United Transportation Union supported "scenario two" as being most advantageous to areas along the border.

Response: Regarding "scenario two," there must be a misunderstanding. The proposed rules did not list scenarios.

Comment: The City of Texarkana, Arkansas, submitted written comments that expressed concern regarding the reduction of funds to Texarkana and provided comment regarding the hardship this would have on their service levels and their ability to match federal dollars. The City further commented regarding the need for toll credits to match federal capital projects.

Response: The department realizes the unique situation and challenge faced by the transit operations in Texarkana and will continue to review the value of innovative financing options such as toll credits, which are not part of this rule promulgation.

Comment: The Honorable Gonzalo Barrientos, State Senator, District 14, provided written comments that expressed concern regarding the impact the proposed rules would have on the Capital Area Rural Transit System. He was also concerned that the proposed rules will penalize rural transit providers that have expanded their infrastructure over the past several years. The senator suggested using federal money to fund increases while freezing other providers at existing allocation levels.

Response: The department will use additional federal money if it is allocated. To freeze the present allocation would leave the current formula unchanged. The legislature gave the commission the task to create a fair and equitable funding system. The commission has determined the current formula needs to be changed to meet this mandate.

Comment: Golden Crescent Regional Planning Commission submitted written comments that supported the awarding of funds based on performance, but with concerns regarding the language proposed. The commenter suggested the language be changed to the following: "(B) If the transit district is in good standing with the department and has no deficiencies and no findings of non-compliance, 20% will be awarded first under clause (ii) of this subparagraph with remaining funds being awarded under clause (i) of this subparagraph as follows."

Response: The department believes that in developing a new formula for the distribution of funds, it is important to build in some flexibility. The ability to use all or part of the 20% will help address the transition to the new formula.

Comment: The City of Laredo submitted written comments that supported the recommendations of PTAC as drafted. The City further expressed concurrence with PTAC for a graduated split with the increase proportion of weight on performance measures from 80/20 to 70/30 to 60/40 to 50/50.

Response: PTAC did consider the graduated split, but voted for the 80/20 split stated in the rules. The department and PTAC do not wish to increase or decrease these amounts until the effect of the addition of performance measures can be evaluated. PTAC has also indicated that it would like to revisit this split for future amendments.

Comments: Various persons submitted oral comments suggesting that the current formula not be revised. The transit system in Midland/Odessa supports the proposal presented by Citibus. The commenter noted that although Midland/Odessa stands to gain, he is concerned about the cost to other areas around the state and believes the formula creates a competition between urbanized areas. The commenter suggested sustaining the current level of funding.

An individual stated that if you cut funds, the disabled will not be able to get to the doctor or other places and requested the department take this into consideration.

A representative of Congressman Solomon Ortiz submitted oral comments stating that Congressman Ortiz has been active in attempting to improve and bring transportation to the valley. The representative noted the Congressman's understanding that transportation services are very important for jobs, medical, and other necessary functions in life, and that cutting funding would have a severe impact on the area. The representative asked why are we fixing something that is already working well and why are the formulas being changed; and also suggested the state look at the lives they are affecting before making any changes.

The county judges from the following counties submitted separate written comments: Floyd County; Hale County; Motley County; Dickens County; and Crosby County. These county judges expressed concern for local impact and stated their beliefs that more time is needed to come up with a more equitable formula. They suggested that the formula should remain as is for this year to allow more time for an equitable distribution of funds.

The County Judge of King County (Judge Daniel) submitted written comments that suggested the state funding be split 50% based on population and 50% on land area; and the performance of 20% be taken into consideration if a system saw a rise or fall in funding from the previous year. For the federal rural funding, Judge Daniel suggested the funding be split 50% based on population and 50% on land area, and the same consideration be given to the 20% performance portion regarding funding increases/decreases. He recommended more emphasis be factored into the rural formula for the land area instead of population. He also recommended both economic and demographics of each county be considered. The judge stated that the formula should remain as is for this year to allow for more time for an equitable distribution of funds.

Response: The legislature gave the commission the task to create a fair and equitable funding system. The commission has determined the current formula needs to be changed to meet this mandate.

Various splits were considered by the department, and it was determined that the adopted splits create the least disruption to service while being fair and equitable. The commission does have the authority to use all or part of the 20% to address funding anomalies. The department considered economic and demographic criteria, but found it difficult to determine what types of numbers to use as a basis in services that are sorely needed throughout the state, and also how do to this while remaining committed to providing public transportation to all individuals who wish to use it. The commission is willing to consider specific suggestions for future amendments.

SUBCHAPTER A. GENERAL

43 TAC §31.3

STATUTORY AUTHORITY: The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers; and Transportation Code, §461.003 which requires the commission to adopt rules necessary to implement

Transportation Code, Chapter 361 and provides the commission with the authority to adopt rules to require certain state agencies to contract with the department for the department to assume the responsibilities of that agency relating to the provision of public transportation services, and to adopt rules to require a public transportation provider to provide detailed information on its public transportation services.

CROSS REFERENCE TO STATUTE: Transportation Code, §456.022.

§31.3. Definitions.

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

(1) Administrative expenses--Include, but are not limited to, general administrative expenses such as salaries of the project director, secretary, and bookkeeper; insurance premiums or payments to a self-insurance reserve; office supplies; facilities and equipment rental; and standard overhead rates.

(2) Allocation--A preliminary distribution of grant funds representing the maximum amount to be made available to a subrecipient during the fiscal year, subject to the subrecipient's completion of and compliance with all application requirements, rules, and regulations applicable to the specific funding program.

(3) APTA guidelines--The "Manual for the Development of Rail Transit System Safety Program Plans" published by the American Public Transportation Association on May 1, 1999, and subsequent revisions.

(4) Authority--A metropolitan or regional authority created under Transportation Code, Chapter 451 or 452, or a city transit department created under Transportation Code, Chapter 453, by a municipality having a population of not less than 200,000 according to the most recent federal census.

(5) Average revenue vehicle capacity--The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(6) Capital expenses--Include the acquisition, construction, and improvement of public transit facilities and equipment needed for a safe, efficient, and coordinated public transportation system.

(7) Commission--The Texas Transportation Commission.

(8) Common rule--49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(9) Contractor--A recipient of public transportation funds through a contract with the department. This definition is synonymous with subrecipient.

(10) Department--The Texas Department of Transportation.

(11) Deputy executive director--The deputy executive director of the department.

(12) Designated recipient--The state, an authority, a municipality that is not included in an authority, a local governmental body, or a nonprofit entity providing rural public transportation services, that receives federal or state public transportation money through the department or the Federal Transit Administration, or its successor.

(13) Director--The director of public transportation for the department.

(14) District--One of the 25 districts of the department having responsibility for administration of public transportation programs in a designated geographic area.

(15) District engineer--The chief executive officer in charge of a district.

(16) Equipment--Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(17) Executive director--The chief executive officer of the department.

(18) Fatality--A death that results from an incident and that occurs within 30 days following the incident.

(19) Federally funded project--A public transportation project that is being funded in part under the provisions of the Federal Transit Act, as amended, 49 USC §5301 et seq., the Federal-Aid Highway Act of 1973, as amended, 23 USC §101 et seq., or any other federal program for funding public transportation.

(20) Fiscal year--The state accounting period of 12 months that begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

(21) FTA--The Federal Transit Administration, an agency of the United States Department of Transportation.

(22) Good standing--A status indicating that the department's director of public transportation has not sent a letter to an entity signifying the entity is in noncompliance with any aspect of a program.

(23) Hazardous condition--A condition that may endanger human life or property, including an unacceptable hazardous condition.

(24) Incident--An intentional or unintentional act that occurs on or in association with transit-controlled property and that threatens or affects the safety or security of an individual or property.

(25) Individual--A natural person, including a passenger, trespasser, employee, or bystander.

(26) Injury--Any physical damage or harm that occurs to an individual as a result of an incident and that requires immediate medical attention away from the scene.

(27) Investigation--A process to determine the probable cause of a rail accident or an unacceptable hazardous condition, including a review by the department, or its agent, of a rail transit agency's determination of the probable cause of a rail accident or an unacceptable hazardous condition.

(28) Like-kind exchange--The trade-in or sale of a transit vehicle before the end of its useful life to acquire a replacement vehicle of like kind.

(29) Local funds--Directly generated funds, as defined in the latest edition of the Federal Transit Administration National Transit Database Reporting Manual. Examples include, but are not limited to, passenger fares, special transit fares, purchased transportation fares, park and ride revenue, other transportation revenue, charter service revenue, freight tariffs, station and vehicle concessions, advertising revenue, funds dedicated to transit at their source, taxes, cash contributions, contract revenue, general revenue, and in-kind contributions.

(30) Local governmental entity--Any local unit of government including a city, town, village, municipality, county, city transit department, metropolitan transit authority, or regional transit authority.

(31) Local public body--Includes cities, counties, and other political subdivisions of states; public agencies; and instrumentalities of one or more states, municipalities, or political subdivisions of states.

(32) Local share requirement--The amount of funds that is required and is eligible to match federally funded projects for the improvement of public transportation.

(33) MPO--Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(34) Net operating expenses--Those expenses that remain after operating revenues are subtracted from eligible operating expenses.

(35) Nonprofit organization--A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 USC §501(c), one that is exempt from taxation under 26 USC §504(a) or §101, or one that has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the nonprofit organization.

(36) Nonurbanized area--An area outside an urbanized area.

(37) Obligated funds--Monies made available under a valid, unexpired contract between the department and a public transportation subrecipient.

(38) Operating expenses--Costs directly related to system operations of a transit agency regardless of the category of funding. At a minimum, this definition includes:

(A) fuel, oil, replacement tires, replacement parts that do not meet the criteria for capital items, drivers' and mechanics' salaries and fringe benefits, dispatchers' salaries, and licenses;

(B) maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism; and

(C) expenses funded with capital or administrative funds, including preventative maintenance, provision of paratransit service under the Americans with Disability Act (ADA), capital cost of contracting, and insurance.

(39) Private--Pertaining to nonpublic entities. This definition does not include municipalities or other political subdivisions of the state; public agencies or instrumentalities of one or more states; Indian tribes (except private nonprofit corporations formed by Indian tribes); public corporations, boards, or commissions established under the law of any state; or entities subject to control by public authority, whether state or municipal.

(40) Project--The public transportation activities to be carried out by a subrecipient, as described in its application for funding.

(41) Property damage--The dollar amount required to replace any vehicle, whether transit or non-transit, and any property or facility damaged during an incident, or to repair it to a state equivalent to the state that existed before the incident.

(42) Public transportation--Transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance. This definition includes fixed guideway transportation and underground transportation, but excludes services provided by aircraft, taxicabs, ambulances, and emergency vehicles.

(43) Rail accident--An event that occurs when a rail fixed guideway system is in operation and as a result of which an individual dies or suffers bodily injury for which immediate medical treatment is given at a location other than the scene of the event or in which a collision, derailment, or fire results in property damage in excess of $100,000. This definition does not include injuries, deaths, and property damage that occur when a rail fixed guideway system is not in revenue service operation.

(44) Rail fixed guideway system--Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

(A) is included in FTA's computation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas, found in 49 USC §5336; and

(B) is not regulated by the Federal Railroad Administration.

(45) Rail transit agency--An entity operating a rail fixed guideway system.

(46) Real property--Land, including improvements, structures, and appurtenances, but excluding movable machinery and equipment.

(47) Revenue vehicle--The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(48) Revenue service--Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(49) Revenues--Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes subscription service fees, whether or not collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be revenues.

(50) Ridership--Unlinked passenger trips.

(51) Ridesharing activities--Transportation provided by rubber-tired vehicles that carry no fewer than 10 nor more than 15 passengers and that are operated on a nonprofit basis.

(52) Rural public transportation (RPT)--A generic term used to identify subrecipients who provide service in nonurbanized areas.

(53) Rural transit district--A political subdivision of the state that provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458.

(54) Safety--Freedom from danger, including freedom from unintentional as well as intentional acts.

(55) Security--Freedom from intentional danger, including criminal acts such as muggings, rapes, robberies, and terrorist acts, such as bombings, releases of poisonous gases, and kidnappings.

(56) Stakeholders--All individuals or groups that are potentially affected by transportation decisions. Examples include public agencies, representatives of transportation agency employees or other

affected employees, private providers of transportation, non-governmental agencies, local businesses, persons in diverse and traditionally underserved communities, and other interested parties.

(57) Strategic priorities--Projects that the commission has determined will:

(A) stabilize funding levels;

(B) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or

(C) advance the level of coordination among transportation service providers, and among transportation service providers and health and human services agencies.

(58) Subrecipient--An entity that receives FTA assistance from the department, rather than directly from FTA. This definition is synonymous with contractor.

(59) Unacceptable hazardous condition--A particular kind of hazardous condition determined by using the hazard resolution matrix contained in the American Public Transportation Association's guidelines.

(60) Uniform grant and contract management standards--The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(61) Unlinked passenger trips--The number of passengers who board public transportation vehicles. A passenger is counted each time the passenger boards a vehicle even though the passenger might be on the same journey from origin to destination.

(62) Urban transit district--In accordance with Transportation Code, Chapter 458, a local governmental body or a political subdivision of the state that operates a public transportation system in an urbanized area with a population between 50,000 and 200,000, according to the most recent federal census. This definition includes small urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994.

(63) Urbanized area--A core area and the surrounding densely populated area with a population of 50,000 or more, with boundaries fixed by the United States Census Bureau.

(64) Vehicle miles--The miles a vehicle travels while in revenue service, plus deadhead miles. This definition excludes miles a vehicle travels for charter service, school bus service, operator training, or maintenance testing.

(65) Vehicle revenue hours or miles--The hours or miles a vehicle travels while in revenue service. This definition includes layover and recovery, but excludes travel to and from storage facilities, the training of operators prior to revenue service, road tests, deadhead travel, and school bus and charter service.

(66) Vehicle utilization--Average daily passenger trips per revenue vehicle, divided by average revenue vehicle capacity. This definition provides a measure of an individual system's ability to use existing seating capacity.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404237

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Effective date: September 1, 2004
Proposal publication date: May 14, 2004
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SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11, §31.13

STATUTORY AUTHORITY: The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers; and Transportation Code, §461.003 which requires the commission to adopt rules necessary to implement Transportation Code, Chapter 361 and provides the commission with the authority to adopt rules to require certain state agencies to contract with the department for the department to assume the responsibilities of that agency relating to the provision of public transportation services, and to adopt rules to require a public transportation provider to provide detailed information on its public transportation services.

CROSS REFERENCE TO STATUTE: Transportation Code, §456.022.

§31.11. Formula Program.

(a) Purpose. Transportation Code, Chapter 456 requires the commission to allocate, at the beginning of each fiscal biennium, certain appropriated amounts from the public transportation fund. This section sets out the policies, procedures, and requirements for that allocation.

(b) Formula allocation. At the beginning of each state fiscal biennium, an amount equal to the amount appropriated from all sources to the commission by the legislature for that biennium for public transportation, other than federal funds and amounts specifically appropriated for coordination, technical support, or other costs of administration, will be allocated to designated recipients. The commission will allocate those funds between small urban and rural providers, with 75% of the funding based on population and 25% based on land area using the latest census data available from the United States Census Bureau, when applicable.

(1) Urban funds available under this section will be allocated to municipalities that are designated recipients or transit providers in urbanized areas that are not served by an authority and to designated recipients that received state transit funding during the fiscal biennium ending August 31, 1997, that are not served by an authority but are located in urbanized areas that include one or more authorities. Any local governmental entity having the power to operate or maintain a public transportation system, except an authority, may receive formula program funds. The commission will distribute the money in the following manner.

(A) Eighty percent will be awarded giving consideration to population by using the latest census data available from, and as defined by, the U.S. Census Bureau for each urbanized area relative to the sum of all urbanized areas.

(B) If the transit district is in good standing with the department and has no deficiencies and no findings of noncompliance,

20% will be awarded under clause (i) or (ii) of this subparagraph as follows.

(i) The commission, using all or a portion of the funds, may award funding to address strategic priorities for the urbanized public transportation program. These amounts are not subject to the transition funding allocation process described in subsection (c) of this section in succeeding fiscal years, and will be awarded on a competitive basis unless they are needed to compensate for funding anomalies arising under this subsection.

(ii) The commission will award the funding by giving equal consideration to local funds per capita, operating expenses per mile (inverted) as compared to the systems performance from the previous year, ridership per capita as compared to the systems performance from the previous year, and vehicle revenue miles as compared to the systems performance from the previous year. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(2) Rural funds available under this section will be allocated in nonurbanized areas. Any eligible recipient may receive formula program funds. Of the money allocated under this paragraph, the commission will distribute the money in the following manner.

(A) Eighty percent will be awarded giving consideration to population weighted at 75% and on land area weighted at 25% by using the latest census data available from, and as defined by, the U.S. Census Bureau for each nonurbanized area relative to the sum of all nonurbanized areas.

(B) If the transit district is in good standing with the department and has no deficiencies and no findings of noncompliance, 20% will be awarded under clause (i) or (ii) of this subparagraph as follows.

(i) The commission, using all or a portion of the funds, may award funding to address strategic priorities for the nonurbanized public transportation program. These amounts are not subject to the transition funding allocation process described in subsection (c) of this section in succeeding fiscal years, and will be awarded on a competitive basis unless they are needed to compensate for funding anomalies arising under this subsection.

(ii) The commission will award the funding by giving equal consideration to local funds per capita, operating expenses per mile (inverted) as compared to the systems performance from the previous year, ridership per capita as compared to the systems performance from the previous year, and vehicle revenue miles as compared to the systems performance from the previous year. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(3) Funds allocated under this section and any local funds may be used for any transit-related activity except that a designated recipient not included in a transit authority but located in an urbanized area that includes one or more transit authorities may only use funds to provide:

(A) 65% of the local share requirement for federally financed projects for capital improvements;

(B) 50% of the local share requirement for projects for operating expenses and administrative costs;

(C) 50% of the total cost of a public transportation capital improvement, if the designated recipient certifies that federal money is unavailable for the proposed project and the commission finds that the proposed project is vitally important to the development of public transportation in the state; and

(D) 65% of the local share requirement for federally financed planning activities.

(c) Transition. Each agency will have five years to transition to full formula allocation and during the five years after the first application of new census data from the United States Census Bureau, the allocations under subsection (b)(1) and (2) of this section will be adjusted to avoid extreme short-term disruptions in the continuity of funding. During this time no award to a transit district under this section will be less than 90% of the award to that transit district for the previous fiscal year, and no award to a transit district will be more than 120% of the award to that transit district for the previous fiscal year. All allocations under subsection (b)(1) and (2) of this section are subject to revision to comply with this standard. If available funding exceeds the allocations, additional funding will be allocated to the transit districts that have the lowest relative funding levels compared to the base.

(d) Change in service area. If part of a transit district's service area is changed due to declaration by the United States Census Bureau, or if the service area is otherwise altered, the department and the subrecipient shall negotiate an appropriate adjustment in the funding awarded to that subrecipient for that funding year or any subsequent year, as appropriate. This negotiated adjustment is not subject to the minimum and maximum standards set forth in subsection (c) of this section.

(e) Unobligated funds. Any money under this section that the designated recipient has not applied for before the November commission meeting in the second year of a state fiscal biennium will be administered by the commission under the discretionary program described in §31.13 of this subchapter.

(f) Returned funds. Any money under this section that the designated recipient agrees to return to the department will be administered by the commission under the discretionary program described in §31.13 of this subchapter.

(g) Application. To receive funds allocated under this section, a designated recipient must first submit a completed application, in the form prescribed by the department, to the appropriate district. The application must include certification that the proposed public transportation project is consistent with continuing, cooperating, and comprehensive regional transportation planning implemented in accordance with 49 USC §5301 and §1602a. Federal approval of a proposed public transportation project will be accepted as a determination that all federal planning requirements have been met.

(h) Project evaluation. In evaluating a project under this section, the department will consider the need for fast, safe, efficient, and economical public transportation and the approval of the FTA, or its successor.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404238
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: September 1, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 463-8630

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SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §31.36

STATUTORY AUTHORITY: The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §456.022, which requires the commission to adopt rules establishing a formula allocating funds among eligible public transportation providers; and Transportation Code, §461.003 which requires the commission to adopt rules necessary to implement Transportation Code, Chapter 361 and provides the commission with the authority to adopt rules to require certain state agencies to contract with the department for the department to assume the responsibilities of that agency relating to the provision of public transportation services, and to adopt rules to require a public transportation provider to provide detailed information on its public transportation services.

CROSS REFERENCE TO STATUTE: Transportation Code, §456.022.

§31.36. Section 5311 Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 USC §5311, authorizes the Secretary of the United States Department of Transportation to make grants for public transportation projects in nonurbanized areas. The department has been designated by the governor to administer the Section 5311 program.

(b) Goal and objectives. The Department's goal in administering the Section 5311 program is to promote the availability of professional, cost-effective, efficient, and coordinated passenger transportation services to the general public in nonurbanized areas using the most efficient combination of financial and other resources. To achieve this goal, the objectives of the department are to:

(1) promote the development and maintenance of a network of general public transportation services in nonurbanized areas throughout the state, in partnership with local officials;

(2) fully integrate the Section 5311 program with other federal, state, and local resources that are designed to serve nonurbanized populations;

(3) improve the efficiency, effectiveness, and safety of Section 5311 systems through the provision of technical assistance; and

(4) include private sector operators in the overall plan to provide public transportation services.

(c) Department role. The department acts as the designated recipient for all Section 5311 funds appropriated to the state and has an oversight responsibility for all nonurbanized transit services within the state. The department, however, recognizes the subrecipients as partners who shall retain control of daily operations. As the administering agency, the department will:

(1) develop application materials and disseminate information to prospective applicants and other interested parties;

(2) allocate the available program funds in a fair and equitable manner as described in subsection (g) of this section (the department will not provide Section 5311 funds to more than one transit system in a geographical area);

(3) develop evaluation criteria and select projects for funding;

(4) prepare the state's annual program of projects and funding application and submit that material to the FTA for approval;

(5) negotiate and execute contracts with local Section 5311 subrecipients;

(6) prepare requests for federal reimbursement, and process payment requests from Section 5311 subrecipients;

(7) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations; and

(8) provide technical assistance to Section 5311 subrecipients to aid them in improving transit services.

(d) Eligible subrecipients. State agencies, local public bodies, private nonprofit organizations, Native American tribes and organizations, and operators of public transportation services are eligible to receive Section 5311 funds through the department. Private for-profit operators of public transportation services may participate in the program through contracts with eligible subrecipients. An entity must be a rural transit district to receive Section 5311 funds except that private for-profit operators of public transportation services and entities that are not rural transit districts are eligible to receive Section 5311 funds through the department under the intercity bus program, as set forth in subsections (g)(1) and (i) of this section.

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the Section 5311 program.

(1) State administrative expenses. The department may use up to 15% of the annual federal apportionment to defray its expenses incurred for the administration of Section 5311 program. These funds may also be used to provide technical assistance to subrecipients. Technical assistance may include project planning, program development, management development, coordination of public transportation projects, and related research. Projects are solicited from subrecipients and other interested parties. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items include, but are not limited to:

(i) buses;

(ii) vans or other paratransit vehicles;

(iii) radios and communications equipment;

(iv) passenger shelters, bus stop signs, and similar passenger amenities;

(v) wheelchair lifts and restraints;

(vi) vehicle rehabilitation, remanufacture, or overhaul;

(vii) preventive maintenance, including all maintenance costs;

(viii) extended warranties that do not exceed the industry standard;

(ix) the mass transit portion of ferry boats and terminals;

(x) operational support such as computer hardware or software;

(xi) installation costs and vehicle procurement, testing, inspection, and acceptance costs;

(xii) construction or rehabilitation of transit facilities, including design, engineering, and land acquisition;

(xiii) facilities to provide access for bicycles to mass transit facilities and equipment for transporting bicycles on mass transit vehicles;

(xiv) the lease of equipment or facilities, provided that the local subrecipient, with the concurrence of the department, determines that a lease is more cost effective than the purchase of equipment or facilities after considering management efficiency, availability of equipment, staffing capabilities and guidelines on capital leases as contained in 49 CFR Part 639;

(xv) the capital portions of costs for service under contract;

(xvi) joint development projects (FTA Circular 9300.1A, or its latest version, provides guidelines for joint development projects);

(xvii) the introduction of new technology, through innovative and improved products, into mass transportation;

(xviii) transit-related intelligent transportation systems; and

(xix) the provision of ADA paratransit service, which shall not exceed 10% of the state's annual apportionment of Section 5311 funds and shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service.

(B) The capital cost of contracting includes depreciation, interest on facilities and equipment, and those allowable capital costs that would otherwise be incurred directly, including maintenance. No capital assets (vehicle, equipment, or facility) that have any remaining federal interest in them and no items purchased with state or local government funds may be capitalized under the grant agreement.

(C) Based on funding availability, federal funds may be used to reimburse up to 80% of eligible capital expenditures. The federal share may increase to up to 90% for bicycle facilities projects or for incremental costs related to compliance with the Clean Air Act or with the Americans with Disabilities Act of 1990. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1E, or its latest version. The local subrecipient must provide a 20% or 10% cash match at the time the equipment is delivered or the services are received.

(3) Project administrative expenses. Costs not directly tied, but essential, to the operations of passenger transportation systems may be reimbursed at up to 80% with federal funds. The local subrecipient must provide a 20% match, either in cash or with in-kind donations.

(4) Operating expenses. Those costs directly tied to systems operations, such as fuel, oil, drivers', mechanics', and dispatchers' salaries, and replacement parts may be reimbursed at 50% of net operating costs. The local subrecipient must provide a 50% match, either in cash or with in-kind donations.

(f) Local share requirements. FTA program funds cannot be used as the local share required for Section 5311 grants. Eligible match sources include local or state programs, or unrestricted federal funds. At least half of the local share for both net operating and non-operating expenses must be cash or cash equivalent from sources other than unrestricted federal funds. In-kind contributions, volunteer services, and donations are eligible as local share if the value is documented.

(g) Allocation of funds. As part of its administration of the Section 5311 program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (FTA Circular 9040.1E, or its latest version). The department will allocate Section 5311 funds to local subrecipients in the following manner.

(1) Reserve. Unless the governor certifies to the Secretary of the United States Department of Transportation that the intercity bus service needs of the state are being adequately met, the department will reserve not less than 15% of the Section 5311 federal apportionment for the development and support of intercity bus transportation to be allocated under subsection (i) of this section. If it is determined that all or a portion of the set-aside monies is not required for intercity bus service, those funds will be applied to the formula apportionment process described in paragraph (3) of this subsection. Procedures for determining if a certification of adequacy is warranted are as follows.

(A) The department will review all data on intercity bus service availability, including outstanding requests from intercity operators, and levels of service.

(B) The department will consult with other state agencies that have jurisdiction with respect to intercity bus regulation and seek their recommendations as to the adequacy of current service.

(C) Based on the findings of subparagraphs (A) and (B) of this paragraph, the commission may certify or recommend that the governor certify to the adequacy of intercity bus service.

(2) Remaining balance allocation. Except as provided in paragraph (1) of this subsection, the balance of the annual Section 5311 federal apportionment, plus the remaining balance of previous Section 5311 federal apportionments, and any state funds appropriated specifically for the purpose of funding nonurbanized public transportation services will be allocated in the following manner.

(A) Eighty percent will be awarded giving consideration to population weighted at 75% and on land area weighted at 25% by using the latest census data available from, and as defined by, the U.S. Census Bureau for each nonurbanized area relative to the sum of all nonurbanized areas.

(B) If the transit district is in good standing with the department and has no deficiencies and no findings of noncompliance, 20% will be awarded under clause (i) or (ii) of this subparagraph as follows.

(i) The commission, using all or a portion of the funds, may award funding to address strategic priorities for the nonurbanized public transportation program. These amounts are not subject to the transition funding allocation process described in paragraph (3) of this subsection in succeeding fiscal years, and will be awarded on a competitive basis unless they are needed to compensate for funding anomalies arising under this subsection.

(ii) The commission will award the funding by giving equal consideration to local funds per capita, operating expenses per mile (inverted) as compared to the systems performance from the previous year, ridership per capita as compared to the systems performance from the previous year, and vehicle revenue miles as compared to the systems performance from the previous year. These criteria may be calculated using the subrecipient's annual audit for the previously completed fiscal year, data from other sources, or from the department's records.

(3) Transition. Each agency will have five years to transition to full formula allocation and during the five years after the first application of new census data from the United States Census Bureau, the allocations under paragraphs (1) and (2) of this subsection will be adjusted to avoid extreme short-term disruptions in the continuity of

funding. During this time no award to a transit district under this section will be less than 90% of the award to that transit district for the previous fiscal year, and no award to a transit district will be more than 120% of the award to that transit district for the previous fiscal year. All allocations under paragraphs (1) and (2) of this subsection are subject to revision to comply with this standard. If available funding exceeds the allocations, additional funding will be allocated to the transit districts that have the lowest relative funding levels compared to the base.

(4) Adjustments to allocation.

(A) If part of a transit district's service area is changed due to declaration by the United States Census Bureau or the service area is otherwise altered, the department and that subrecipient shall negotiate an appropriate adjustment in the funding year or any subsequent year, as appropriate. This negotiated adjustment is not subject to the minimum and maximum standards set forth in paragraph (3) of this subsection.

(B) If a previously designated urbanized area is declared nonurbanized by the United States Census Bureau, a public transportation subrecipient serving that area must apply for funds in accordance with paragraph (5) of this subsection.

(5) Application and contract. Prior to receiving funds a subrecipient must complete and comply with all application requirements, rules, and regulations applicable to the Section 5311 program. A completed application must be submitted, in a form prescribed by the department, to the appropriate district office, and document the need and demand for general public passenger transportation services. A contract shall be for no less than 12 months unless authorized by the department.

(h) Program of projects. All projects for a fiscal year will be identified in accordance with the allocation rules included in subsection (g) of this section. After commission approval of the allocation, these projects will be submitted to the FTA as the annual program of projects for the fiscal year.

(i) Intercity bus. If the governor does not certify to the adequacy of intercity bus transportation within the state, funds will be made available in accordance with subsection (g)(1) of this section. An annual request for proposals will be issued for projects complying with FTA definitions of intercity bus transportation.

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

Filed with the Office of the Secretary of State on June 25, 2004.

TRD-200404239
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: September 1, 2004
Proposal publication date: May 14, 2004
For further information, please call: (512) 463-8630

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

State Seed and Plant Board

Title 4, Part 5

The State Seed and Plant Board of the Texas Department of Agriculture (the department) proposes to review Title 4, Texas Administrative Code, Part 5, Chapter 81, concerning Certification Procedures and Chapter 82, concerning Administrative Procedures, pursuant to the Texas Government Code, §2001.039. Section 2001.039 requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

The assessment of Title 4, Part 5, Chapters 81 and 82 by the State Seed and Plant Board and the department at this time indicates that the reason for adopting or readopting without changes all sections in Chapters 81 and 82 continues to exist.

The State Seed and Plant Board and the department are accepting comment on the review of Chapters 81 and 82. Comments on the review may be submitted within 30 days following the publication of this notice in the *Texas Register* to Kelly Book, Deputy Assistant Commissioner for Regulatory Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711.

TRD-200404290
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
State Seed and Plant Board
Filed: June 29, 2004

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Texas Workers' Compensation Commission

Title 28, Part 2

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 116 concerning General Provisions-Subsequent Injury Fund. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

§116.11. Request for Reimbursement or Refund from the Subsequent Injury Fund.

§116.12. Subsequent Injury Fund Payment/Reimbursement Schedule.

The agency's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt these rules. Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on July 9, 2004 and submitted to Linda Velásquez, Legal Services, Office of General Counsel, MS 4-D, Texas Workers' Compensation Commission, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1609.

TRD-200404269
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: June 28, 2004

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Adopted Rule Reviews

Texas Building and Procurement Commission

Title 1, Part 5

The Texas Building and Procurement Commission adopts the review of Chapter 117 concerning the Support Services Division. The proposed notice was published in the May 7, 2004 edition of the *Texas Register* (29 TexReg 4555). During the review the Commission determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Government Code, §2001.039.

As part of the review process but in a separate proposal, the Texas Building and Procurement Commission has proposed the following rule changes: amendments to Subchapter D, §117.61 and the repeals of Subchapter B, §117.41 and Subchapter C, §117.51 which have been filed simultaneously with this rule review and readoption. This concludes the Commission's review of Chapter 117 as required by the Texas Government Code, §2001.039.

TRD-200404204
Cynthia de Roch
General Counsel
Texas Building and Procurement Commission
Filed: June 23, 2004

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Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 331, Underground Injection Control, without changes, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to

exist. The notice of intention to review was published in the March 19, 2004 issue of the *Texas Register* (29 TexReg 2929).

CHAPTER SUMMARY

Chapter 331 provides for the regulation of injection wells consistent with federal requirements and state statutes. Subchapter A requires permits or provides for permits by rule for all injection wells in Texas, and provides for registration of certain pre-injection units. Subchapter C provides standards for mechanical integrity, corrective action, closure, and pond liners, as well as executive director approval of construction or completion of injection wells, and commission waivers for Class III and Class V injection wells. Subchapter D provides construction standards and requirements for operating injection wells, monitoring and testing, recordkeeping, reporting, and post-closure care for Class I wells other than salt cavern solid waste disposal wells. Subchapter E provides construction, operating, monitoring, reporting, and closure requirements for Class III injection wells. Subchapter F establishes additional standards for Class III well injection activities regarding the development of production or other areas authorized by an area permit or production area authorization, including standards for the confinement of mining solutions, production area monitor wells, establishment of baseline and restoration values, monitoring standards, remedial action for excursion, and restoration. Subchapter G sets forth the criteria that the commission must consider before approving authorizations for injection wells. Subchapter H provides standards for Class V injection wells, including standards for construction and closure. Subchapter I provides the requirements for financial assurance. Subchapter J provides additional standards and requirements for Class I salt cavern solid waste disposal wells, including standards for performance and construction of both wells and salt caverns and requirements for operation, monitoring and testing, recordkeeping, reporting, closure, post-closure care, and other issues. Subchapter K sets forth additional standards and requirements for Class V aquifer storage wells, including standards for construction and closure and requirements for operation, monitoring, and reporting, and additional requirements necessary for final project authorization.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 331 continue to exist. The rules are needed as the basis for federal authorization of the state Underground Injection Control program consistent with the Safe Drinking Water Act and to maintain the quality of fresh water in the state. Within the commission's jurisdiction, the rules implement 40 Code of Federal Regulations Parts 144 and 146 and applicable rules in Part 264, including the criteria in §144.6 for classifying injection wells into Classes I, II, III, IV, and V. The rules implement Texas Water Code, Chapter 27; applicable parts of Texas Health and Safety Code, Chapter 361; and the Memorandum of Understanding between the commission and the Texas Department of Health adopted by reference in 30 TAC §7.118.

PUBLIC COMMENT

The public comment period closed on April 19, 2004. No comments were received.

TRD-200404265
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 28, 2004

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, without changes, in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the March 19, 2004 issue of the *Texas Register* (29 TexReg 2927).

CHAPTER SUMMARY

Chapter 335 is a recodification of rules which were initiated in 1970 with the adoption of regulations concerning industrial solid waste by the Texas Water Quality Board under the Texas Solid Waste Disposal Act, 61st Legislature, 1969. These initial rules established: design criteria and permit requirements for commercial disposal operations; the basic policy that waste generators are responsible for assuring that their waste is properly and safely disposed of; and requirements for a certificate of registration whereby each noncommercial industrial solid waste facility's compliance status would be established and regularly reviewed.

Subsequent regulatory development came in 1975, when the Texas Water Quality Board revised its industrial solid waste regulations to establish uniform performance standards for all disposal operations. The 1975 amendments prohibited: discharge of industrial solid waste to groundwater or surface water; the creation of any nuisance or public health problems; and disposal at unauthorized locations. Also, these amendments called for the development of technical guidelines outlining recommended technical standards for various methods of industrial solid waste storage and disposal, and established shipping control requirements for a certain category of industrial solid waste.

The 65th Legislature, 1977, amended the Texas Solid Waste Disposal Act to require permits for all waste storage, processing, and disposal facilities that would manage waste identified as hazardous waste by the administrator of the United States Environmental Protection Agency (EPA). Then, after the identification of hazardous waste by EPA in 1980, the Texas Department of Water Resources adopted rules implementing this statutory permit requirement. These rules also set forth hazardous solid waste management requirements patterned after the hazardous waste regulations promulgated by the EPA. Successor agencies to the Texas Department of Water Resources, the Texas Water Commission, the Texas Natural Resource Conservation Commission, and the Texas Commission on Environmental Quality, have amended Chapter 335 over the subsequent years to update its hazardous waste rules and to implement various state statutory mandates and commission initiatives.

The standards within Chapter 335 include requirements and provisions relating to permitting, technical guidelines, general prohibitions, deed recordation, notification, financial assurance, closure, remediation, recordkeeping, reporting, shipping, variances, and sharing of information. In addition, Chapter 335 contains standards relating to owners and operators, generators, transporters, interim status, location, recycling, universal waste, military munitions, open dumps, fees, hazardous substance facilities assessment and remediation, pre-application review, household waste, hazardous waste land disposal restrictions, warning signs, pollution prevention, waste classification, and risk reduction.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 335 continue to exist. The rules are needed to accomplish the purposes of Texas Health and Safety Code (THSC),

Chapter 361. Section 361.017(b) states, "[t]he commission shall accomplish the purposes of this chapter by controlling all aspects of the management of industrial solid waste and hazardous municipal waste by all practical and economically feasible methods consistent with its powers and duties under this chapter and other law." Section 361.024(a) states, "[t]he commission may adopt rules consistent with this chapter and establish minimum standards of operation for the management and control of solid waste under this chapter." The rules are also needed to maintain authorization granted by the EPA under the Resource Conservation and Recovery Act to implement hazardous waste program elements in lieu of the EPA, in accordance with grant commitments.

PUBLIC COMMENT

The public comment period closed on April 12, 2004. No comments were received.

TRD-200404264
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 28, 2004

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Texas Department of Transportation

Title 43, Part 1

Notice of Readopted Rule: In accordance with Government Code, §2001.039, the Texas Department of Transportation (department) readopts Title 43, TAC, Part 1, Chapter 5, Finance; Chapter 15, Transportation Planning and Programming; and Chapter 27, Toll Projects. This concludes the review of Chapters 5, 15, and 27.

The proposed review was published in the April 9, 2004, issue of the *Texas Register* (29 TexReg 3664). No comments were received regarding the readoption of these rules. The Texas Transportation Commission (commission) has reviewed these rules and determined that the reasons for initially adopting them continue to exist.

TRD-200404263
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: June 28, 2004

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 7 TAC §91.510(a)(1)

Assets	Minimum Coverage
$1,000 to $1,000,000	Coverage Equal to Total Assets
$1,000,001 to $15,000,000	$1,000,000
$15,000,001 to $50,000,000	$2,000,000
$50,000,001 to $150,000,000	$3,000,000
Over $150,000,000	$5,000,000

Figure: 7 TAC §91.510(a)(3)

Assets	Maximum Deductible
$1,000 to $100,000	No deductibles allowed
$100,001 to $150,000,000	$2,000 plus 1/1000 of total assets
Over $150,000,000	As determined prudent by the board

Figure: 16 TAC §3.80(a)

Table 1. Railroad Commission Oil and Gas Division Forms

Form Number	Form Title	Creation or Last Revision Date (* No date available)	Statewide Rule Number (16 TAC § __) or Other Authority
AOF-1	Field Application for AOF Status	10/95	3.31
AOF-2	Individual Operator Application for AOF Status	10/95	3.31
AOF-3	Operator's Review of AOF Status	12/95	3.31
C-1	Carbon Black Plant Report	7/66	3.54, 3.63
C-2	Application for Permit to Operate a Carbon Black Plant	7/66	3.54, 3.63
C-3	Permit to Operate Carbon Black Plant	12/67	3.54, 3.63
CF-1	Commercial Facility Bond	8/98	3.78
CF-2	Commercial Facility Irrevocable Letter of Credit	8/98	3.78
G-1	Gas Well Back Pressure Test, Completion or Recompletion Report, and Log	4/83	3.4, 3.9, 3.16, 3.28, 3.31
G-3	Gas Storage Data Sheet	10/94	3.96, 3.97
G-5	Gas Well Classification Report	1/86	3.53
G-9	Gas Cycling Report	4/71	
G-10	Gas Well Status Report	9/00	3.28, 3.53, 3.55, 3.71
GC-1	Gas Well Capability	5/92	3.31
GT-1	Geothermal Production Test, Completion or Recompletion Report, and Log	01/76	3.4, 3.16, 3.33
GT-2	Producer's Monthly Report of Geothermal Wells	01/76	Tex. Nat. Res. Code, Ch. 141
GT-3	Monthly Geothermal Gatherer's Report	01/76	Tex. Nat. Res. Code, Ch. 141
GT-4	Producer's Certificate of Compliance and Authorization to Transport Geothermal Energy and/or Natural Gas and/or Other Minerals	01/76	Tex. Nat. Res. Code, Ch. 141
GT-5	Application to Inject Fluid into a Reservoir Productive of Geothermal Resources	9/75	Tex. Nat. Res. Code, Ch. 141
H-1	Application to Inject Fluid into a Reservoir Productive of Oil or Gas	05/01/04	3.46
H-1A	Injection Well Data for H-1 Application	05/01/04	3.46
H-1S	Injection Well Area Permit	12/98	3.46
H-2	Permit Application to Create, Operate and Maintain a Brine Mining Facility	5/99	3.81
H-4	Application to Create, Operate and Maintain an Underground Hydrocarbon Storage Facility	4/82	3.95, 3.97
H-5	Disposal/Injection Well Pressure Test Report	6/85	3.9, 3.46, 3.96
H-7	Fresh Water Data Form	3/68	3.46
H-8	Crude Oil, Gas Well Liquids, or Associated Products Loss Report	6/70	3.20
N/A	Interim H-8 Crude Oil Spill Sheet	12/93	3.20
H-9	Certificate of Compliance, Statewide Rule 36 (Hydrogen Sulfide)	12/77	3.36
H-10	Annual Disposal/Injection Well Monitoring Report (RRC computer-generated)	7/95	3.9, 3.46
H-10H	Annual Well Monitoring Report Underground Storage in Salt Formations	7/95	3.95, 3.96, 3.97

Form Number	Form Title	Creation or Last Revision Date (* No date available)	Statewide Rule Number (16 TAC § __) or Other Authority
H-11	Application for Permit to Maintain and Use a Pit	5/84	3.8
H-12	New or Expanded Enhanced Oil Recovery Project and Area Designation Approval Application	10/03	3.50
H-13	EOR Positive Production Response Certification Application	4/90	3.50
H-14	Enhanced Oil Recovery Reduced Tax Annual Report	2/93	3.50
H-15	Test on an Inactive Well More than 25 Years Old	8/93	3.14
H-20	Hazardous Oil and Gas Waste Generator (and Transporter) Notification	6/96	3.98
H-21	Annual Hazardous Oil and Gas Waste Report	10/01	3.98
L-1	Electric Log Status Report	1/02	3.16
MD-1	Optional Operator Market Demand Forecast for Gas Well Gas in Prorated Fields	5/92	3.31
PR	Monthly Production Report	02/11/05	3.27, 3.54, 3.58
P-1B	Producer's Monthly Supplemental Report	9/90	3.50, 3.80
P-3	Authority to Transport Recovered Load or Frac Oil	3/77	3.58
P-4	Producer's Certificate of Compliance and Transportation Authority	5/02	3.1, 3.14, 3.30, 3.58, 3.73, 3.78
P-5	Organization Report	1/87	3.1
P-5 IWB	Individual Well Bond	11/00	3.78
P-5 IWLC	Individual Well Irrevocable Documentary Letter of Credit	1/02	3.78
P-5LC	Irrevocable Documentary Blanket Letter of Credit	2/01	3.78
P-5 PB(1)	Individual Performance Bond	2/01	3.78
P-5PB(2)	Blanket Performance Bond	2/01	3.78
P-5S	P-5 Supplemental Officer Listing	9/91	3.1
N/A	Franchise Tax Certification (The Commission will accept a copy of the Certificate of Account Status from the Texas Comptroller of Public Accounts in lieu of the Commission's form.)	11/01	3.1
P-6	Request for Permission to Consolidate/Subdivide Leases	5/02	3.26, 3.27, 3.38, 3.39, 3.58
P-7	New Field Designation and/or Discovery Allowable Application	2/89	3.41, 3.42
P-8	Request for Clearance of Storage Tanks Prior to Potential Test	12/82	3.58
P-12	Certificate of Pooling Authority	5/01	3.31, 3.38, 3.40
P-13	Application of Landowner to Condition an Abandoned Well for Fresh Water Production	9/79	3.14
P-15	Statement of Productivity of Acreage Assigned to Proration Units	5/71	3.31
P-17	Application for Exception to Statewide Rules 26 and/or 27 (Commingling)	1/78	3.26, 3.27
P-17A	Interim Commingling / Measurement Application Supplement	6/97	3.26, 3.27
P-18	Skim Oil/Condensate Report	1/86	3.56
PS-79	Application for a Permit to Construct a Sour Gas Pipeline Facility	3/98	3.106
R-1	Monthly Report and Operations Statement for Refineries	1974	3.61
R-2	Monthly Report for Reclaiming and Treating Plants	12/77	3.8, 3.57
R-3	Monthly Report for Gas Processing Plants	10/00	3.54, 3.56, 3.60, 3.62

Form Number	Form Title	Creation or Last Revision Date (* No date available)	Statewide Rule Number (16 TAC § __) or Other Authority
R-4	Gas Processing Plant Report of Gas Injected	9/75	3.54
R-5	Certificate of Compliance (Gasoline Plants and Refineries)	3/72	3.61
R-6	Application for Certificate of Compliance (Cycling Plant)	9/75	3.62
R-7	Pressure Maintenance & Repressuring Plant Report	*	3.54
R-9	Application for Permit to Operate Reclamation Plant	2/90	3.57
S-10	Application for Transfer of Allowable, Casing Leak Well East Texas Field)	2/89	Field Rules
ST-1	Application for Texas Severance Tax Incentive Certification	10/03	3.83, 3.101, 3.103
T-1	Monthly Transportation & Storage Report	3/72	3.59
T-4, T-4A, T-4C	Forms relating to pipeline permits; under jurisdiction of the Safety Division	T-4: 9/99 T-4A: 4/99 T-4C: 4/97	3.70
T-6	Pipeline Company Monthly Report of Gas Exported from Texas	1948	Exec. Order
T-7	Dist. 10 Panhandle Fields Monthly Gas Gatherer Report	6/91	Dkt. 10-87017
VCP-1	Voluntary Cleanup Program Application	11/03	4.401 - 4.405
VCP-2	Voluntary Cleanup Program Agreement	11/03	4.401 - 4.405
W-1	Application to Drill, Deepen, Plug Back, or Reenter	07/01/04	3.5
W-1A	Substandard Acreage Certification	5/01	3.38
W-1D	Supplemental Directional Well Information	07/01/04	3.5
W-1H	Supplemental Horizontal Well Information	07/01/04	3.5
W-1X	Application for Future Re-Entry of Inactive Wellbore and 14(b)(2) Extension Permit	10/03	3.14, 3.78
W-2	Oil Well Potential Test, Completion or Recompletion Report, and Log	4/83	3.4, 3.9, 3.16, 3.46, 3.51
W-3	Plugging Record	12/92	3.14
W-3A	Notice of Intention to Plug and Abandon	1/83	3.14
W-4	Application for Multiple Completion	8/69	3.6
W-4A	Sketch of Multiple Completion Installation	8/69	3.6
W-5	Packer Setting Report	8/69	3.6
W-6	Communication or Packer Leakage Test	1/70	3.6
W-7	Bottom-hole Pressure Report	*	3.41
W-9	Net Gas-Oil Ratio Report	7/69	RRC Order, §49
W-10	Oil Well Status Report	7/95	3.26, 3.27, 3.52, 3.53
W-12	Inclination Report	1/71	3.11
W-14	Application to Dispose of Oil & Gas Waste by Injection into a Porous Formation Not Productive of Oil or Gas	05/01/04	3.9
W-15	Cementing Report	4/83	3.8, 3.13, 3.14
WH-1	Application for Oil and Gas Waste Hauler's Permit (formerly Application for Salt Water Hauler's Permit)	4/94	3.8
WH-2	Oil and Gas Waste Hauler's List of Vehicles (formerly Salt Water Hauler's Permit Bond)	4/94	3.8
WH-3	Oil and Gas Waste Hauler's Authority to Use Approved Disposal/Injection System	4/94	3.8

Form Number	Form Title	Creation or Last Revision Date (* No date available)	Statewide Rule Number (16 TAC § __) or Other Authority
W-21	Application for Exception to Statewide Rule 21 to Produce by Swabbing, Bailing, or Jetting	2/03	3.21
Data Sheet	SWR 10 Exception Data Sheet	*	3.10
Data Sheet	SWR 32 Exception Data Sheet	2/99	3.32
EPA 8700-12	RCRA Subtitle C Site Identification Form (not an RRC form but required)	01/04	3.98
N/A	Claim for Proceeds of Salvage	9/94	Tex. Nat. Res. Code, §89.086
N/A	Request for Notice by Lienholder or Non-Operator	9/94	Tex. Nat. Res. Code, §§89.043(c), 89.085(f), 91.115(f)
SAD	Security Administrator Designation (SAD) Form	07/04	3.80

Figure: 22 TAC §7.10(a)

Fee Description	Architects	Landscape Architects	Interior Designers
Exam Application	$100	$100	$100
Examination	981	***	**
Registration by Examination – Resident	155	*355	*355
Registration by Examination – Nonresident	180	*380	*380
Reciprocal Application	150	150	150
Reciprocal Registration	*400	*400	*400
Active Renewal - Resident	*310	*310	*310
Active Renewal - Nonresident	*400	*400	*400
Active Renewal 1-90 days late - Resident	*465	*465	*465
Active Renewal 91-365 days late - Resident	*620	*620	*620
Active Renewal 1-90 days late - Nonresident	*600	*600	*600
Active Renewal 91-365 days late - Nonresident	*800	*800	*800
Emeritus Renewal - Resident	50	N/A	N/A
Emeritus Renewal- Nonresident	183	N/A	N/A
Emeritus Renewal 1-90 days late - Resident	75	N/A	N/A
Emeritus Renewal 91-365 days late - Resident	100	N/A	N/A
Emeritus Renewal 1-90 days late - Nonresident	274.50	N/A	N/A
Emeritus Renewal 91-365 days late - Nonresident	366	N/A	N/A
Inactive Renewal - Resident	50	50	50
Inactive Renewal - Nonresident	125	125	125
Inactive Renewal 1-90 days late - Resident	75	75	75
Inactive Renewal 91-365 days late - Resident	100	100	100
Inactive Renewal 1-90 days late - Nonresident	187.50	187.50	187.50
Inactive Renewal 91-365 days late - Nonresident	250	250	250
Reciprocal Reinstatement	620	620	620
Change in Status - Resident	65	65	65
Change in Status - Nonresident	95	95	95
Reinstatement - Resident	685	685	685
Reinstatement - Nonresident	775	775	775
Certificate of Standing - Resident	30	30	30
Certificate of Standing - Nonresident	40	40	40
Replacement or Duplicate Wall Certificate - Resident	80	80	80
Replacement of Duplicate Wall Certificate - Nonresident	90	90	90
Duplicate Pocket Card	15	15	15
Reopen Fee for closed candidate files	25	25	25
Examination - Administrative Fee	-	40	-
Examination - Record Maintenance	25	25	25
Returned Check Fee	25	25	25
Application by Prior Examination	-	-	100
Administrative Fee for 1.5 Hour LARE Review	-	22	-
Administrative Fee for 1 Hour LARE Review	-	17	-

*These fees include a $200 professional fee required by the State of Texas and deposited with the State Comptroller of Public Accounts into the General Revenue Fund.
**NCIDQ fee: October 2004 - $675; April 2005 - $695; October 2005 - $695
***LARE fee: June 2004 - $430 (2 sections only); August 2004 - $500 (remaining 3 sections) (Total exam – June/August 2004 - $930); December 2004 - $470 (2 sections only); March 2005 - $525 (estimate for remaining 3 sections) (Total exam – December 2004/March 2005 - $995); June 2005 - $470 (2 sections only); August 2005 - $525 (estimate for remaining 3 sections) (Total exam – June/August 2005 - $995); December 2005 - $490 (2 sections only)

Figure: 30 TAC §101.394(a)(1)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S	=	the allocation for the site.
i	=	each site located in Harris County and subject to this division.
n	=	the total number of sites subject to this division.
LA	=	the level of activity baseline for a site, calculated as the average annual level of activity for the five consecutive year period of 2000 - 2004 for the site, as certified by the executive director.
AC	=	2,240.8 tons per year of highly-reactive volatile organic compounds.

Figure: 30 TAC §101.394(a)(2)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S	=	the allocation for the site.
i	=	each site located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties and subject to this division.
n	=	the total number of sites subject to this division.
LA	=	the level of activity baseline for a site, calculated as the average annual level of activity for the five consecutive year period of 2000 - 2004 for the site, as certified by the executive director.
AC	=	3,085.4 tons per year of highly-reactive volatile organic compounds.

Figure: 30 TAC §101.394(d)(1)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S	=	the allocation for the petroleum refinery process units.
i	=	each refinery located in Harris County and subject to this division.
n	=	the total number of refineries subject to this division.
LA	=	the level of activity baseline for petroleum refinery process unit, calculated as the average annual level of activity for the five consecutive year period of 2000 - 2004 for the refinery, as certified by the executive director.
AC	=	770.2 tons per year of highly-reactive volatile organic compounds.

Figure: 30 TAC §101.394(d)(2)

$$S = \frac{LA}{\sum_{i=1}^{n} LAi} \times AC$$

Where:

S = the allocation for the petroleum refinery process units.

i = each refinery located in Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties and subject to this division.

n = the total number of refineries subject to this division.

LA = the level of activity baseline for a petroleum refinery process unit, calculated as the average annual level of activity for the five consecutive year period of 2000 - 2004 for the refinery, as certified by the executive director.

AC = 1,489.3 tons per year of highly-reactive volatile organic compounds.

Figure: 30 TAC §321.43(j)(2)

AFO Status and Proposed Action	Buffer Option 1	Buffer Option 2
Expansion of an AFO that started operations after August 19, 1998.	1/2 mile buffer	1/4 mile buffer and an odor control plan in accordance with subparagraph (F) of this paragraph
Construction of an AFO that started or plans to start operations after August 19, 1998.	1/2 mile buffer	1/4 mile buffer and an odor control plan in accordance with subparagraph (F) of this paragraph
Continued operation of an AFO that was in operation on or before August 19, 1998.	1/4 mile buffer	odor control plan in accordance with subparagraph (F) of this paragraph
Expansion or modification of an AFO that was in operation on or before August 19, 1998.	1/4 mile buffer	odor control plan in accordance with subparagraph (F) of this paragraph

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Proposals - Intellectual Property, Copyright/Trademark Counsel

Purpose and Scope.

The Texas Department of Agriculture (the Department), an agency of the state of Texas, is seeking to employ an Intellectual Property and Copyright/Trademark Counsel to assist TDA with legal services in the intellectual property and copyright / trademark areas of law in the implementation of programs under Title III of the Texas Agriculture Code.

The Department was granted by the Texas Legislature the authority in Title III of the Texas Agriculture Code to promote various products and commodities associated with Texas enterprises through marketing programs with include the use of copyrighted material and registered trademarks owned by the state of Texas.

Under Title III, Chapters 12 and 46 of the Agriculture Code the Department is authorized to increase consumer awareness of Texas agricultural products and other products, and to expand the markets for Texas agricultural products and other products through a product promotion program using copyrighted material and trademarks.

The Department may implement design marks which are registered trademarks, as well as other copyrighted material, in the implementation of product promotion programs such as: the GO TEXAN Partner Program, the Texas Oyster Program, the Texas Shrimp Marketing Assistance Program, TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, Texas Wine Marketing Assistance Program, and programs pertaining to the promotion of healthy foods.

Statement of Duties for the Counsel.

The counsel's responsibilities for intellectual and copyright / trademark work will include, but will not be limited to, securing state and federal trademark / certification registrations, advising the Department on protection of property rights while registrations are pending, and advising or assisting with any matter directly related to securing registration and protection of the Department's interests in the property.

With respect to intellectual property and copyright / trademark issues, counsel, in consultation with the staff of the Department, will prepare all legal documents required by the U.S. Patent and Trademark Office, the Texas Secretary of State's Office, Comptroller of Public Accounts, Attorney General, or outside parties; protect Department interests in such property and obtain registrations and certifications from the appropriate authorities; and review actions and render opinions on the legality of pending, existing or proposed copyrighted material / trademark.

The counsel shall also perform other legal services, if requested by the Department, that do not come within the functions of registration or certification of copyrighted material or trademark, but are needed for the implementation and administration of such copyrighted material and trademarks within the context of the Department's promotional programs. Such services shall include, without limitation, the following: consultation concerning planning and development of copyrighted material and design marks for programs of the Department; review of design mark applications and registrations; advice and services concerning legislation affecting such programs; and advising on, and upon request of the Department potential claims against other parties by the Department in relation to copyrighted material and trademarks programs.

Proposal Contents.

Responses to this Request for Proposals ("RFP") should include, at least, the following: a thorough description of your firm's ability to represent the Department in the stated job duties; a description of your firm's past experience as intellectual property and copyright / trademark counsel for other state agencies; a description of your firm's past experience as counsel to U.S. Patent and Trademark Office, the Texas Secretary of State's Office, and other similar agencies in other states; a designation of the individuals who might be assigned to the work of the Department; examples of similar programs in which your firm has assisted as legal counsel; a quotation of your proposed fee structure based upon the certification and registration of trademarks and counsel of clients; a statement addressing the effort made by your firm to encourage and develop the participation of women and minorities in your firm; affirmation that the firm does not, and shall not during the term of the contract, represent any plaintiff in a proceeding seeking monetary damages from the State of Texas or any of its agencies; and a statement of willingness to comply with policies, directives, and guidelines of the Department and the Attorney General of the State of Texas.

Statement of Evaluation Process.

Responses to this RFP will be evaluated and ranked according to the information provided, and summarized for the Commissioner of Agriculture's review. Staff will rank the proposals and make a recommendation to the Commissioner. The Department intends to select the proposal that demonstrates the highest degree of competency and the necessary qualifications and experience in providing the requested legal services at a fair and reasonable price.

Proposal Requirements.

A duly authorized representative of the firm must execute the submitted response. An unsigned response will not be accepted. Issuance of this RFP in no way constitutes a commitment by the Department to award a contract, or to pay for any services incurred either in the preparation of a response to this RFP or for the production of any contract for services. All communications with the Department concerning this RFP and the selection of counsel should be directed to Kathryn A. Reed, General Counsel on behalf of the Department. **Any contact by a submitting firm, its employees or representatives, with any staff member of the Department for the purposes of soliciting or encouraging a favorable review may be considered grounds for disqualification.**

Proposal Submission.

All proposals must be received no later than 5:00 p.m., August 1, 2004. Proposal responses, modifications or addenda to an original response received by the Department after the specified time and date for closing will not be considered. Each firm is responsible for ensuring that its response reaches the Department before the proposed due date. Firms should **submit one unbound original and three (3) copies of their**

proposal to: Ms. Kathryn A. Reed, General Counsel, Texas Department of Agriculture , P.O. Box 12847, Austin, Texas 78711, Street Address: 1700 N. Congress, Stephen F. Austin Bldg., 11th Floor, Austin, Texas 78701.

Please mark the envelopes containing proposals with the following note in the lower left-hand corner: **IN RESPONSE TO PROPOSAL REQUEST: INTELLECTUAL PROPERTY AND COPYRIGHT / TRADEMARK COUNSEL.** All proposals become the property of the Department. Proposals must set forth full, accurate and complete information as required by this request. Oral responses, instructions or offers will not be considered. The Department reserves the right to reject any and all responses.

Term of the Agreement. The contract term shall be for the period beginning September 1, 2004 through August 31, 2005.

Terms of the Agreement. The contract issued under this RFP will be in the form prescribed by the Office of the Attorney General for Outside Counsel Contracts.

Proposal Modification.

Any response may be modified or withdrawn even after received by the Department at any time prior to the proposal due date. No material changes will be allowed after the expiration of the proposal due date; however, non- substantive corrections or deletions may be made with the approval of staff of the Department. The Department reserves the exclusive right to review proposals and make an appropriate selection from such proposals. The Department is not bound to accept any proposal by virtue of this RFP. **Cost Incurred In Responding.**

All costs directly or indirectly related to preparation of a response to the RFP or any oral presentation required to supplement and/or clarify the RFP which may be required by the Department shall be the sole responsibility of, and shall be borne by your firm. **Release Of Information And Open Records.**

All proposals shall be deemed, once submitted, to be the property of the Department. Information submitted in response to this RFP shall not be released by the Department during the proposal evaluation process or prior to the awarding of a contract. After the Department completes the process and a contract is awarded, proposals and information included therein may be subject to public disclosure under the Texas Public Information Act.

TRD-200404316
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: June 30, 2004

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of June 17, 2004, through June 24, 2004. The public comment period for these projects will close at 5:00 p.m. on July 30, 2004.

FEDERAL AGENCY ACTIONS:

Applicant: Davis Petroleum Corporation; Location: The project is located in Corpus Christi Bay, in State Tract (ST) 98, with two pipelines, one crossing ST's 88 and 95, and the other crossing ST's 49, 50, 51, 81, 96 and 97 approximately 5 miles east of Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Crane Islands NW, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 673400; Northing: 3065700. Project Description: The applicant proposes to drill a well in State Tract 98, utilizing a 240- foot-long by 100-foot-wide drilling pad of shell, gravel or crushed rock. The project would include the installation of a typical marine barge and keyway, a production platform with attendant facilities, and flowlines between the well and the production platform. The water depth at the proposed well site is approximately -12 feet mean low tide. In addition, the applicant proposes to install a 6-inch diameter pipeline, approximately 11,621 feet long, from the proposed well to tie into an existing Cross-Tex pipeline in ST 88. A second 6-inch pipeline, approximately 24,085 feet in length, would be installed from the proposed well to an existing Sabco Oil platform in ST 49. The pipelines would be trenched, bored or jetted a minimum depth of 3 feet below the bay bottom. CCC Project No.: 04-0205-F1; Type of Application: U.S.A.C.E. permit application #23444 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A §1251-1387). Note: The consistency review for this project may be conducted by the Railroad Commission under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200404310
Larry L. Laine
Chief Clerk, Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: June 30, 2004

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 07/05/04 -- 07/11/04 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 07/05/04 -- 07/11/04 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005[3] for the period of 07/01/04 -- 07/31/04 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 for the period of 07/01/04 -- 07/31/04 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200404291
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 29, 2004

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Texas Commission on Environmental Quality

Correction of Error

The Texas Commission on Environmental Quality adopted new 30 TAC §106.533, concerning Remediation. The notice of adoption appeared in the June 25, 2004, issue of the *Texas Register* (29 TexReg 6116).

Due to a typographical error in the Commission's submission the word "pollutants" was misspelled in §106.533(i)(5) on page 6119. The last line in the paragraph should read as follows.

"...Air Pollutants: Site Remediation, effective October 8, 2003."

TRD-200404326

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Notice of District Petition

Notices mailed June 15 through June 17, 2004

TCEQ Internal Control No. 02272004-D05; East Central Water Supply Corporation (Petitioner) has filed a petition with the Texas Commission on Environmental Quality (TCEQ) to convert East Central Water Supply Corporation to East Central Special Utility District (District) and to transfer Certificate of Convenience and Necessity (CCN) No. 10655 from East Central Water Supply Corporation to East Central Special Utility District. East Central Special Utility District's business address will be: P.O. Box 570; Adkins, Texas 78101. The petition was filed pursuant to Chapters 13 and 65 of the Texas Water Code; 30 Texas Administrative Code Chapters 291 and 293; and the procedural rules of the TCEQ. The nature and purpose of the petition are for the conversion of East Central Water Supply Corporation and the organization, creation and establishment of East Central Special Utility District under the provisions of Article XVI, Section 59, Texas Constitution, and Chapter 65 of the Texas Water Code, as amended. The District shall have the purposes and powers provided in Chapter 65 of the Texas Water Code, and CCN No. 10655 shall be transferred as provided in Chapter 13, of the Texas Water Code, as amended. The nature of the services presently performed by East Central Water Supply Corporation is to purchase, own, hold, lease and otherwise acquire sources of water supply; to build, operate and maintain facilities for the transportation of water; and to sell water to individual members, towns, cities, private businesses, and other political subdivisions of the State. The nature of the services proposed to be provided by East Central Special Utility District is to purchase, own, hold, lease, and otherwise acquire sources of water supply; to build, operate, and maintain facilities for the storage, treatment, and transportation of water; and to sell water to individuals, towns, cities, private business entities and other political subdivisions of the State. Additionally, it is proposed that the District will protect, preserve and restore the purity and sanitary condition of the water within the District. It is anticipated that conversion will have no adverse effects on the rates and services provided to the customers. The proposed District is located in Bexar, Wilson and Guadalupe Counties and will contain approximately 135.97 square miles. The territory to be included within the proposed District includes all of the singularly certified service area covered by CCN No. 10655 and is set forth in the boundary description available for viewing, along with the notice and a plat showing the boundary of the proposed District as described in the petition, at the proposed District's office in Adkins, Texas, the TCEQ's Office of the Chief Clerk and on each county's bulletin board used for posting legal notices. CCN No. 10655 will be transferred after a positive confirmation election.

TCEQ Internal Control No. 05212004-D03; Beazer Homes Texas, L.P. (Petitioner) filed a petition for creation of Harris County Municipal Utility District No. 381 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the land to be included in the proposed District; (3) the proposed District will contain approximately 130.1736 acres located within Harris County, Texas; and (4) the proposed District is within the corporate limits of the City of Houston, Texas, and is not within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2004-391, effective May 11, 2004, the City of Houston, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) purchase, construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $8,460,000.

TCEQ Internal Control No. 01082004-D08; 2219 Kaufman Partners, L.P., (Petitioner) filed a petition for creation of Kingsborough Municipal Utility District No. 4 of Kaufman County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, American Bank of Texas, on the land to be included in the proposed District; (3) the proposed District will contain approximately 606.441 acres located within Kaufman County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Mesquite, Texas, and is not within the jurisdiction of any

other city, town, or village in Texas. By Resolution No. 20-2003, effective June 2, 2003, the City of Mesquite, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) purchase, construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $24,6750,000.

TCEQ Internal Control No. 01222004-D03; GREEN VALLEY SPECIAL UTILITY DISTRICT of Guadalupe County (the District) has filed an application with the Texas Commission on Environmental Quality (TCEQ) for authority to levy impact fees of $1,600 per equivalent single family connection for new connections to the water system within or near the service area of Green Valley Special Utility District. The District files this application under the authority of Chapter 395 of the Local Government Code, 30 Texas Administrative Code Chapter 293 and the procedural rules of the TCEQ. The purpose of impact fees is to generate revenue to recover the costs of capital improvements and facility expansions made necessary by and attributable to serving new development in the District's service area. At the direction of the District, a registered engineer has prepared a capital improvements plan for the system which identifies the capital improvements or facility expansions and their costs for which the impact fees will be assessed. The impact fee application and supporting information are available for inspection and copying during regular business hours in the Utilities and Districts Section of the Water Supply Division, Third Floor of Building F (in the TCEQ Park 35 Office Complex located between Yager & Braker Lanes on North IH-35), 12100 Park 35 Circle, Austin, Texas 78753. A copy of the impact fee application and supporting information, as well as the capital improvements plan, is available for inspection and copying at the Green Valley Special Utility District's office during regular business hours.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200404218
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 24, 2004

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Notice of District Petition

Notices mailed June 25 through June 29, 2004

TCEQ Internal Control No. 06042004-D07; Windmeadows Investors, LTD. and WM Commercial, L.P. (Petitioners) filed a petition for creation of Fort Bend County Municipal Utility District No.150 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioners are the owner of a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 170.8 acres located within Fort Bend County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Rosenberg, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2004-08, effective April 20, 2004, the City of Rosenberg, Texas gave its consent to the creation of the proposed District and authorized the Petitioner to initiate proceedings to create such political subdivision within its jurisdiction. The petition further states that the proposed District will: (1) design, construct, acquire, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition. According to the petition, the Petitioners has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $8,785,000.

TCEQ Internal Control No. 06222004-D02; Lake Pointe Town Center, Ltd. (Petitioner) filed a petition for creation of First Colony Municipal Utility District No. 10 of Fort Bend County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there is one lienholder, JPMorgan Chase Bank, on the property to be included in the proposed District; (3) the proposed District will contain approximately

189.8 acres located within Fort Bend County, Texas; and (4) the proposed District is within the corporate limits of the City of Sugar Land, Texas, and is not within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. The Petitioner has also provided the TCEQ with a certificate evidencing the consent of JPMorgan Chase Bank to the creation of the proposed District. By Resolution No. 04-16, effective June 1, 2004, the City of Sugar Land, Texas, gave its consent to the creation of the proposed District. The petition further states that the proposed District will: (1) purchase, construct, acquire, maintain, and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of water, as more particularly described in an engineer's report filed simultaneously with the filing of the petition; and (4) purchase, construct, acquire, improve, maintain, and operate additional facilities, systems, plants, and enterprises consistent with the purposes for which the District is created and permitted under State law. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project, and from the information available at the time, the cost of the project is estimated to be approximately $8,700,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on a petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve a petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of the notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687- 4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200404318
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 30, 2004

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapters 101, 114, and 115, and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules; 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles; 30 TAC Chapter 115, Control of Air Pollution from Volatile Organic Compounds; and the state implementation plan (SIP), concerning the Houston/Galveston/Brazoria (HGB) and the Beaumont/Port Arthur (BPA) ozone nonattainment areas, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The commission proposes revisions to the SIP concerning the rate-of-progress (ROP) demonstration for the HGB ozone nonattainment area. The proposed SIP revision will update the emission inventories, ROP emission budgets, and motor vehicle emission budgets (MVEB) to reflect the use of new EPA emission factor models (NONROAD and MOBILE6) and new motor vehicle activity estimates. The updated emission inventories, ROP emission budgets, and MVEBs are consistent with concurrent SIP proposals. (Project Number 2004-049b-SIP-NR)

The commission proposes revisions to the SIP concerning the attainment demonstration for the HGB ozone nonattainment area. The proposed SIP revision reflects a strategy based on nitrogen oxides and point source highly-reactive volatile organic compound emission reductions rather than solely a nitrogen oxides emission reduction plan. This proposal contains results of photochemical modeling and technical documentation in support of the attainment demonstration. As a result of these analyses, the proposal revises a number of nitrogen oxides control strategies and the highly-reactive volatile organic compound emission reduction requirements. Additionally, the proposal contains a revision to the environmental speed limit strategy. The currently posted speed limits, at five miles per hour (mph) below what was posted before May 1, 2002, where speed limits were 65 mph or higher, are maintained and the reinstatement of the 55 mph speed limit on May 1, 2005 is removed, as required by House Bill 1365, 78th Legislature, 2003. (Project Number 2004-042-SIP-NR)

The commission proposes amendments to §§115.352, 115.354 - 115.357, and 115.359 of 30 TAC Chapter 115; and corresponding revisions to the state implementation plan. The proposed amendments are being proposed in Subchapter D (Petroleum Refining, Natural Gas Processing, and Petrochemical Processes), Division 3 (Fugitive Emission Control in Petroleum Refining, Natural Gas/Gasoline Processing, and Petrochemical Processes). The proposed rulemaking would remove certain recordkeeping requirements from the general volatile organic fugitive emissions rules in Subchapter D, Division 3, and make the requirements applicable only to sources of highly-reactive volatile organic compound fugitive emissions in rule amendments that are being proposed as part of a concurrent rulemaking in 30 TAC Chapter 115, Subchapter H. The proposed amendments would also make a variety of changes to correct typographical errors, update cross-references, add flexibility, and achieve the intended emission reductions of the program. (Rule Project Number 2004-052-115-AI)

The commission proposes new §§115.620 - 115.622, 115.626, 115.627, and 115.629 of 30 TAC Chapter 115. The proposed rulemaking would implement new rules per commission directive of December 5, 2001, concerning consideration of a petition from Fluoro-Seal. The rules would be placed in Subchapter G (Consumer-Related Sources); Division 2 (Portable Fuel Containers). The provisions would specify

performance standards, testing requirements, and labeling requirements for portable fuel containers manufactured on or after January 1, 2006, for sale in Texas. The rules would apply statewide. (Rule Project Number 2004-033-115-AI)

The commission proposes amendments to §§115.10, 115.720, 115.722, 115.725 - 115.727, 115.729, 115.760, 115.761, 115.764, 115.769, 115.780 - 115.783, and 115.786 - 115.789; new §115.766 and §115.767; and the repeal of §§115.766 - 115.768 and 115.785 of 30 TAC Chapter 115; and corresponding revisions to the state implementation plan. The amended, new, and repealed sections are being proposed in 30 TAC Chapter 115, Subchapter A, (Definitions); Subchapter H (Highly-Reactive Volatile Organic Compounds), Division 1 (Vent Gas Control), Division 2 (Cooling Tower Heat Exchange Systems), and Division 3 (Fugitive Emissions). The proposed rulemaking would achieve emission reductions in support of the attainment demonstration of the national ambient air quality standard for ozone in the HGB ozone nonattainment area and would implement measures to ensure compliance with the specific strategies to control highly-reactive volatile organic compound emissions. The proposed amendments would also make a variety of changes to correct typographical errors and update cross-references. (Rule Project Number 2004-037-115-AI)

The commission proposes new §§101.390 - 101.394, 101.396, 101.399 - 101.401, and 101.403 of 30 TAC Chapter 101; and corresponding revisions to the state implementation plan. The new sections are being proposed in 30 TAC Chapter 101, Subchapter H (Emissions Banking and Trading); new Division 6 (Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program). The proposed rulemaking would establish a mandatory annual cap and trade program to achieve reductions of highly-reactive volatile organic compound emissions in support of the attainment demonstration of the one-hour national ambient air quality standard for ozone in the HGB ozone nonattainment area. (Rule Project Number 2004-058-101-AI)

The commission proposes amendments to §§114.1, 114.2, 114.50, 114.52, and 114.53 of 30 TAC Chapter 114; Subchapter A (Definitions); and Subchapter C (Vehicle Inspection and Maintenance and Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program); Division 1 (Vehicle Inspection and Maintenance). The proposed rulemaking would remove all references to the inspection and maintenance program in three counties of the HGB (Chambers, Liberty, and Waller Counties) before the scheduled program implementation date of May 1, 2005 in these three counties. The proposed rulemaking would also remove the requirement for these three counties to submit individually or collectively an alternative control plan with strategies that would be implemented instead of an inspection and maintenance program. (Rule Project Number 2004-035-114-AI)

The commission proposes the repeal of §114.452 and §114.459 of 30 TAC Chapter 114; Subchapter I (Non-Road Engines); Division 6 (Lawn Service Equipment Operating Restrictions). The proposed rulemaking would repeal the lawn service equipment operating restrictions that are scheduled to go into effect April 1, 2005 in the HGB. (Rule Project Number 2004-034-114-AI)

The commission proposes the repeal of §§114.500, 114.502, 114.507, and 114.509 of 30 TAC Chapter 114; Subchapter J (Operational Controls for Motor Vehicles); Division 1 (Motor Vehicle Idling Limitations). The proposed rulemaking would repeal the rules that prohibit a motor vehicle over 14,000 pounds from idling for more than five consecutive minutes in the HGB during the period of April 1 through October 31 of each calendar year. (Rule Project Number 2004-043-114-AI)

The commission proposes revisions to the SIP concerning the ROP demonstration for the BPA ozone nonattainment area. The proposed SIP revision will update emission inventories, ROP emission budgets, and MVEBs to reflect the use of new EPA emission factor models (NONROAD and MOBILE6) and new motor vehicle activity estimates. The revised emission inventories, ROP emission budgets, and MVEBs are consistent with concurrent SIP proposals. Additionally, new emission inventories, ROP emission budgets, and MVEBs are being proposed for milestone years 1999, 2002, and 2005 because the BPA area has been reclassified with a new attainment date of 2005. (Project Number 2004-049a-SIP-NR)

The commission proposes revisions to the SIP concerning the attainment demonstration for the BPA ozone nonattainment area. The proposal contains results of photochemical modeling and technical analyses in support of the demonstration of attainment of the eight-hour ozone standard, and a new MVEB using MOBILE6, the newest version of the EPA's emission factor model for mobile sources. (Project Number 2004-053-SIP-NR)

Public hearings for these proposed rulemakings and SIP revisions have been scheduled for: August 2, 2004, 1:30 p.m. and 5:30 p.m., City of Houston, City Council Chambers, 2nd Floor, 901 Bagby, Houston; August 3, 2004, 10:30 a.m., John Gray Institute, 855 Florida Avenue, Beaumont; and August 5, 2004, 9:30 a.m., Texas Commission on Environmental Quality, 12100 North I-35, Building F, Room 2210, Austin. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearings to assure that enough time is allowed for every interested person to speak. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes before the hearings and will answer questions before and after the hearings.

Persons planning to attend the hearings who have special communication or other accommodation needs, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Written comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; by fax at (512) 239- 4808; or by email to *siprules@tceq.state.tx.us*. All comments should reference the project numbers that they pertain to. Comments must be received by 5:00 p.m. on August 9, 2004. For further information, please contact Kelly Keel, Environmental Planning and Implementation Division at (512) 239-3607, or Alan Henderson, Policy and Regulations Division, at (512) 239-1510.

TRD-200404268
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: June 28, 2004

Notice of Water Quality Applications

The following notices were issued during the period of June 16, 2004 through June 22, 2004.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087,

WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

The Texas Commission on Environmental Quality (TCEQ) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to CITY OF CLEBURNE, to incorporate a substantial modification to the approved pretreatment program. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow of: 6.25 million gallons per day (MGD), increasing to 7.5 MGD following plant expansion, via Outfall 001; and an annual average flow of 0.3 MGD via Outfall 002. The facility is located on the north side of Buffalo Creek, approximately 1 mile southwest of the intersection of State Highway 174 and State Highway 171 in Johnson County, Texas.

CITY OF CORRIGAN has applied which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located approximately 2,900 feet northeast of the intersection of U. S. Highway 59 and State Highway 352 in Polk County, Texas.

CITY OF MUNDAY has applied for a renewal of TPDES Permit No. 10228-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located immediately south of Farm-to-Market Road 1587 approximately 2.3 miles northwest of the intersection of Farm-to-Market Road 1587 and Farm-to- Market Road 266 in Knox County, Texas.

THE CITY OF ROGERS has applied for a renewal of TPDES Permit No. 10804-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 161,000 gallons per day. The facility is located south of the City of Rogers, immediately west of Farm-to-Market Road 437 and approximately 3/4 mile south of the intersection of U.S. Highway 190 and Farm-to-Market 437 in Bell County, Texas.

SOUTHWEST MILAM WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 14110-001, which authorizes the discharge of treated water treatment filter backwash water at a daily average flow not to exceed 31,000 gallons per day. This facility is located on the south side of Farm-to-Market Road 908 approximately 1,500 feet east of the intersection of Farm-to-Market Road 908 and Milam County Road 316 in Milam County, Texas.

UPPER LEON RIVER MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 14206-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 249,000 gallons per day. The facility is located on Farm-to-Market Road 2861, 1.8 miles north of the intersection of Farm-to-Market Road 2861 and U.S. Highway 377, which is located 4.6 miles west of the City of Proctor in Comanche County, Texas.

TRD-200404219
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: June 24, 2004

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Texas Department of Health

Notice of Certification of Nonprofit Hospitals or Hospital Systems for Limited Liability

The Hospital Survey Unit in the Center for Health Statistics, Texas Department of Health (department), has completed its analysis of hospital data for the purpose of certifying nonprofit hospitals or hospital systems for limited liability in accordance with the Health and Safety Code, §311.0456 (enacted in §22.02 of House Bill (HB) 4, 78th Texas Legislature). We received requests for certification from 60 hospitals. We will notify each hospital by mail that is certified in accordance with HB 4, 78th Texas Legislature. Therefore, if you have any comments or questions about the following certification results, please contact Mr. Dwayne Collins of the department's Center for Health Statistics.

Certified. 4 non-profit hospitals were determined to be eligible for certification based on information that they provided 8 percent or more of their net patient revenue as charity care and provided 40 percent or more of the charity care in their counties:

1. Christus Spohn Hospital Alice in Jim Wells County;

2. Madison St. Joseph Health Center in Madison County;

3. Christus Spohn Hospital Corpus Christi in Nueces County; and

4. Daughters of Charity Health Services - Brackenridge Hospital in Travis County.

Not Certified. 3 non-profit hospitals were not certified because they did not provide 40 percent or more of the charity care in their counties, but did provide 8 percent or more of their net patient revenue as charity care:

1. Shriners Burns Hospital--Galveston in Galveston County;

2. Shriners Hospitals For Children in Harris County; and

3. DePaul Center--Division of Providence Health Center in McLennan County.

Not Certified. 4 hospitals were excluded from certification because they were not non-profit hospitals:

1. Hereford Regional Medical Center in Deaf Smith County;

2. Laird Memorial Hospital in Gregg County;

3. Stephens Memorial Hospital in Stephens County; and

4. Val Verde Regional Medical Center in Val Verde County.

Not Certified. 45 non-profit hospitals and 1 hospital system (3 hospitals in the system) were not certified because, based on their survey data, they did not provide 8 percent of their net patient revenue as charity care:

1. Daughters of Charity Health Services (Hospital System) - submitted 1 request for certification for the following 3 hospitals in the system:

a. Seton Medical Center in Travis County;

b. Seton Highland Lakes in Burnet County; and

c. Seton Edgar B. Davis in Caldwell County;

2. Cedar Crest Hospital in Bell County;

3. Scott and White Memorial Hospital in Bell County;

4. Goodall-Witcher Healthcare Foundation in Bosque County;

5. Saint Joseph Regional Health Center in Brazos County;

6. Burleson St. Joseph Health Center of Caldwell in Burleson County;

7. Valley Baptist Medical Center in Cameron County;

8. East Texas Medical Center Pittsburg in Camp County;

9. East Texas Medical Center Jacksonville in Cherokee County;

10. Memorial Hermann Fort Bend Hospital in Fort Bend County;

11. Memorial Hermann Katy Hospital in Fort Bend County;

12. East Texas Medical Center at Mount Vernon in Franklin County;

13. East Texas Medical Center - Fairfield in Freestone County;

14. Devereux Texas Treatment Network in Galveston County;

15. Texoma Medical Center in Grayson County;

16. Texoma Medical Center Restorative Care Hospital in Grayson County;

17. Good Shepherd Medical Center in Gregg County;

18. Memorial Hermann Hospital in Harris County;

19. Memorial Hermann Memorial City Hospital in Harris County;

20. Memorial Hermann Northwest Hospital in Harris County;

21. Memorial Hermann Southeast Hospital in Harris County;

22. Memorial Hermann Southwest Hospital in Harris County;

23. Central Texas Medical Center in Hays County;

24. East Texas Medical Center Athens in Henderson County;

25. Knapp Medical Center in Hidalgo County;

26. Mission Hospital in Hidalgo County;

27. East Texas Medical Center - Crockett in Houston County;

28. Sid Peterson Memorial Hospital in Kerr County;

29. Yoakum Community Hospital in Lavaca County;

30. Covenant Medical Center in Lubbock County;

31. Hillcrest Baptist Medical Center in McLennan County;

32. Providence Health Center in McLennan County;

33. Memorial Hermann The Woodlands Hospital in Montgomery County;

34. Memorial Hermann Baptist Orange Hospital in Orange County;

35. East Texas Medical Center - Carthage in Panola County;

36. Memorial Medical Center - Livingston in Polk County;

37. East Texas Medical Center - Clarksville in Red River County;

38. Henderson Memorial Hospital in Rusk County;

39. East Texas Medical Center in Smith County;

40. Osteopathic Medical Center of Texas in Tarrant County;

41. Hendrick Medical Center in Taylor County;

42. Shannon West Texas Memorial Hospital in Tom Green County;

43. Trinity Community Medical Center of Brenham in Washington County;

44. Johns Community Hospital in Williamson County;

45. East Texas Medical Center - Quitman in Wood County; and

46. Presbyterian Hospital of Winnsboro in Wood County.

Not Certified. 1 hospital was excluded because we did not receive sufficient information to evaluate their request:

1. Grimes St. Joseph Health Center in Grimes County.

For further information about this report, please contact Mr. Dwayne Collins or Ms. JaNell Jenkins in the Center for Health Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas, telephone (512) 458-7261.

TRD-200404293

Susan K. Steeg
General Counsel
Texas Department of Health
Filed: June 29, 2004

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Texas Health and Human Services Commission

Public Hearing Notice

The Texas Health and Human Services Commission is holding a public hearing to take public comment on the development of the Commission's Legislative Appropriation Request (LAR) for the FY 2006 - 2007 biennium. The hearing is July 19, 2004, at 9:00 a.m. at the Department of Human Services, John H. Winter's Building, Public Hearing Room 125, at 701 West 51st Street, Austin, Texas 78751.

The LAR will not be completed until after the hearing.

HHSC Contact: Marilyn Williams, Texas Health and Human Services Commission, (512) 424-6629 or marilyn.williams@hhsc.state.tx.us.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Ms. Williams by July 14, 2004, so that appropriate arrangements can be made.

TRD-200404319
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Filed: June 30, 2004

♦ ♦ ♦

Texas Department of Human Services

Open Solicitation for Crocket County

Pursuant to Title 2, Chapters 22 and 32, of the Human Resources Code and 40 Texas Administrative Code (TAC) §19.2324, the Texas Department of Human Services (DHS) is announcing an open solicitation period of 30 days, effective the date of this public notice, for **Crockett County, County #053**. Medicaid nursing facility occupancy rates in **Crockett County** exceeded the 90% occupancy threshold for six consecutive months during the period of **December 2003 through May 2004**. The county occupancy rates for each month of that period were: **91.1%, 93.5%, 94.3%, 92.9%, 92.1%, 90.6%**. In accordance with primary selection process requirements contained in 40 TAC §19.2324(b), current nursing facility licensees or property owners of currently licensed nursing facilities may apply for an additional allocation of Medicaid beds. The allocation of additional Medicaid beds is restricted to nursing facility beds that are currently licensed and may be converted to Medicaid- certified beds. Applicants for additional Medicaid beds must demonstrate a history of quality care as specified in 40 TAC §19.2322(e). Applicants must submit a written reply as described in 40 TAC §19.2324(b)(5) to Joe D. Armstrong, Texas Department of Human Services Contract and Licensure Section, Long Term Care-Regulatory, Mail Code E-342, P.O. Box 149030, Austin, Texas 78714-9030. The written reply must be received by DHS before the close of business August 9, 2004, the published ending date of the open solicitation period. If one or more applicants are eligible for additional Medicaid beds, DHS will allocate Medicaid beds in accordance with 40 TAC §19.2324(b)(6) and (7). If the number of beds allocated under the primary selection process does not reduce the occupancy rate below 90%, DHS will place another public notice in the *Texas Register* in accordance with secondary selection process requirements.

TRD-200404317

Carey Smith
Deputy Commissioner, Legal Services
Texas Department of Human Services
Filed: June 30, 2004

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by MIDDLE STATES INSURANCE COMPANY INC., a foreign fire and/or casualty company. The home office is in Oklahoma City, Oklahoma.

Application to change the name of BANKERS RESERVE LIFE INSURANCE COMPANY OF WISCONSIN, to SUPERIOR HEALTHPLAN NETWORK, a domestic life, accident and/or health company. The home office is in Austin, Texas.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas, 78701, within 20 days after this notice is published in the *Texas Register*.

TRD-200404315
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 30, 2004

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Unitrin Auto and Home Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages +1.12 to +3.88 by coverage, class, and territory. The overall rate change is -0.09%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by July 26, 2004.

TRD-200404294
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 29, 2004

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Kemper Independence Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages -0.63 to +2.57 by coverage, class, and territory. The overall rate change is -0.09%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by July 26, 2004.

TRD-200404295
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 29, 2004

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Unitrin Preferred Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages -0.96 to +3.03 by coverage, class, and territory. The overall rate change is -0.0.9%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by July 26, 2004.

TRD-200404296
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 29, 2004

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of American Wholehealth Networks, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200404311
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: June 30, 2004

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Texas Lottery Commission

Instant Game Number 440 "Sizzlin' 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 440 is "SIZZLIN' 7's". The play style in Game 1 is "key number match". The playstyle in Game 2 is "key symbol match". The play style in Game 3 is "tic tac toe".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 440 shall be $7.00 per ticket.

1.2 Definitions in Instant Game No. 440.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, $3.00, $4.00, $7.00, $10.00, $14.00, $21.00, $47.00, $77.00, $177, $577, $1,777, $7,777, $77,777, BOOT SYMBOL, SADDLE SYMBOL, HAT SYMBOL, SPUR SYMBOL, HORSE SYMBOL, HORSESHOE SYMBOL, BAR OF GOLD SYMBOL, STACK OF BILLS SYMBOL, CLOVER SYMBOL, POT OF GOLD SYMBOL, and SEVEN SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 440 - 1.2D

PLAY SYMBOL	CAPTION
$3.00	THREE$
$4.00	FOUR$
$7.00	SEVEN$
$10.00	TEN$
$14.00	FRTN
$21.00	TWY ONE
$47.00	FRY SVN
$77.00	SVY SVN
$177	HUN 77
$577	FIV 77
$1,777	1 THOU 777
$7,777	7 THOU 777
$77,777	77 THOU 777
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TWL
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSE
28	TWEG
29	TWNI
30	TRTY
BOOT SYMBOL	BOOT
SADDLE SYMBOL	SADLE
HAT SYMBOL	HAT

SPUR SYMBOL	SPUR
HORSE SYMBOL	HORSE
HORSESHOE SYMBOL	SHOE
GOLD BAR SYMBOL	GOLD
STACK OF BILLS SYMBOL	BILLS
CLOVER SYMBOL	CLVER
POT OF GOLD SYMBOL	POT
SEVEN SYMBOL	SVN
X	
O	
7	

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 440 - 1.2E

CODE	PRIZE
SVN	$7.00
TEN	$10.00
FRN	$14.00
TWE	$21.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit security number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $7.00, $10.00, $14.00, or $21.00.

H. Mid-Tier Prize - A prize of $47.00, $77.00, $177, or $577.

I. High-Tier Prize - A prize of $1,777, $7,777 or $77,777.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (440), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 440-0000001-000.

L. Pack - A pack of "SIZZLIN' 7's" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be two (2) fanfold configurations for this game: (i) Type A - The front of each pack will display ticket back 074, next page will consist of 073, etc., and the back of each pack will display ticket front 000; and (ii) Type B - The front of each pack will display ticket back 000, and the back of each pack will display ticket front 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SIZZLIN' 7's" Instant Game No. 440 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SIZZLIN' 7's" Instant Game is determined once the latex on the ticket is scratched off to expose 62 (sixty-two) play symbols. In Game 1, if the player matches either of the WINNING NUMBERS play symbols to any of the YOUR NUMBERS play symbols, the player will win the prize indicated. If the player reveals a "7" play symbol in Game 1, the player will win double the prize indicated. In Game 2, if the player gets three (3) "7" play symbols across in the same play, the player will win the prize shown for that play. In Game 3, if the player finds three (3) "7" play symbols in any row, column or diagonal line, the player will win the prize indicated in the prize box. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 62 (sixty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 62 (sixty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each Play Symbol must match exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each Play Symbol on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Adjacent tickets within a book will not have identical patterns. Two tickets have identical patters if and only if they have the same symbols in the same positions.

B. Game 1: There will be no more than two (2) identical non-winning prize symbols.

C. Game 1: The non-winning YOUR NUMBERS symbols will be unique.

D. Game 1: The two (2) WINNING NUMBERS symbols will be unique.

E. Game 1: The "7" symbol will never appear as the WINNING NUMBER.

F. Game 1: Non-winning prize symbols will not match winning prize symbols.

G. Game 1: Each of the Play Symbols will be used as a WINNING NUMBERS symbol evenly except as required by the constraints.

H. Game 1: On each game that wins two (2) or more times (excluding the play spots winning with the "7" symbol), each WINNING NUMBER will be used to create winners.

I. Game 2: Non-winning prize symbols will be unique.

J. Game 2: There will be no more that two (2) identical non-winning symbols combined in all plays except the "7" symbol.

K. Game 2: The will be a least four (4) "7" symbols among all plays.

L. Game 2: Non-winning plays will be unique. This means no two plays will have the same symbols in the same positions.

M. Game 2: Non-winning prize symbols will not match winning prize symbols.

N. Game 2: The "7" symbol will never fill an entire column or diagonal of three adjacent positions.

O. Game 3: Symbols other than the "7" symbol will not form a line along any vertical, horizontal or diagonal line.

P. Game 3: Each Play Symbol will appear exactly three (3) times in each game.

Q. Game 3: A winning line will consist of three (3) matching "7" symbols on the same vertical, horizontal or diagonal line.

R. Game 3: There can only be one (1) winning line per game.

2.3 Procedure for Claiming Prizes.

A. To claim a "SIZZLIN' 7's" Instant Game prize of $7.00, $10.00, $14.00, $21.00, $47.00, $77.00, $177 or $577, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $47.00, $77.00, $177 or $577 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the

Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SIZZLIN' 7's" Instant Game prize of $1,777, $7,777, or $77,777, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SIZZLIN' 7's" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SIZZLIN' 7's" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.7 Disclaimer.. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefore, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefore, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefore. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 440. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 440 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$7	476,000	8.57
$10	272,000	15.00
$14	435,200	9.38
$21	95,200	42.86
$47	64,600	63.16
$77	14,000	291.43
$177	4,200	971.43
$577	450	9,066.67
$1,777	12	340,000.00
$7,777	10	408,000.00
$77,777	4	1,020,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.00. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 440 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 440, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404312
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 30, 2004

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Instant Game Number 453 "Tripler Bingo"

1.0 Name and Style of Game.

A. The name of Instant Game No. 453 is "TRIPLER BINGO". The play style is "bingo with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 453 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 453.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: B01, B02, B03, B04, B05, B06, B07, B08, B09, B10, B11, B12, B13, B14, B15, I16, I17, I18, I19, I20, I21, I22, I23, I24, I25, I26, I27, I28, I29, I30, N31, N32, N33, N34, N35, N36, N37, N38, N39, N40, N41, N42, N43, N44, N45, G46, G47, G48, G49, G50, G51, G52, G53, G54, G55, G56, G57, G58, G59, G60, O61, O62, O63, O64, O65, O66, O67, O68, O69, O70, O71, O72, O73, O74, O75, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, FREE, and TPL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 453 - 1.2D

PLAY SYMBOL	CAPTION
B01	
B02	
B03	
B04	
B05	
B06	
B07	
B08	
B09	
B10	
B11	
B12	
B13	
B14	
B15	
I16	
I17	
I18	
I19	
I20	
I21	
I22	
I23	
I24	
I25	
I26	
I27	
I28	
I29	
I30	
N31	
N32	
N33	
N34	
N35	
N36	
N37	
N38	
N39	
N40	
N41	
N42	
N43	
N44	
N45	
G46	

G47	
G48	
G49	
G50	
G51	
G52	
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G56	
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G58	
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73	
74	
75	
FREE	
TPL	

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 453 - 1.2E

CODE	PRIZE
TWO	$2.00
THR	$3.00
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $50.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000 or $30,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (453), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 453-0000001-000.

L. Pack - A pack of "TRIPLER BINGO" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 000 will be shown on the front of the pack; the back of ticket 124 will be revealed on the back of the pack. Every other book will reverse i.e., the back of ticket 000 will be shown on the front of the pack and the front of ticket 124 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLER BINGO" Instant Game No. 453 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLER BINGO" Instant Game is determined once the latex on the ticket is scratched off to expose 130 (one hundred thirty) play symbols. The player must scratch off the CALLER'S CARD area to reveal 24 (twenty-four) Bingo Numbers and six (6) Bonus Numbers. The player must mark all the BINGO NUMBERS on Cards 1 through 4 that match the Caller's Card. Each card has a corresponding prize box on any one "Card". Players win by matching those same numbers on the four Player's Cards. If the player finds a diagonal, vertical or horizontal straight line or the four corners of the gird, or an X pattern, they win a prize according to the legend of the respective playing grid. Examples of play, if a player matches all bingo numbers plus the Free Space in a complete horizontal, vertical, or diagonal line pattern in any one card the player wins prize according to the legend of the respective playing card. If the player matches all bingo numbers in all four (4) corner pattern in any one card the player wins prize according to the legend of the respective playing card. If the player matches all bingo numbers plus Free Space to make a complete "X" pattern in any one card the player wins prize according to the legend of the respective playing card. The TPL symbol in the four Bingo Cards can be used as a FREE space to complete a winning pattern. If the TPL symbol appears in any winning Bingo pattern, the prize is tripled. For

example, a diagonal line winner is created if a player matches 3 of the 4 required numbers and reveals a TPL symbol in that line. The Player can win up to four times on any ticket but only once on each "card".

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 130 (one hundred thirty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 130 (one hundred thirty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 130 (one hundred thirty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 130 (one hundred thirty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A ticket will win as indicated by the prize structure.

B. A ticket can win up to four times and only once per Card.

C. Adjacent tickets in a pack will not have identical patterns.

D. There will never be more than one win on a single Bingo Card.

E. No duplicate numbers will appear on the Caller's Card and Bonus Numbers.

F. No duplicate numbers will appear on each individual Player's Card.

G. Each Caller's Card will have a minimum of four (4) and a maximum of six (6) numbers from each range per letter. The Bonus Numbers will have a maximum of two (2) numbers for each range per letter.

H. The TPL symbol will act as a FREE space. If a winning pattern is found which contains a TPL symbol, the prize won will be Tripled.

I. The number range used for each letter will be as follows: B: 01-15; I: 16-30; N: 31-45; G: 46-60; O: 61-75.

J. Each Player's Card on the same ticket must be unique.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLER BINGO" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TRIPLER BINGO" Instant Game prize of $1,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas

Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLER BINGO" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLER BINGO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLER BINGO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 19,920,000 tickets in the Instant Game No. 453. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 453 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	2,390,400	8.33
$3	1,314,720	15.15
$5	637,440	31.25
$10	159,360	125.00
$15	119,520	166.67
$20	159,360	125.00
$30	70,965	280.70
$50	49,800	400.00
$100	18,675	1,066.67
$500	1,245	16,000.00
$1,000	55	362,181.82
$30,000	8	2,490,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.05 The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 453 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 453, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404303
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 29, 2004

♦ ♦ ♦

Instant Game Number 461 "Stars & Stripes"

1.0 Name and Style of Game.

A. The name of Instant Game No. 461 is "STARS & STRIPES". The play style is "key symbol match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 461 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 461.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 11, 12 ,13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, FLAG SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $1,000 and $24,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 461 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
FLAG SYMBOL	WIN$50
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$1,000	ONE THOU
$24,000	24 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 461 - 1.2E

CODE	PRIZE
TWO	$2.00
FIV	$5.00
EGT	$8.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $5.00, $8.00, $10.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $1,000 or $24,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (461), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 461-0000001-000.

L. Pack - A pack of "STARS & STRIPES" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000 and 001 will be on the top page; tickets 002 and 003 on the next page; etc.; and tickets 248 and 249 will be on the last page. Please note the books will be in a A - B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "STARS & STRIPES" Instant Game No. 461 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "STARS & STRIPES" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. Match YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, win prize shown for that number. If a player reveals a FLAG SYMBOL, the player wins $50.00 automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning Your Numbers play symbols on a ticket.

C. No duplicate Winning Numbers play symbols on a ticket.

D. No three (3) or more like non-winning prize symbols on a ticket.

E. No more than one pair of duplicate non-winning prize symbols on a ticket.

F. The auto win symbol will appear on approximately 50% of winning tickets that win $50 and will always appear with the $50 prize symbol.

G. The auto win symbol will never appear more that once on a ticket.

H. Non-winning prize symbols will never be the same as the winning prize symbol(s).

I. No prize amount in a non-winning spot will correspond with the Your Numbers play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "STARS & STRIPES" Instant Game prize of $2.00, $5.00, $8.00, $10.00, $20.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "STARS & STRIPES" Instant Game prize of $1,000 or $24,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "STARS & STRIPES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "STARS & STRIPES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "STARS & STRIPES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank

account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 9,000,000 tickets in the Instant Game No. 461. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 461 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	1,080,000	8.33
$5	504,000	17.86
$8	162,000	55.56
$10	72,000	125.00
$20	54,000	166.67
$50	45,000	200.00
$200	7,575	1,188.12
$1,000	115	78,260.87
$24,000	9	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on the number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.68. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 461 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 461, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404304
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 29, 2004

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Instant Game Number 466 "Run the Table"

1.0 Name and Style of Game.

A. The name of Instant Game No. 466 is "RUN THE TABLE". The play style in BLACKJACK is "add up with doubler and auto win". The play style in DOUBLE ROULETTE is "key number match". The play style in SLOTS is "match up". The play style in DICE is "add up". The play style in HIT ME is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 466 shall be $25 per ticket.

1.2 Definitions in Instant Game No. 466.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A, K, Q, J, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $25.00, $30.00, $40.00, $50.00, $100, $200, $500, $1,000, $2,000, $10,000, $20,000, BUSTS SYMBOL, 1 DICE SYMBOL, 2 DICE SYMBOL, 3 DICE SYMBOL, 4 DICE SYMBOL, 5 DICE SYMBOL, 6 DICE SYMBOL, $ONE MILL SYMBOL, SEVEN SYMBOL, GOLD BAR SYMBOL, HORSE SHOE SYMBOL, BELL SYMBOL, DOLLAR SIGN SYMBOL, POT OF GOLD SYMBOL, STAR SYMBOL, DIAMOND SYMBOL AND HIT ME SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 466 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$25.00	TWY FIV
$30.00	THIRTY
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$2,000	TWO THOU
$10,000	TEN THOU
$20,000	20 THOU
A	ACE
K	KNG
Q	QUN
J	JCK
$ONE MILL SYMBOL	ONE MIL

BUSTS SYMBOL	BUSTS
1 DICE SYMBOL	ONE
2 DICE SYMBOL	TWO
3 DICE SYMBOL	THR
4 DICE SYMBOL	FOR
5 DICE SYMBOL	FIV
6 DICE SYMBOL	SIX
SEVEN SYMBOL	SEVN
GOLD BAR SYMBOL	GBAR
HORSE SHOE SYMBOL	SHOE
BELL SYMBOL	BELL
DOLLAR SIGN SYMBOL	DOLR
POT OF GOLD SYMBOL	GPOT
STAR SYMBOL	STAR
DIAMOND SYMBOL	DIAM
HIT ME SYMBOL	HIT ME
21 SYMBOL	WIN$50

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

F. Mid-Tier Prize - A prize of $25.00, $30.00, $40.00, $50.00, $100, $200 or $500.

G. High-Tier Prize - A prize of $1,000, $2,000, $10,000, $20,000 or $1,000,000.

H. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

I. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (466), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 466-0000001-000.

J. Pack - A pack of "RUN THE TABLE" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate from pack to pack. Fanfold A: ticket front 000 will be on the top ticket and 074 back will be on the last page. Fanfold B: ticket back 000 will be on the top and ticket front 074 will be on the last page.

K. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RUN THE TABLE" Instant Game No. 466 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RUN THE TABLE" Instant Game is determined once the latex on the ticket is scratched off to expose 68 (sixty-eight) Play Symbols. In the game BLACKJACK, if the total in any player's hand for that table is higher than the dealer's hand, win prize for that player. If any player gets BLACKJACK (total 21), win double the prize for that player. If the dealer's hand reveals a Bust Symbol win all five prizes. .The J, Q, and K play symbols equal 10, and the Ace play symbol equals 11. In the game DOUBLE ROULETTE for each game, if YOUR NUMBER play symbol matches any number play symbol on the Roulette Wheel, the player will win prize shown for that number. In the game SLOTS, if the player reveals three (3) identical play symbols in the same spin, the player will win prize shown in the legend. In the game HIT ME, if the player reveals a "21" play symbol, win $50 instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 68 (sixty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 68 (sixty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 68 (sixty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 68 (sixty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Although not all prize symbols may be won in all locations, all may appear in non-winning prize locations.

C. Game Blackjack: No ties between a Player's hand and the Dealer's hand.

D. Game Blackjack: No duplicate non-winning Player's Hand within the game.

E. Game Blackjack: No duplicate non-winning prize symbol within a game.

F. Game Blackjack: The doubler feature will only appear as dictated by the prize structure and will be approximately evenly split between the two games.

G. Game Blackjack: The dealer's score will never be the same symbol on both games unless at least one player contains a winning hand.

H. Game Double Roulette: No duplicate Wheel Numbers play symbols within a game.

I. Game Double Roulette: No duplicate non-winning prize symbols between the two (2) games.

J. Game Double Roulette: No prize amount in a non-winning spot will correspond with any play symbol in the same game (i.e. 5 and $5).

K. Game Double Roulette: Non-winning prize symbols will never be the same as the winning prize symbol(s).

L. Game Double Roulette: No duplicate non-winning Your Numbers play symbols between the two (2) games.

M. Game Slots: No duplicate non-winning spins in any order.

N. Game Slots: No three (3) like non-winning symbols in a vertical or diagonal line.

O. Game Dice: No duplicate non-winning prize symbols.

P. Game Dice: No duplicate non-winning rolls in any order.

Q. Game Hit Me: The twenty-one (21) play symbol will appear on approximately 50% of tickets that win a $50 prize.

2.3 Procedure for Claiming Prizes.

A. To claim a "RUN THE TABLE" Instant Game prize of $25.00, $30.00, $40.00, $50.00, $100, $200 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $25.00, $30.00, $40.00, $50.00, $100, $200 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RUN THE TABLE" Instant Game prize of $1,000, $2,000, $10,000, $20,000 or $1,000,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RUN THE TABLE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RUN THE TABLE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RUN THE TABLE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 466. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 466 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$25	806,400	6.25
$30	302,400	16.67
$40	252,000	20.00
$50	201,600	25.00
$100	201,600	25.00
$200	36,750	137.14
$500	5,460	923.08
$1,000	1,596	3,157.89
$2,000	1,512	3,333.33
$10,000	294	17,142.86
$20,000	84	60,000.00
$1,000,000	3	1,680,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on the number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 2.78. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 466 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 466, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404313
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 30, 2004

♦ ♦ ♦

Instant Game Number 469 "In the Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 469 is "IN THE MONEY". The play style for Game 1 is "match 3 of 6 with auto win". The play style for Game 2 is "key number match". The play style for Game 3 is "match 3 of 6". The play style for Bonus Game is "probability."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 469 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 469.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000, $5,000, $50,000, GOLD BAR SYMBOL, TRY SYMBOL and NEXT SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 469 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SEV
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FON
15	FTN
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUN
$500	FIV HUN
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
GOLD BAR SYMBOL	GLDBAR
TRY SYMBOL	AGAIN
NEXT SYMBOL	TIME

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 469 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (469), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 469-0000001-000.

L. Pack - A pack of "IN THE MONEY" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 000 will be shown on the front of the pack; the back of ticket 074 will be revealed on the back of the pack. Every other book will reverse i.e., reverse order will be: the back of ticket 000 will be shown on the front of the pack and the front of ticket 074 will be shown on the back of the pack.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "IN THE MONEY" Instant Game No. 469 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "IN THE MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 29 (twenty-nine) Play Symbols. Game 1: If a player reveals three (3) identical amounts the player will win that amount. If a player reveals a GOLD BAR SYMBOL, the player wins the highest prize shown in Game 1. GAME 2: If a player matches any of YOUR NUMBERS to either LUCKY NUMBER, the player wins prize shown below that number. GAME 3: If a player reveals three (3) identical amounts, player wins that amount. BONUS GAME: If a player reveals any prize amount in the bonus play area the player wins that amount. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 29 (twenty-nine) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 29 (twenty-nine) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 29 (twenty-nine) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 29 (twenty-nine) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. General: Consecutive non-winning tickets within a book will not have identical patterns.

B. Game 1: Players can win once in this play area.

C. Game 1: There will never be more than one (1) set of three (3) like prize amounts on a single ticket.

D. Game 1: There will never be more than three (3) like prize amounts on a single ticket.

E. Game 1: No ticket will contain more than one (1) "Gold Bar" symbol.

F. Game 1: Tickets containing a "Gold Bar" symbol will not contain two (2) or more like prize amounts.

G. Game 1: The "Gold Bar" symbol will not appear on non-winning tickets.

H. Game 2: Players can win up to seven (7) times in this play area.

I. Game 2: Non-winning prize symbols will not match a winning prize symbol on a ticket.

J. Game 2: There will be no duplicate Lucky Numbers on a ticket.

K. Game 2: Your Number will never equal the corresponding Prize symbol.

L. Game 2: No duplicate non-winning Your Number play symbols on a ticket.

M. Game 2: No prize symbol will appear more than 2 times on a non-winning ticket.

N. Game 3: Players can win once in this play area.

O. Game 3: There will never be more than one (1) set of three (3) like prize amounts on a single ticket.

P. Game 3: There will never be more than three (3) like prize amounts on a single ticket.

Q. BONUS AREA: Players can win once in this play area.

R. BONUS AREA: Winning tickets in this play area will reveal a prize amount.

S. BONUS AREA: Tickets that do not win in the Bonus Area will display one of the non-winning play symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "IN THE MONEY" Instant Game prize of $5.00, $10.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "IN THE MONEY" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "IN THE MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "IN THE MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "IN THE MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing,

distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 469. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 469 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	739,200	6.82
$10	537,600	9.38
$20	201,600	25.00
$50	67,410	74.77
$100	1,764	2,857.14
$500	336	15,000.00
$1,000	126	40,000.00
$5,000	33	152,727.27
$50,000	3	1,680,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.26. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 469 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 469, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404314
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 30, 2004

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Instant Game Number 471 "Easy 10"

1.0 Name and Style of Game.

A. The name of Instant Game No. 471 is "EASY 10". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 471 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 471.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1 SYMBOL, 2 SYMBOL, 3 SYMBOL, 4 SYMBOL, 5 SYMBOL, 6 SYMBOL, 7 SYMBOL, 8 SYMBOL, 9 SYMBOL, 10 SYMBOL, 11 SYMBOL, 12 SYMBOL, $1.00, $2.00, $3.00, $4.00, $5.00, $6.00 $10.00, $20.00, $30.00, $50.00, $60.00, $200, or $1,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink

in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 471 - 1.2D

PLAY SYMBOL	CAPTION
1 SYMBOL	ONE
2 SYMBOL	TWO
3 SYMBOL	THR
4 SYMBOL	FOR
5 SYMBOL	FIV
6 SYMBOL	SIX
7 SYMBOL	SVN
8 SYMBOL	EGT
9 SYMBOL	NIN
10 SYMBOL	TEN
11 SYMBOL	ELV
12 SYMBOL	TLV
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$5.00	FIVE$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$30.00	THIRTY
$50.00	FIFTY
$60.00	SIXTY
$200	TWO HUND
$1,000	ONE THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 471 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
THR	$3.00
FOR	$4.00
FIV	$5.00
SIX	$6.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $60.00, $100 or $200.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (471), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 471-0000001-000.

L. Pack - A pack of "EASY 10" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000 to 004 will be on the top page; tickets 005 to 009 on the next page; etc.; and tickets 245 to 249 will be on the last page. A ticket will be folded over on both the front and back of the book so both ticket art and ticket backs are displayed in the shrink -wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "EASY 10" Instant Game No. 471 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "EASY 10" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) Play Symbols. If a player reveals a 10 play symbol in the play area, the player wins prize shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 12 (twelve) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 12 (twelve) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning play symbols on a ticket.

C. No duplicate non-winning prize symbols on a ticket.

D. No prize amount in a non-winning spot will correspond with the your Number play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "EASY 10" Instant Game prize of $1.00, $2.00, $3.00, $4.00, $5.00, $6.00, $10.00, $20.00, $30.00, $60.00, $100 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $60.00, $100 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "EASY 10" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "EASY 10" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "EASY 10" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "EASY 10" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 14,160,000 tickets in the Instant Game No. 471. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 471 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,189,440	11.90
$2	1,416,000	10.00
$3	113,280	125.00
$4	84,960	166.67
$5	56,640	250.00
$6	56,640	250.00
$10	56,640	250.00
$20	42,480	333.33
$30	12,980	1,090.91
$60	9,440	1,500.00
$100	1,770	8,000.00
$200	1,593	8,888.89
$1,000	300	47,200.00

* The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.65. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 471 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 471, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404225
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 24, 2004

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Instant Game Number 472 "Hot Streak"

1.0 Name and Style of Game.

A. The name of Instant Game No. 472 is "HOT STREAK". The play style is "key number match with auto win.".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 472 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 472.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 0,1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $200, $2,000 and $25,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 472 - 1.2D

PLAY SYMBOL	CAPTION
0	AUTO
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$2,000	TWO THOU
$25,000	25 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 472 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $2,000 or $25,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (472), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 472-0000001-000.

L. Pack - A pack of "HOT STREAK" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000 and 001 will be on the top page; tickets 002 and 003 on the next page; etc.; and tickets 248 and 249 will be on the last page. Please note the books will be in a A - B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HOT STREAK" Instant Game No. 472 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOT STREAK" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If a player matches any of YOUR NUMBERS (#) play symbol to either ROULETTE NUMBER play symbol the player will win prize shown for that number. If a player's YOUR NUMBER (#) play symbol is "0" (zero) the player will win prize shown automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical "spot for spot" play data.

B. No duplicate non-winning Your Numbers play symbols on a ticket.

C. No duplicate Roulette Numbers play symbols on a ticket.

D. No three (3) or more like non-winning prize symbols on a ticket.

E. No more than one pair of duplicate non-winning prize symbols on a ticket.

F. The auto win symbol will never appear more than once on a ticket.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. No prize amount in a non-winning spot will correspond with the Your Numbers play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "HOT STREAK" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOT STREAK" Instant Game prize of $2,000 or $25,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOT STREAK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOT STREAK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOT STREAK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 11,040,000 tickets in the Instant Game No. 472. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 472 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	1,413,120	7.81
$4	772,800	14.29
$5	132,480	83.33
$10	154,560	71.43
$20	44,160	250.00
$50	44,160	250.00
$200	14,536	759.49
$2,000	44	250,909.09
$25,000	14	788,571.43

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes.

**The overall odds of winning a prize are 1 in 4.29. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 472 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 472, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404226
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 24, 2004

♦ ♦ ♦

Instant Game Number 482 "5 Times the Money"

1.0 Name and Style of Game.

A. The name of Instant Game No. 482 is "5 TIMES THE MONEY". The play style is "key number match with doubler and 5X win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 482 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 482.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00,

$50.00, $100, $500, $1,000, $50,000, MONEY BAG SYMBOL, 5X SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 482 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY

$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU
MONEY BAG SYMBOL	DBLE
5X SYMBOL	WINX5

E. Retailer Validation Code - Three letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 482 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13-digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit security number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $200, $500.

I. High-Tier Prize - A prize of $1,000, $5,000, $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (482), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 482-0000001-000.

L. Pack - A pack of "5 TIMES THE MONEY" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074, while the other fold will show the back of ticket 000 and front of 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "5 TIMES THE MONEY" Instant Game No. 482 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "5 TIMES THE MONEY" Instant Game is determined once the latex on the ticket is scratched off to expose 43 (forty-three) Play Symbols. If the player matches any of the YOUR NUMBERS to any of the WINNING NUMBERS, the player will win the prize shown for that number. If the player gets a money bag symbol, the player will win double the amount shown. If the player gets a 5X symbol, the player will win five times the amount shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 43 (forty-three) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 43 (forty-three) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 43 (forty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 43 (forty-three) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No 3 or more like non-winning prize symbols.

C. No duplicate non-winning Your Number play symbols.

D. No duplicate Winning Number play symbols.

E. No prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e. 5 and $5).

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. The doubler symbol will appear according to the prize structure.

H. The 5X symbol will appear according to the prize structure.

I. The doubler symbol and the 5X symbol will never appear more than once on a ticket and they will never appear together on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "5 TIMES THE MONEY" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not in some cases, required to pay a $50.00, $100, $200, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "5 TIMES THE MONEY" Instant Game prize of $1,000, $5,000, or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "5 TIMES THE MONEY" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "5 TIMES THE MONEY" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "5 TIMES THE MONEY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 482. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 482 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5.00	1,041,600	4.84
$10.00	336,000	15.00
$15.00	100,800	50.00
$20.00	134,400	37.50
$50.00	42,000	120.00
$100	8,274	609.14
$200	420	12,000.00
$500	294	17,142.86
$1,000	126	40,000.00
$5,000	15	336,000.00
$50,000	5	1,008,000.00

*The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.03. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 482 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 482, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404305
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 29, 2004

♦ ♦ ♦

Instant Game Number 488 "All the Marbles"

1.0 Name and Style of Game.

A. The name of Instant Game No. 488 is "ALL THE MARBLES". The play style is "key symbol match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 488 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 488.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $3.00, $6.00, $9.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00, $300, $3,000 and $30,000.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 488 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$3.00	THREE$
$6.00	SIX$
$9.00	TEN$
$15.00	FIFTN
$18.00	EGHTN
$24.00	TWY FOR
$30.00	THIRTY
$60.00	SIXTY
$90	NINTY
$300	THR HUND
$3,000	THR THOU
$30,000	30 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 488 - 1.2E

CODE	PRIZE
THR	$3.00
SIX	$6.00
TEN	$9.00
NIN	$15.00
EHT	$18.00
TFR	$24.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $6.00, $9.00, $15.00, $18.00 or $24.00.

H. Mid-Tier Prize - A prize of $30.00, $60.00, $90.00 or $300.

I. High-Tier Prize - A prize of $3,000 or $30,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (488), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 488-0000001-000.

L. Pack - A pack of "ALL THE MARBLES" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be (two) 2 fanfold configurations for this game. Configuration A will show the front of ticket 000 and the back of ticket 124. Configuration B will show the back of ticket 000 and the front of ticket 124.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ALL THE MARBLES" Instant Game No. 488 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "ALL THE MARBLES" Instant Game is determined once the latex on the ticket is scratched off to expose 28 (twenty-eight) Play Symbols. Match any of YOUR MARBLES to any of the WINNING MARBLES, win prize shown for that marble. Match either of the DOUBLE MARBLES to any of the WINNING MARBLES, win DOUBLE the prize shown for that marble. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 28 (twenty-eight) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 28 (twenty-eight) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 28 (twenty-eight) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 28 (twenty-eight) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Doubler wins will only be a match as dictated by the prize structure.

C. No duplicate non-winning YOUR MARBLES play symbols on a ticket.

D. No duplicate WINNING MARBLES play symbols on a ticket.

E. No more than 2 pair of duplicate non-winning prize symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR MARBLES or DOUBLE MARBLES play symbol (i.e. 5 and $5).

H Although not all prizes can be won in all locations, they may appear in non-winning locations.

2.3 Procedure for Claiming Prizes.

A. To claim a "ALL THE MARBLES" Instant Game prize of $3.00, $6.00, $9.00, $15.00, $18.00, $24,00, $30.00, $60.00, $90.00 or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $60.00, $90.00 or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "ALL THE MARBLES" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "ALL THE MARBLES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ALL THE MARBLES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "ALL THE MARBLES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 4,080,000 tickets in the Instant Game No. 488. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 488 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	391,680	10.42
$6	244,800	16.67
$9	65,280	62.50
$15	32,640	125.00
$18	32,640	125.00
$24	32,640	125.00
$30	32,640	125.00
$60	16,320	250.00
$90	7,650	533.33
$300	714	5,714.29
$3,000	18	226,666.67
$30,000	6	680,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.76. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 488 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 488, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200404227

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: June 24, 2004

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Reciprocal Approval of a Final Order Pursuant to P.U.C. Procedural Rule §22.263(d)

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on June 15, 2004 for approval of tariff revisions pursuant to P.U.C. Procedural Rule §22.263(d).

Docket Title and Number: Application of Panhandle Telephone Cooperative, Incorporated for Approval of Tariff Revisions Pursuant to P.U.C. Procedural Rule §22.263(d); Docket Number 29857.

The Application: Panhandle Telephone Cooperative, Incorporated (PTCI) filed an application for approval of tariff revisions pursuant to P.U.C. Procedural Rule §22.263(d). PTCI requests the commission adopt Final Order Number 459157 issued by the Oklahoma Corporation Commission which allows PCTI to change wording in its lifeline tariff to make "reference" to the federal Subscriber Line Charge rather than list the actual rate. PTCI is a telephone cooperative serving approximately 16,984 member subscribers. Of the 16,984 member subscribers, 16,710 are located in the state of Oklahoma while the remaining 274 are located in the state of Texas. Panhandle's member subscribers in Texas are served out of the Guymon, Hardesty and Texhoma exchanges and comprise less than 2.0% of PTCI's total customer base.

On or before July 16, 2004, persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 29857.

TRD-200404242
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 25, 2004

♦ ♦ ♦

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 22, 2004, for a service provider certificate of operating authority (SPCOA), pursuant to Public Utility Regulatory Act (PURA) §§54.151 - 54.156. A summary of the application follows.

Docket Title and Number: Application of Miracletel Telephone Service LLC for a Service Provider Certificate of Operating Authority, Docket Number 29875 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by SBC Texas and Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 14, 2004. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29875.

TRD-200404207
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 23, 2004

♦ ♦ ♦

Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on June 24, 2004, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of Sprint Communications Company L.P.'s request for two consecutive thousand-blocks in the San Antonio, Texas exchange.

Docket Title and Number: Petition of Sprint Communications Company L.P. for Waiver of NeuStar Denial of Number Block Request in San Antonio Exchange. Docket Number 29888.

The Application: Sprint Communications Company L.P. requested the commission direct Neustar to allocate to Sprint two thousand-blocks in the San Antonio, Texas exchange.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 14, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29888.

TRD-200404283
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 28, 2004

♦ ♦ ♦

Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208

Notice is given to the public of Brazos Telephone Cooperative, Incorporated's application filed with the Public Utility Commission of Texas (commission) on June 14, 2004 to withdraw Extended Area Service for the Elbert Exchange from its local Exchange Tariff pursuant to commission substantive rule §26.208(h).

Docket Title and Number: Application of Brazos Telephone Cooperative, Incorporated to Withdraw Extended Area Service Elbert Exchange from its Local Exchange Tariff Pursuant to P.U.C. Substantive Rule §26.208(h), Docket Number 29852.

The Application: Brazos Telephone Cooperative, Incorporated (Brazos Telephone) filed an application to withdraw Extended Area Service (EAS) for the Elbert Exchange from its Local Exchange Tariff pursuant to P.U.C. Substantive Rule §26.208(h). Brazos Telephone stated it has no subscribers for this service and requests to withdraw the service because Expanded Local Calling service (ELCS) was implemented in 1999. The ELCS duplicated the calling scope of the mandatory EAS. Brazos Telephone stated that there are no customers subscribing to the EAS, therefore, provisions for grandfathering current subscribers are not necessary and it has no annual revenues to report.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas no later than July 30, 2004, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll-free 1-800-735-2989. All correspondence should refer to Docket Number 29852.

TRD-200404241

Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 25, 2004

♦ ♦ ♦

Notice of Petition for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas a petition on June 22, 2004, for waiver of denial by the North American Numbering Plan Administrator (NANPA) Pooling Administrator (PA) of AMA Communications, LLC, doing business as AMA TechTel Communications request for additional telephone numbers in the Amarillo rate center.

Docket Title and Number: Petition of AMA Communications, LLC, doing business as AMA TechTel Communications for Waiver of Neustar Denial and Request for Expedited Action. Docket Number 29877.

The Application: AMA Communications, LLC, doing business as AMA TechTel Communications requested the commission waive Neustar's denial of its request for numbering resources to accommodate a single customer in the Amarillo rate center.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 14, 2004. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 29877.

TRD-200404208
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: June 23, 2004

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Texas Racing Commission

Notice of Horsemen's Organization Registration Deadline

The Executive Secretary for the Texas Racing Commission has established July 30, 2004 as the deadline for filing a request for recognition as the horsemen's representative organization. The Texas Racing Act, Texas Civil Statutes, Art. 179e §3.13 authorizes the Commission to recognize an organization to represent a segment of the racing industry, such as owners, breeders, trainers, or other persons involved in the racing industry.

In 16 Tex. Admin. Code §309.299, the Commission has adopted criteria for being recognized as an organization to represent horse owners and trainers. To be eligible for recognition as a horsemen's representative organization, each officer and director of the organization during the two-year term of the recognition must be licensed by the Commission as an owner or trainer. Other recognition criteria include the experience and qualifications of the organization's directors, executive officers, and management personnel, the organization's benevolence programs, and the degree to which the organization's membership represents a fair and equitable cross-section of the horse owners and trainers participating at each of the racetracks in this state.

An organization recognized under 16 Tex. Admin. Code §309.299 has a variety of responsibilities, including negotiation with licensed racetracks regarding the racetracks' live racing programs. The organization is subject to audit by the Texas Racing Commission.

To request recognition, an organization must file a written request on a form prescribed by the Executive Secretary. To obtain a copy of the form, interested persons should contact Gloria Giberson, Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, 512-833-6699, FAX 512-833-6907. For more information, contact Paula C. Flowerday, Executive Secretary, Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080, 512-833-6699, FAX 512-833-6907.

TRD-200404223
Nicole Galwardi
General Counsel
Texas Racing Commission
Filed: June 24, 2004

♦ ♦ ♦

Railroad Commission of Texas

Forms Adopted with Amendments to 16 TAC §3.80

The Railroad Commission of Texas has adopted amendments to 16 TAC §3.80, relating to Commission Forms, Applications and Filing Requirements, as published in this issue of the *Texas Register*. The amendments were proposed in the May 7, 2004, issue of the *Texas Register* (29 TexReg 4375) and add language concerning electronic filings with the Commission, require rulemaking for adoption or revision of forms, and incorporate a list of current forms and their creation or last revision dates. The Commission received one comment from an individual. Commission staff contacted the individual, who agreed that his concerns were not with the actual proposed amendments to §3.80, but with an operator's ability to submit to the Commission required reports and other information in a timely manner. The individual agreed to submit additional information detailing specific areas of concern so that the Commission may better focus on possible solutions, which will be handled in a future rulemaking, if necessary.

The forms included in this project are:

(1) the Security Administrator Designation (SAD) Form (Figure 1);

(2) the accompanying ECAP procedures for the SAD Form (Figure 2);

(3) Form CF-1 (Figure 3);

(4) Form CF-2 (Figure 4);

(5) the instructions for Forms CF-1 and CF-2 (Figure 5); and

(6) EPA Form 8700-12 (RCRA Subtitle C Site Identification Form) (Figure 6).

Railroad Commission of Texas
Permitting/Production Services / Oil and Gas Division

P.O. Box 12967
Austin, Texas 78711-2967

July 2004

SAD FORM

SECURITY ADMINISTRATOR DESIGNATION
FOR ELECTRONIC FILING

SEE INSTRUCTIONS ON BACK

I. COMPANY IDENTIFICATION

CHECK APPROPRIATE BOX:

[ ] Operator **OR** [ ] Petroleum Consultant/Independent Contractor or other Non-Operator

COMPLETE THE FOLLOWING:

Company Name: _____ RRC P-5 Number, if Operator: _____

Mailing Address: _____

Phone No.: _____ Fax No.: _____ E-mail Address: _____

II. SECURITY ADMINISTRATOR IDENTIFICATION

YOU **MUST** COMPLETE THE FOLLOWING TO PARTICIPATE AS A SECURITY ADMINISTRATOR:

Name of Security Administrator: _____

Mailing Address if Different from Above: _____

E-mail Address: _____

Phone No.: _____

Fax No.: _____

Initial One-Time Use Password: _____

CERTIFICATION

I declare, under penalties prescribed in Sec. 91.143, Texas Natural Resources Code, that I am authorized to make this Security Administrator Designation, that it was prepared by me or under my supervision and direction, and that the information stated herein is true, correct, and complete, to the best of my knowledge and belief.

I further declare that all electronic filings made pursuant to this designation will be in the manner prescribed by the Railroad Commission of Texas and will be compatible with the software, equipment, and facilities required by the Railroad Commission of Texas. All electronic filings will comply with any required procedures for participation in electronic filing.

I further declare that any filings which I make on behalf of another party will be made only if I have been authorized by that party to file on its behalf and I acknowledge that any filings made on behalf of an operator by me as an independent third party which are subsequently determined by the Commission to be made without the operator's authorization may result in the suspension or revocation of this Security Administrator Designation and/or the right to make any filings at the Commission on behalf of other parties.

SIGNATURE: _____

NAME (Print): _____

For RRC Use Only
Approval Date: _____
Initials: _____

TITLE: _____

ELECTRONIC FILING

SECURITY ADMINISTRATOR DESIGNATION FORM

Authorization Procedures

- Refer to Statewide Rule 80 (16 Texas Administrative Code [TAC] §3.80)

- A Security Administrator Designation Form must be on file as a condition of participation in electronic filing with the Commission. A separate form must be completed for each additional security administrator. Participants may change a Security Administrator Designation at any time.

  Once the Commission approves the Security Administrator Designation, the security administrator will be notified of his or her assigned User ID. The security administrator may then further distribute security by assigning additional User IDs to employees within the company and designating which forms they are authorized to file electronically with the Commission. The security administrators will have complete control over who within the company receives authorization to file electronically for the company. The security administrator is responsible for maintaining security of all assigned User IDs and passwords.

  For any filing made on behalf of an operator by an independent third party, the operator on whose behalf the filing was made is responsible for compliance with all Commission rules and regulations relating to the filing and any permit issued by the Commission.

  If the Commission determines that a filing made by an independent third party on behalf of an operator was not authorized by the operator, the Commission may take action to suspend or revoke the Security Administrator Designation of the independent third party and may pursue an enforcement action against the independent third party for violation of Texas Natural Resources Code, §91.143. Violations of §91.143 may result in the assessment by the Commission of an administrative penalty of up to $1,000 per incident after an administrative hearing is held. Violations of §91.143 may also be subject to separate criminal prosecution.

  Passwords must have a minimum length of six (6) and no more than thirty (30) characters. Passwords may consist of alphabetic characters, numeric characters, the following special characters (@, #, {, }, $, or |), or any combination of these characters.

  Mail the Security Administrator Designation Form to:

  Railroad Commission of Texas
  Permitting/Production Services
  1701 North Congress Avenue
  P.O. Box 12967
  Austin, TX 78711-2967

  Receipt of the Security Administrator Designation Form will be acknowledged by e-mail.

  All electronic filing information maintained at the Commission is subject to the Public Information (Open Records) Act, Chapter 552 of the Texas Government Code.

July 2004

Electronic Compliance And Approval Process

(ECAP)

Requirements for Participation

Authorization Procedures

- Refer to SWR 80 (16 Texas Administrative Code [TAC] §3.80)
- Security Administrator Designation

A Security Administrator Designation must be on file as a condition of participation in electronic filing with the Commission, including ECAP filing. A separate form must be completed for each additional security administrator. Participants may change a Security Administrator Designation at any time.

Once the Commission approves the Security Administrator Designation, the security administrator will be notified of his or her assigned User ID. The security administrator can then further distribute security by assigning additional User IDs to employees within the company and designating which forms they are authorized to file electronically with the Commission. The security administrator(s) will have complete control over who within the company receives authorization to file electronically. The security administrator is responsible for maintaining security of all assigned User IDs and passwords.

For filings made on behalf of an operator by an independent third party, the operator on whose behalf the filing was made is responsible for compliance with all Commission rules and regulations relating to the filing and any permit issued by the Commission.

If the Commission determines that a filing made by an independent third party on behalf of an operator was not authorized by the operator, the Commission may take action to suspend or revoke the Security Administrator Designation of the independent third party and may pursue an enforcement action against the independent third party for violation of Texas Natural Resources Code, §91.143. Violations of §91.143 may result in the assessment by the Commission of an administrative penalty of up to $1,000 per incident after an administrative hearing is held. Violations of §91.143 may also be subject to separate criminal prosecution.

Passwords must have a minimum length of six (6) and no more than thirty (30) characters. Passwords may consist of alphabetic characters, numeric characters, the following special characters (@, #, {, }, $, or |), or any combination of these characters.

Mail the Security Administrator Designation to:

Railroad Commission of Texas
Permitting/Production Services
1701 North Congress Avenue
P.O. Box 12967
Austin, TX 78711-2967

Receipt of the Security Administrator Designation will be acknowledged by e-mail.

General Procedures for Electronic Filing

Electronic Filing through ECAP

- To submit filings through ECAP, the following equipment is required:
  - Personal computer
  - Internet connection
  - Standard web browser, such as Microsoft Internet Explorer (version 5.5/SP2 or higher) or Netscape Navigator (version 4.77 or higher)
  - Image scanner for capturing attachments electronically

- A scanning resolution with a minimum of 200 dots per inch is required for recording documents that contain no type font smaller than six point. For documents with a type font smaller than 6 point, scanning resolution must be adequate to ensure that no information is lost.

  For plats, operators will be required to enter pre-scanned plat paper size and to show a scale bar on the plat. When the scanned plat is printed out from the electronic record on the same size paper as the original, the scale is the same. The bar will ensure that the scale is identical.

- Payments, when required, must be made by Visa or MasterCard only through the State of Texas payment portal. Access to the payment portal is provided within the application.

- All ECAP information maintained at the Commission is subject to the Public Information (Open Records) Act, Chapter 552 of the Texas Government Code.

RAILROAD COMMISSION OF TEXAS
Oil and Gas Division

RRC **CF-1**
rev. 8/28/98
TDI Ref. No. TDI-98-BB155-RCT-PF

COMMERCIAL ☐ STORAGE, ☐ RECLAMATION, ☐ TREATMENT, OR ☐ DISPOSAL FACILITY BOND

1. Organization Name, exactly as shown on P-5 organization Report.	2. P-5 Number, if assigned.	3. Total # of operators Wells, if applicable.
4. Other Commission-regulated operations.		

Background

1.1 _____ (operator name), "Principal", operates or is applying for Railroad Commission approval to operate one or more commercial storage, reclamation, treatment, or disposal facilities ("Facility" or "Facilities") subject to Texas laws. Texas Natural Resources Code §91.109 and Texas Administrative Code Vol. 16, §3.76, provide that the owner and operator of a Facility must maintain a bond or letter of credit that satisfies the Railroad Commission.

1.2 As specified in §3.76, Principal has retained _____ , a State of Texas authorized Surety, to secure this promise to pay.

1.3 This bond covers the following Facilities (*include the facility name, RRC ID No., physical address, and county in which the facility is located; attach information on additional facilities as Exhibit A*):

(A) _____

(B) _____

(C) _____

(D) _____

Terms

2.1 Principal and Surety must pay the Railroad Commission of Texas, in Austin, Travis County, Texas, the sum of $_____ U.S., according to the following paragraphs.

2.2 The Railroad Commission will notify the Surety after Principal fails to operate or close a Facility as required by Texas law, Railroad Commission rules, or the permit conditions. Notice will be mailed by registered or certified U.S. mail to the address shown below. After Surety receives notice of Principal's default, the Surety may either:

(A) pay up to the face amount of this bond to bring into compliance or close the Facility according to Texas law, Railroad Commission rules, and the permit conditions; or

(B) pay the face amount of this bond to the Railroad Commission to be used by the Railroad Commission to bring into compliance or close the Facility. The Railroad Commission will return unexpended funds to the Surety after the Facility is brought into compliance or closed.

Bond No. _____

2.3 The Railroad Commission does not have to expend state funds before Surety must pay under this bond.

2.4 The State of Texas may enforce the Suretys obligation under this bond without first obtaining a judgment against Principal or exhausting its remedies against the Principals properties or assets.

2.5 Under paragraph 2.2(A), Surety must present to the Railroad Commission, within 60 days after it receives notice of Principals default, a plan demonstrating how the Facility will be brought into compliance or closed. Surety must also furnish an accounting, acceptable to the Railroad Commission, of all sums expended by it to bring into compliance or close the Facility according to Texas law, Railroad Commission rules, and the permit conditions. Surety will submit the accounting to the Railroad Commission within 30 days of its bringing into compliance or closing the Facility.

2.6 Under paragraph 2.2(B), Surety must pay the face amount of the bond to the Railroad Commission of Texas, at Austin, Texas within 60 days after the Surety receives written notice of Principals default.

2.7 Under paragraph 2.2, Surety remains obligated to pay for any other covered Facilities up to the face amount of the bond.

2.8 The term of this bond expires _____ , _____, and is renewable annually. The Principal or Surety will renew in writing this bond and submit it to the Railroad Commission 30 days before the bond expires. Obligations to pay part or all of the bond amount are released after 4 years from the expiration date of the bond if no clean up or closure-related activities are initiated by the Railroad Commission or its authorized representative at the Facility during that 4 year period. The Railroad Commission or its authorized representative may relieve in writing Principal and Surety from their obligations under this bond.

2.9 If the Surety does not fulfill its obligations according to the bond terms and if judgment for any part of the bond amount is awarded through action of the Attorney General in court, then the State shall be entitled to court costs and reasonable attorney's fees awarded by the court. Suretys liability for such costs and fees shall not be limited by the face amount of this bond.

2.10 Principal and Surety execute this bond and agree to pay proceeds under this bond in Austin, Travis County, Texas. A suit to collect on this bond or construe this bond lies in Travis County, Texas.

Dated _____ , _____

_____	_____
SURETY (Attach Power of Attorney)	PRINCIPAL
_____	_____
NAME AND TITLE	NAME AND TITLE
_____	
SURETYS FULL MAILING ADDRESS	
	(Seal)
_____	
(Seal)	

RRC **CF-2**
rev. 8/28/98

Date: _____

Name of Issuing Bank: _____

Address: _____

_____

Other Information: _____

COMMERCIAL ☐ **STORAGE,** ☐ **RECLAMATION** ☐ **TREATMENT, OR** ☐ **DISPOSAL FACILITY**

IRREVOCABLE STANDBY LETTER OF CREDIT NO. _____

TO: RAILROAD COMMISSION OF TEXAS
Attention: Oil and Gas Division
Environmental Services Section
P.O. Box 12967
Austin, Texas 78711-2967

1. Organization Name, exactly as shown on P-5 organization Report.	2. P-5 Number, if assigned.	3. Total # of operators Wells, if applicable.
4. Other Commission-regulated operations.		

This letter of credit covers the following Facilities (*include the facility name, RRC ID No., physical address, and county in which the facility is located; attach information on additional facilities as Exhibit A*):

(A) _____

(B) _____

(C) _____

(D) _____

We hereby issue in favor of the Railroad Commission of Texas, Austin, Texas our irrevocable credit for the account of _____ (operator's name), for an amount or amounts not to exceed in the aggregate $_____ U.S., available by your drafts at sight on the bank, effective _____, _____ and expiring on the date we are provided with a letter from you stating that each of the above-referenced facilities have been closed in a manner that meets your requirements or on such date as you authorize the release of this letter of credit.

The documents specified below must be presented at sight on or before the expiry date in accordance with the terms and conditions of this letter of credit:

A. This Irrevocable Standby Letter of Credit or a copy thereof; and

B. An affidavit from the Railroad Commission of Texas or its authorized representative, stating that a commercial facility subject to this Letter of Credit has defaulted on its obligations under state law, Railroad Commission rules, or the conditions of the commercial facility permit.

We engage with you that drafts drawn under and in conformity with the terms of this credit will be duly honored on presentation if presented to us at our office at the address shown above on or before the expiry date.

The credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 revision in force as of January 1, 1994), International Chamber of Commerce--Publication 500.

_____ _____
AUTHORIZED COUNTERSIGNATURE AUTHORIZED SIGNATURE

Page 1 of 1

LOC No. _____

GUIDANCE FOR FILING
FORMS RRC CF-1 (BOND) and RRC CF-2 (LETTER OF CREDIT)
RULE 78 (p): FINANCIAL SECURITY FOR COMMERCIAL FACILITIES

FORM RRC CF-1

Type of Facility:	Place an X in the box that identifies the type of facility (ies) the bond will cover.
Box Number 1:	Fill in complete organization name exactly as it appears on Form P-5 (Organization Report). If the name on the Form P-5 is an assumed name, you must also state the full name of the organization for which the Form P-5 name is assumed. For example, if the name DC Drilling is on the Form P-5, but DC Drilling is actually a d/b/a or assumed name of Smith Exploration, Inc. the name in Box Number 1 would be DC Drilling (a d/b/a (or assumed name) of Smith Exploration, Inc.)
Box Number 2:	Fill in Form P-5 number as shown on organization report.
Box Number 3:	Include the total number of injection/disposal wells, if applicable, associated with the commercial facility. For example, a collecting pit is associated with at least one injection/disposal well.
Box Number 4:	Identify any other Commission-regulated operations. If none, may mark "NA" or leave blank.
1.1:	Fill in the operator's name exactly as shown above in Box Number 1.
1.2:	Fill in full name of Surety.
1.3:	Use each line for information concerning one permit only. If there will be more than 4 permits covered by the instrument, the additional permits may be added on a separate sheet entitled "Exhibit A of RRC CF-1 Bond No. _____."
	Include only the pertinent information as described in instructions on form: facility name, RRC ID No., physical address, county, permit number.
2.1:	Fill in the amount of financial security approved by the Commission.
Bond No.:	Fill in the bond number.
2.8:	Fill in the expiration date.
Dated:	Fill in the effective date of the bond.
Surety Signature:	The person signing for the surety must have authority to sign. Place a seal on the bond and attach a signed and dated power of attorney demonstrating that the person signing for the surety indeed has authority to sign.
Principal Signature:	The person signing for the operator/principal must have authority to sign and may be asked to provide documentation demonstrating the person's authority to sign. Print or type the name of the person that signed and their title.
NOTE:	If the Commission approved bond has a rider, the rider must be updated and included with any continuation certificate yearly, or upon renewal, a clause can be included in continuation certificate.

FORM RRC CF-2

Date:	Fill in date.
Name of Issuing Bank:	Fill in complete name of issuing bank.
Address of Issuing Bank:	Fill in complete physical address of the issuing bank.
Type of Facility:	Place an X in the box that identifies the type of facility (ies) the letter of credit will cover.
Letter of Credit No.:	Fill in the letter of credit number. This number must match the number on the bottom right of this page "LOC No. ____," and on the Exhibit A, if an Exhibit A is needed.
Box Number 1:	Fill in complete organization name exactly as it appears on Form P-5 (Organization Report). Form P-5 must be active. If the name on the Form P-5 is an assumed name, you must also state the full name of the organization for which the Form P-5 name is assumed. For example, if the name DC Drilling is on the Form P-5, but DC Drilling is actually a d/b/a or assumed name of Smith Exploration, Inc. the name in Box Number 1 would be DC Drilling (a d/b/a (or assumed name) of Smith Exploration, Inc.)
Box Number 2:	Fill in Form P-5 number as shown on organization report.
Box Number 3:	Include the total number of injection/disposal wells, if applicable, associated with the commercial facility. For example, a collecting pit is associated with at least one injection/disposal well.
Box Number 4:	Identify any other Commission-regulated operations. If none, may mark "NA" or leave blank.
Lines (A) through (D):	Use each line for information concerning one permit only. If there will be more than 4 permits covered by the instrument, the additional permits may be added on a separate sheet entitled "Exhibit A of RRC CF-2 Letter of Credit No. _____." Include only the pertinent information as described in instructions on form: facility name, RRC ID No., physical address, county, permit number.
2nd Paragraph:	Fill in the operator's name exactly as shown above in Box Number 1. Fill in the aggregate amount of financial security approved by the Commission, and the effective date of the letter of credit.
Authorized Signature and Countersignature:	Sign by officers of the financial institution, type their name and office under their signature. Send a certified copy of the financial institution's Corporate Resolution that is passed each fiscal year stating who has authority to sign and for how much. The authorized signature must be from a person whom the corporate resolution identifies as having authority.
LOC No.:	Fill in the letter of credit number.
NOTE:	No additional wording of any nature may be added to the form.

OMB#: 2050-0028 Expires 1/31/2006

SEND COMPLETED FORM TO: The Appropriate State or EPA Regional Office.	United States Environmental Protection Agency **RCRA SUBTITLE C SITE IDENTIFICATION FORM**	

1. Reason for Submittal (See Instructions on page 13.)

MARK ALL BOX(ES) THAT APPLY

Reason for Submittal:

- ❑ To provide Initial Notification of Regulated Waste Activity (to obtain an EPA ID Number for hazardous waste, universal waste, or used oil activities)
- ❑ To provide Subsequent Notification of Regulated Waste Activity (to update site identification information)
- ❑ As a component of a First RCRA Hazardous Waste Part A Permit Application
- ❑ As a component of a Revised RCRA Hazardous Waste Part A Permit Application (Amendment #_____)
- ❑ As a component of the Hazardous Waste Report

2. Site EPA ID Number (page 14)

EPA ID Number

└┴┴┴┴┴┴┴┴┴┴┴┴┘

3. Site Name (page 14)

Name:

4. Site Location Information (page 14)

Street Address:	
City, Town, or Village:	**State:**
County Name:	**Zip Code:**

5. Site Land Type (page 14)

Site Land Type: ❑ Private ❑ County ❑ District ❑ Federal ❑ Indian ❑ Municipal ❑ State ❑ Other

6. North American Industry Classification System (NAICS) Code(s) for the Site (page 14)

A.	**B.**
C.	**D.**

7. Site Mailing Address (page 15)

Street or P. O. Box:		
City, Town, or Village:		
State:		
Country:		**Zip Code:**

8. Site Contact Person (page 15)

First Name:	**MI:**	**Last Name:**
Phone Number: **Extension:**		**Email address:**

9. Operator and Legal Owner of the Site (pages 15 and 16)

A. Name of Site's Operator:	**Date Became Operator (mm/dd/yyyy):**
Operator Type: ❑ Private ❑ County ❑ District ❑ Federal ❑ Indian ❑ Municipal ❑ State ❑ Other	
B. Name of Site's Legal Owner:	**Date Became Owner (mm/dd/yyyy):**
Owner Type: ❑ Private ❑ County ❑ District ❑ Federal ❑ Indian ❑ Municipal ❑ State ❑ Other	

EPA Form 8700-12 (Revised 1/2004) Page 1 of 3

RAILROAD COMMISSION OF TEXAS

EPA ID NO: ☐☐☐ ☐☐☐ ☐☐☐ ☐☐☐

OMB#: 2050-0028 Expires 1/31/2006

9. Legal Owner (Continued) Address	Street or P. O. Box:	
	City, Town, or Village:	
	State:	
	Country:	Zip Code:

10. Type of Regulated Waste Activity
Mark "Yes" or "No" for all activities; complete any additional boxes as instructed. (See instructions on pages 16 to 20.)

A. Hazardous Waste Activities
Complete all parts for 1 through 6.

Y☐ N☐ **1. Generator of Hazardous Waste**
If "Yes", choose only one of the following - a, b, or c.

☐ a. LQG: Greater than 1,000 kg/mo (2,200 lbs./mo.) of non-acute hazardous waste; or

☐ b. SQG: 100 to 1,000 kg/mo (220 - 2,200 lbs./mo.) of non-acute hazardous waste; or

☐ c. CESQG: Less than 100 kg/mo (220 lbs./mo.) of non-acute hazardous waste

In addition, indicate other generator activities.

Y☐ N☐ d. United States Importer of Hazardous Waste

Y☐ N☐ e. Mixed Waste (hazardous and radioactive) Generator

Y☐ N☐ **2. Transporter of Hazardous Waste**

Y☐ N☐ **3. Treater, Storer, or Disposer of Hazardous Waste (at your site)** Note: A hazardous waste permit is required for this activity.

Y☐ N☐ **4. Recycler of Hazardous Waste (at your site)**

Y☐ N☐ **5. Exempt Boiler and/or Industrial Furnace**
If "Yes", mark each that applies.
☐ a. Small Quantity On-site Burner Exemption
☐ b. Smelting, Melting, and Refining Furnace Exemption

Y☐ N☐ **6. Underground Injection Control**

B. Universal Waste Activities

Y☐ N☐ **1. Large Quantity Handler of Universal Waste (accumulate 5,000 kg or more) [refer to your State regulations to determine what is regulated]. Indicate types of universal waste generated and/or accumulated at your site. If "Yes", mark all boxes that apply:**

	Generate	Accumulate
a. Batteries	☐	☐
b. Pesticides	☐	☐
c. Thermostats	☐	☐
d. Lamps	☐	☐
e. Other (specify) _____	☐	☐
f. Other (specify) _____	☐	☐
g. Other (specify) _____	☐	☐

Y☐ N☐ **2. Destination Facility for Universal Waste**
Note: A hazardous waste permit may be required for this activity.

C. Used Oil Activities
Mark all boxes that apply.

Y☐ N☐ **1. Used Oil Transporter**
If "Yes", mark each that applies.
☐ a. Transporter
☐ b. Transfer Facility

Y☐ N☐ **2. Used Oil Processor and/or Re-refiner**
If "Yes", mark each that applies.
☐ a. Processor
☐ b. Re-refiner

Y☐ N☐ **3. Off-Specification Used Oil Burner**

Y☐ N☐ **4. Used Oil Fuel Marketer**
If "Yes", mark each that applies.
☐ a. Marketer Who Directs Shipment of Off-Specification Used Oil to Off-Specification Used Oil Burner
☐ b. Marketer Who First Claims the Used Oil Meets the Specifications

RAILROAD COMMISSION OF TEXAS

EPA ID NO: | | | | | | | | | | | | |

OMB#: 2050-0028 Expires 1/31/2006

11. Description of Hazardous Wastes (See Instructions on page 20.)

A. Waste Codes for Federally Regulated Hazardous Wastes. Please list the waste codes of the Federal hazardous wastes handled at your site. List them in the order they are presented in the regulations (e.g., D001, D003, F007, U112). Use an additional page if more spaces are needed.

B. Waste Codes for State-Regulated (i.e., non-Federal) Hazardous Wastes. Please list the waste codes of the State-regulated hazardous wastes handled at your site. List them in the order they are presented in the regulations. Use an additional page if more spaces are needed for waste codes.

12. Comments (See Instructions on page 20.)

13. Certification. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. **(See Instructions on page 20.)**

Signature of operator, owner, or an authorized representative	Name and Official Title (type or print)	Date Signed (mm/dd/yyyy)

EPA Form 8700-12 (Revised 1/2004)

Page 3 of 3

RAILROAD COMMISSION OF TEXAS

For further information on §3.80 or the accompanying forms, call Ms. Leslie Savage at (512) 463-7308.

TRD-200404221
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Filed: June 24, 2004

♦ ♦ ♦

Texas Department of Transportation

Request for Proposal for Aviation Engineering Services - Commerce Municipal Airport

The City of Commerce through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT, Aviation Division will solicit and receive proposals for professional aviation engineering design services described in this notice.

Airport Sponsor: City of Commerce, Commerce Municipal Airport. TxDOT CSJ No.: 0401CMRCE Scope: Provide engineering/design services to perform a drainage study of the airport property and to design recommended drainage improvements, and to design pavement rehabilitation improvements at the Commerce Municipal Airport.

The HUB goal is set at 7%. TxDOT Project Manager is Harry Lorton, P.E.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online by selecting "Commerce Municipal Airport" at:

www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm

Interested firms shall utilize the most current version of the Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address:

http://www.dot.state.tx.us/avn/avn550.doc

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

(Attention: To ensure utilization of the latest version of Form 550, firms are encouraged to download Form 550 from the TxDOT website. Utilization of Form 550 from a previous download may not be the exact same format. Form 550 is an MS Word Template).

Five completed, unfolded copies of Form AVN 550 must be postmarked by U. S. Mail by midnight July 30, 2004. (CDST). Mailing address: TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. (CDST) on August 2, 2004; overnight address: TxDOT, Aviation Division, 200 E. Riverside Drive, Austin, Texas, 78704. Hand delivery must be received by 4:00 p.m. August 2, 2004 (CDST); hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of Aviation staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at:

www.dot.state.tx.us/business/avnconsultinfo.htm

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. In such case, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager, or for technical questions Harry Lorton, Project Manager, at 1-800-68-PILOT (74568).

TRD-200404307
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: June 29, 2004

♦ ♦ ♦

Request for Proposal for Aviation Engineering Services - The City of Stamford, Arledge Field

The City of Stamford, through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT, Aviation Division will solicit and receive proposals for professional aviation engineering design services described in this notice.

Airport Sponsor: City of Stamford, Arledge Field. TxDOT CSJ No.:0408STAMF Scope: Provide design services and construction oversight to rehabilitate Runway 17-35, turnarounds, stub taxiways and apron.

The DBE goal is set at 5%. TxDOT Project Manager is Steve Roth.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and project narrative are available online by selecting "Arledge Field" at:

www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm

Interested firms shall utilize the Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site, URL address:

http://www.dot.state.tx.us/avn/avn550.doc

The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

(Attention: To ensure utilization of the latest version of Form 550, firms are encouraged to download Form 550 from the TxDOT website. Utilization of Form 550 from a previous download may not be the exact same format. Form 550 is an MS Word Template).

Five completed, unfolded copies of Form AVN 550 must be postmarked by U. S. Mail by midnight July 30, 2004. (CDST). Mailing address: TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483. Overnight delivery must be received by 4:00 p.m. (CDST) on August 2, 2004; overnight address: TxDOT, Aviation Division, 200 E. Riverside Drive, Austin, Texas, 78704. Hand delivery must be received by 4:00 p.m. August 2, 2004 (CDST); hand delivery address: 150 E. Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members.

The final selection by the sponsor's committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating engineering proposals can be found at:

www.dot.state.tx.us/business/avnconsultinfo.htm

All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews of the top rated firms if the committee deems it necessary. In such case, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager, at 1-800-68-PILOT (74568) or contact Steve Roth, Project Manager, at 325-676-6851 for technical questions.

TRD-200404306
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: June 29, 2004

♦ ♦ ♦

Texas Workers' Compensation Commission

Invitation to Apply to the Medical Advisory Committee (MAC)

The Texas Workers' Compensation Commission seeks to have a diverse representation on the MAC and invites all qualified individuals from all regions of Texas to apply for openings on the MAC in accordance with the eligibility requirements of the Procedures and Standards for the Medical Advisory Committee. The Medical Review Division is currently accepting applications for the following Medical Advisory Committee vacancies:

Primary

*Public Health Care Facility

Alternate

*Public Health Care Facility Representative

*Dentist

*Pharmacist,

*Employer

*General Public 1

In addition to these current vacancies, applications are being accepted for several other positions that will expire on August 31, 2004, leaving the following vacancies:

Primary

*Podiatrist

*Registered Nurse

Alternate

*Medical Doctor

*Physical Therapist

*Podiatrist

*Registered Nurse

*General Public Representative 2

Commissioners for the Texas Workers' Compensation Commission appoint the Medical Advisory Committee members who are composed of 18 primary and 18 alternate members representing health care providers, employees, employers, insurance carriers, and the general public. Primary members are required to attend all Medical Advisory Committee meetings, subcommittee meetings, and work group meetings to which they are appointed. The alternate member may attend all meetings, however during a primary member's absence, the alternate member must attend all meetings to which the primary member is appointed. Requirements and responsibilities of members are established in the Procedures and Standards for the Medical Advisory Committee as adopted by the Commission.

The Medical Advisory Committee meetings must be held at least quarterly each fiscal year during regular Commission working hours. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

The purpose and task of the Medical Advisory Committee, which includes advising the Commission's Medical Review Division on the development and administration of medical policies, rules and guidelines, are outlined in the Texas Workers' Compensation Act, §413.005.

Applications and other relevant Medical Advisory Committee information may be viewed and downloaded from the Commission's website at *http://www.twcc.state.tx.us* and then clicking on Calendar of Commission Meetings, Medical Advisory Committee. Applications may also be obtained by calling Jane McChesney, MAC Coordinator, at 512-804-4855 or R. L. Shipe, Director, Medical Review, at 512-804-4802. The qualifications as well as the terms of appointment for all positions are listed in the Procedures and Standards for the Medical Advisory Committee. These Procedures and Standards are as follows:

LEGAL AUTHORITY The Medical Advisory Committee for the Texas Workers' Compensation Commission, Medical Review Division is established under the Texas Workers' Compensation Act, (the Act) §413.005.

PURPOSE AND ROLE The purpose of the Medical Advisory Committee (MAC) is to bring together representatives of health care specialties and representatives of labor, business, insurance and the general public to advise the Medical Review Division in developing and administering the medical policies, fee guidelines, and the utilization guidelines established under §413.011 of the Act.

COMPOSITION Membership. The composition of the committee is governed by the Act, as it may be amended. Members of the committee are appointed by the Commissioners and must be knowledgeable and qualified regarding work-related injuries and diseases.

Members of the committee shall represent specific health care provider groups and other groups or interests as required by the Act, as it may be amended. As of September 1, 2001, these members include a public health care facility, a private health care facility, a doctor of medicine, a doctor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, and an acupuncturist. Appointees must

have at least six (6) years of professional experience in the medical profession they are representing and engage in an active practice in their field.

The Commissioners shall also appoint the other members of the committee as required by the Act, as it may be amended. An insurance carrier representative may be employed by: an insurance company; a certified self-insurer for workers' compensation insurance; or a governmental entity that self-insures, either individually or collectively. An insurance carrier member may be a medical director for the carrier but may not be a utilization review agent or a third party administrator for the carrier.

A health care provider member, or a business the member is associated with, may not derive more than 40% of its revenues from workers compensation patients. This fact must be certified in their application to the MAC.

The representative of employers, representative of employees, and representatives of the general public shall not hold a license in the health care field and may not derive their income directly from the provision of health care services.

The Commissioners may appoint one alternate representative for each primary member appointed to the MAC, each of whom shall meet the qualifications of an appointed member.

Terms of Appointment: Members serve at the pleasure of the Commissioners, and individuals are required to submit the appropriate application form and documents for the position. The term of appointment for any primary or alternate member will be two years, except for unusual circumstances (such as a resignation, abandonment or removal from the position prior to the termination date) or unless otherwise directed by the Commissioners. A member may serve a maximum of two terms as a primary, alternate or a combination of primary and alternate member. Terms of appointment will terminate August 31 of the second year following appointment to the position, except for those positions that were initially created with a three-year term. For those members who are appointed to serve a part of a term that lasts six (6) months or less, this partial appointment will not count as a full term.

Abandonment will be deemed to occur if any primary member is absent from more than two (2) consecutive meetings without an excuse accepted by the Medical Review Division Director. Abandonment will be deemed to occur if any alternate member is absent from more than two (2) consecutive meetings which the alternate is required to attend because of the primary member's absence without an excuse accepted by the Medical Review Division Director.

The Commission will stagger the August 31st end dates of the terms of appointment between odd and even numbered years to provide sufficient continuity on the MAC.

In the case of a vacancy, the Commissioners will appoint an individual who meets the qualifications for the position to fill the vacancy. The Commissioners may re-appoint the same individual to fill either a primary or alternate position as long as the term limit is not exceeded. Due to the absence of other qualified, acceptable candidates, the Commissioners may grant an exception to its membership criteria, which are not required by statute.

RESPONSIBILITY OF MAC MEMBERS Primary Members. Make recommendations on medical issues as required by the Medical Review Division.

Attend the MAC meetings, subcommittee meetings, and work group meetings to which they are appointed.

Ensure attendance by the alternate member at meetings when the primary member cannot attend.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies.

Alternate Members. Attend the MAC meetings, subcommittee meetings, and work group meetings to which the primary member is appointed during the primary member's absence.

Maintain knowledge of MAC proceedings.

Make recommendations on medical issues as requested by the Medical Review Division when the primary member is absent at a MAC meeting.

Provide other assistance requested by the Medical Review Division in the development of guidelines and medical policies when the primary member is absent from a MAC meeting.

Committee Officers. The chairman of the MAC is designated by the Commissioners. The MAC will elect a vice chairman. A member shall be nominated and elected as vice chairman when he/she receives a majority of the votes from the membership in attendance at a meeting at which nine (9) or more primary or alternate members are present.

Responsibilities of the Chairman. Preside at MAC meetings and ensure the orderly and efficient consideration of matters requested by the Medical Review Division.

Prior to a MAC meeting confer with the Medical Review Division Director, and when appropriate, the TWCC Executive Director to receive information and coordinate: a. Preparation of a suitable agenda. b. Planning MAC activities. c. Establishing meeting dates and calling meetings. d. Establishing subcommittees. e. Recommending MAC members to serve on subcommittees.

If requested by the Commission, appear before the Commissioners to report on MAC meetings.

COMMITTEE SUPPORT STAFF The Director of Medical Review will provide coordination and reasonable support for all MAC activities. In addition, the Director will serve as a liaison between the MAC and the Medical Review Division staff of TWCC, and other Commission staff if necessary.

The Medical Review Director will coordinate and provide direction for the following activities of the MAC and its subcommittees and work groups:

Preparing agenda and support materials for each meeting.

Preparing and distributing information and materials for MAC use.

Maintaining MAC records.

Preparing minutes of meetings.

Arranging meetings and meeting sites.

Maintaining tracking reports of actions taken and issues addressed by the MAC.

Maintaining attendance records.

SUBCOMMITTEES The chairman shall appoint the members of a subcommittee from the membership of the MAC. If other expertise is needed to support subcommittees, the Commissioners or the Director of Medical Review may appoint appropriate individuals.

WORK GROUPS When deemed necessary by the Director of Medical Review or the Commissioners, work groups will be formed by the Director. At least one member of the work group must also be a member of the MAC.

WORK PRODUCT No member of the MAC, a subcommittee, or a work group may claim or is entitled to an intellectual property right in work performed by the MAC, a subcommittee, or a work group.

MEETINGS Frequency of Meetings. Regular meetings of the MAC shall be held at least quarterly each fiscal year during regular Commission working hours.

CONDUCT AS A MAC MEMBER Special trust has been placed in members of the Medical Advisory Committee. Members act and serve on behalf of the disciplines and segments of the community they represent and provide valuable advice to the Medical Review Division and the Commission. Members, including alternate members, shall observe the following conduct code and will be required to sign a statement attesting to that intent.

Comportment Requirements for MAC Members:

Learn their duties and perform them in a responsible manner;

Conduct themselves at all times in a manner that promotes cooperation and effective discussion of issues among MAC members;

Accurately represent their affiliations and notify the MAC chairman and Medical Review Director of changes in their affiliation status;

Not use their memberships on the MAC: a. in advertising to promote themselves or their business. b. to gain financial advantage either for themselves or for those they represent; however, members may list MAC membership in their resumes;

Provide accurate information to the Medical Review Division and the Commission;

Consider the goals and standards of the workers' compensation system as a whole in advising the Commission;

Explain, in concise and understandable terms, their positions and/or recommendations together with any supporting facts and the sources of those facts;

Strive to attend all meetings and provide as much advance notice to the Texas Workers' Compensation Commission staff, attn: Medical Review Director, as soon as possible if they will not be able to attend a meeting; and

Conduct themselves in accordance with the MAC Procedures and Standards, the standards of conduct required by their profession, and the guidance provided by the Commissioners, Medical Review Division or other TWCC staff.

TRD-200404309
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: June 30, 2004

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 29 (2004) is cited as follows: 29 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 16, April 9, July 9, and October 8, 2004). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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